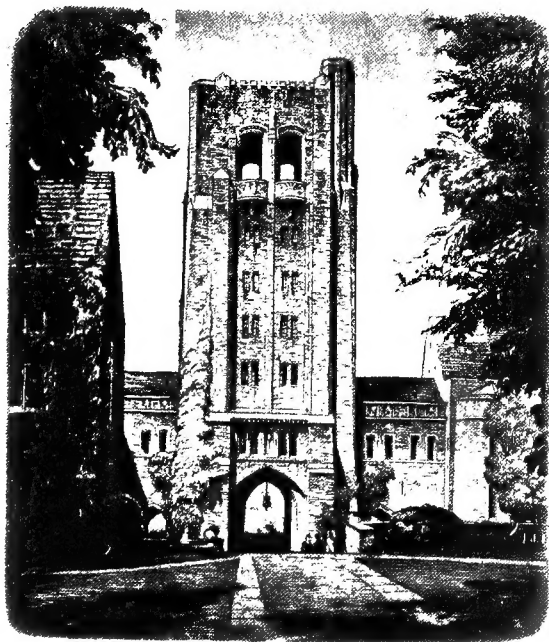


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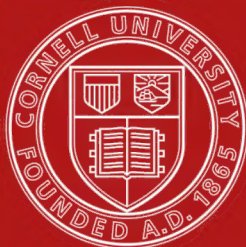
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A TREATISE
ON THE
BANKRUPTCY LAW

of the United States

BY HAROLD REMINGTON

VOLUME III
SUPPLEMENT

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PREFACE

This Supplemental Volume III of "Remington on Bankruptcy" has been necessitated by the large number of important cases decided by the Courts since the publication of the original treatise, and also by the passage, on June 25th, 1910, of radical amendments to the Bankruptcy Act.

This Supplemental Volume is not only "supplemental" in the sense that it brings the decisions in bankruptcy down to date, but it is also completely revisory. All changes and additions necessitated in the original treatise by virtue either of the Amendments of 1910 or of the decisions of the Courts modifying rules formerly laid down, have been incorporated in this Supplemental Volume, each in its appropriate place. Thus, wherever the decisions of the Courts or the Amendments of 1910 have touched any of the propositions laid down in the original treatise, the reader can at once see these changes in the correspondingly numbered sections of the Supplemental Volume.

Indeed, the word "supplemental" is perhaps not sufficiently broad to cover the completeness of the revision effected by the new volume. It would, in fact, have been much easier for the writer to have made a complete revision of the original work, but such a revision, it was thought, would not be fair to those members of the profession who have recently purchased the two volumes of the original set. Had there been a complete revision it would have necessitated three volumes in any event; whilst, now, there is in effect a complete revision with simply the additional Volume III to be added to the original set.

The above outline indicates the proper method of using this Supplemental Volume. It is expected that the reader will first go to the original volumes and then turn to the corresponding section—easily found—in the third volume. This arrangement has the added value of enabling the practicing attorney to see how the law stood before the Amendments of 1910, and also to see clearly the modifying effect of those amendments upon the various propositions coming up in actual bankruptcy practice. It is too early, at this time, to give any decisions under the recent amendments, for there has not been sufficient time for the rules thereunder to have been enunciated or expounded by the Courts. This affords an additional reason for a Supplemental Volume rather than a complete revision; and it affords, too, an additional ground for the writer's hope that this Supplemental Volume will be of special aid to the profession at this time, since the writer's intimate connection with the framing of the Amendments and his acquaintance with the discussions upon the same before Congress ought to place him in a position where his observations as to the effect of the various amendments would be of particular help to the profession—until such time, at any rate, as the Courts shall have come to pass authoritatively upon their effect.

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REMINGTON ON BANKRUPTCY

SUPPLEMENT

§ 1. Power to Enact Bankruptcy Laws.

Page 21. See *Hurley v. Devlin*, 18 A. B. R. 627, 151 Fed. 919 (D. C. Kans.), quoted at § 17.

Bankruptcy Law a Commercial Regulation.—See interesting article at end of 15 Am. B. R. by Mr. James M. Olmstead, Referee in Bankruptcy at Boston, "Bankruptcy Law a Commercial Regulation."

§ 3. "Uniformity" Geographical, Not Personal.

Page 21, note 3. See, in addition, *Thomas v. Woods*, 23 A. B. R. 132, 170 Fed. 764 (C. C. A. Kans.); obiter, *Darling v. Berry*, 13 Fed. 659 (C. C.).

§ 5. Recognition of Diverse Exemption Laws, Priority Laws, Dower Rights, etc., Not Lack of "Uniformity."

Page 22, note 4. See, in addition, *In re Cohn*, 22 A. B. R. 761, 163 Fed. 444 (D. C. N. Dak.).

Page 22. The law is not unconstitutional because it recognizes the different dower rights of the various states.

Thomas v. Woods, 23 A. B. R. 132, 170 Fed. 764 (C. C. A. Kans.).

§ 17. Objects and Purposes.

Page 32, note 1. See Speech of Hon. Swager Sherley, Congressional Record of March 1st, 1910.

Page 33. *Coal Land Co. v. Ruffner Bros.*, 21 A. B. R. 474, 165 Fed. 881 (C. C. A. W. Va.): "The prime purpose of the Bankruptcy Act is to secure an equal distribution of an insolvent's estate among the creditors."

Page 34. *Hurley v. Devlin*, 18 A. B. R. 627, 151 Fed. 919 (D. C. Kans.): "Before passing to a consideration of the precise question involved in this controversy, it may be well to advert to a few general principles of the law, and to state some of the fundamental propositions underlying the rights of the respective parties to this litigation. First, it may be observed, as has been so often announced by the courts, that the federal Constitution and the acts of Congress passed in pursuance of the power it confers are the supreme law of this country, binding alike on all persons, all courts, and the Legislatures of the several states. By § 8 of the Constitution the people of this nation, in their individual, and the several states in their sovereign, capacities, conferred upon the Congress of the United States the express power to enact 'uniform laws on the subject of bankruptcy throughout the United States;' and in pursuance of the power

thus conferred the national bankrupt law was enacted. The object and purpose of Congress as portrayed by this act was to take in charge the property of insolvent debtors who had committed acts of bankruptcy, through proceedings had in the bankruptcy courts, divide this property between the bankrupt, his wife and children, if any, on the one hand, and his creditors on the other, in proportion to their provable demands, and grant a discharge to the bankrupt debtor from further liability for his debts in so far as the Bankrupt Act grants a discharge. * * * In the exercise of this supreme power, Congress acts untrammelled by any State laws, whether organic or statutory, and it was within the power of Congress to preserve to the bankrupt debtor, his wife and children, just such rights in the bankrupt estate as are by the terms of the act provided, or, in the exercise of such power, to have cut off and destroyed all such claims and exemptions, and all others, leaving all the estate to the creditors and nothing to the bankrupt or his family, as Congress in its wisdom might deem proper."

In *re Tindall*, 18 A. B. R. 773, 155 Fed. 456 (D. C. S. Car.): "The main object of the Bankrupt Act and one of its most beneficial results, was an equal distribution among the creditors of the estate of the bankrupt."

Compare *Hardie v. Dry Goods Co.*, 21 A. B. R. 457, 165 Fed. 588 (C. C. A. Tex.): "Originally, in bankrupt laws, the discharge of the bankrupt may have been incidental, and the main purpose the equal distribution of his goods among creditors; but to say it now, and of the present law, we must shut our eyes to the actual practice in our courts. In nearly all and every voluntary bankruptcy brought under the present law the administration or distribution of the bankrupt's property has been practically concluded before filing petition, and the sole object of the petitioner is to be relieved of his debts, and in number the voluntary cases are about four to one of the involuntary. See Report, Dept. of Justice, 1907. And the same may be said of the voluntary cases under the Act of March 2, 1867, c. 176, 14 Stat. 517, which was passed mainly to relieve the unfortunate debtors ruined by and through the vicissitudes of the great Civil War. For these considerations, we are disposed to deny that in the present bankruptcy law the discharge of the honest debtor is a mere incident which could have been omitted without impairing its symmetry and efficiency; and, on the contrary, to assert that the release of the honest, unfortunate, and insolvent debtor from the burden of his debts and his restoration to business activity, in the interest of his family and the general public, are the main, if not the most important, objects of the law."

In *re Adams & Hoyt Co.*, 21 A. B. R. 161, 164 Fed. 489 (D. C. Ga.): "It is the paramount law for the administration of estates of insolvents. Its provisions * * * seek to bring about equality among creditors of the same class."

§ 18. Bankruptcy Proceedings, Proceedings in Rem, Also in Personam.

Page 34, note 1. See, in addition, *Johnson v. United States*, 20 A. B. R. 724, 163 Fed. 30 (C. C. A. Mass.), quoted at § 2323; In *re Am. Brew. Co.*, 7 A. B. R. 463, 112 Fed. 752 (C. C. A. Ills.), quoted at § 444.

General View of Amendments of 1910.—For a general resumé of the different amendments passed in 1910, see parallel column statement, annexed to the speech of Hon. Swager Sherley, to be found in the Congressional Record of March 1st, 1910.

§ 20. Bankruptcy Proceedings, Proceedings in Equity.

Page 37, note 9. See, in addition, *Missouri Elec. Co. v. Hamilton Brown Co.*, 21 A. B. R. 270, 165 Fed. 283 (C. C. A. Mo.), quoted post at § 552; *Natl. Bank v. Abbott*, 21 A. B. R. 436, 165 Fed. 852 (C. C. A. Mo.); *In re Cooke*, 5 A. B. R. 434, 109 Fed. 631 (D. C. N. Y.); *Westall v. Avery*, 22 A. B. R. 673, 171 Fed. 626 (C. C. A. N. Car.). Also, *In re Faulkner*, 20 A. B. R. 542, 161 Fed. 900 (C. C. A. Kan.).

Page 37, note 10. See, in addition, *In re Cooper Bros.*, 20 A. B. R. 393, 159 Fed. 956 (D. C. Pa.); *In re Irwin*, 22 A. B. R. 165, 174 Fed. 642 (D. C. Pa.); *Westall v. Avery*, 22 A. B. R. 673, 171 Fed. 626 (C. C. A. N. Car.).

Page 37. And the rules of equity control rather than those of law.

In re Pinkel, 1 A. B. R. 333 (Ref. N. Y.); *Westall v. Avery*, 22 A. B. R. 673, 171 Fed. 626 (C. C. A. N. Car.).

§ 22. Bankruptcy Act Remedial and to Be Fairly Construed.

Page 38. *In re Faulkner*, 20 A. B. R. 542, 161 Fed. 900 (C. C. A. Kans.): "Bankruptcy proceedings are equitable in their nature, and should be as far as possible conducted on broad lines to accomplish the ultimate purpose of distributing the assets of a bankrupt pro rata among his creditors."

Page 38, note 13. See, in addition, *Atchison, etc., R. Co. v. Hurley*, 18 A. B. R. 396, 153 Fed. 503 (C. C. A.).

Page 38, note 14. See, in addition, *In re Toledo Portland Cement Co.*, 19 A. B. R. 117, 156 Fed. 83 (D. C. Mich.). Compare, rules laid down in *Stevens v. Nave-McCord Co.*, 17 A. B. R. 615.

Page 38. Where things are described particularly in a section of the statute the section is to be construed as meaning to cover nothing except the things described.

Stephens v. Merchants' Bank, 18 A. B. R. 560, 154 Fed. 341 (C. C. A. Ill.).

Page 38. The district court, save in exceptional cases, will defer to a decision of the Circuit Court of Appeals of another circuit where it is not in conflict with the decision of its own appellate tribunal.

In re Baird, 18 A. B. R. 655, 154 Fed. 215 (D. C. Pa.).

§ 23. Celerity of Procedure Intended.

Page 38, note 15. See, in addition, *In re Syracuse Paper & Pulp Co.*, 21 A. B. R. 174, 164 Fed. 275 (D. C. N. Y.). Obiter, *In re Faulkner*, 20 A. B. R. 542, 161 Fed. 900 (C. C. A. Kans.), quoted at § 734. See also post, § 718. Also see to the same general effect, *Paxton v. Scott*, 10 A. B. R. 81; *In re Crenshaw*, 2 A. B. R. 623, 95 Fed. 633 (D. C. Ala.); *In re Cornell*, 3 A. B. R. 172, 97 Fed. 29 (D. C.). Compare post, § 388½.

Page 38. Obiter, *West v. McLaughlin Co.*, 20 A. B. R. 654, 162 Fed. 124 (C. C. A. Mich.): "One purpose which runs through the act is to require the prompt and expeditious winding up of estates."

Page 38. *In re Lisk Mfg. Co.*, 21 A. B. R. 674, 167 Fed. 411 (D. C. N. Y.): "The Bankrupt Act was passed for the benefit of creditors, on the principle that when a bankrupt's property is insufficient to pay its debts in full, there shall

be an equitable division thereof pro rata among them, and this fundamental rule requires the court, not only to preserve the estate and prevent its dissipation, but that the property and assets of the bankrupt should be collected or marshaled and the amount realized distributed without unnecessary delay."

Page 39. But the proceedings in bankruptcy are not to be so summary as to deprive parties of a reasonable opportunity to defend.

Inferentially, *In re Faulkner*, 20 A. B. R. 542, 161 Fed. 900 (C. C. A. Kans.), quoted at § 734.

§ 24. Economy of Administration Intended.

Page 39, note 17. Compare to same effect post, § 2011; *In re Marks*, 22 A. B. R. 54 (Ref. Ga.); *In re Allert*, 23 A. B. R. 101, 173 Fed. 691 (D. C. N. Y.); *In re Kyte*, 19 A. B. R. 768, 158 Fed. 121 (D. C. Pa.). Impliedly, *In re Harper*, 23 A. B. R. 918 (939), 175 Fed. 412 (D. C. N. Y.), quoted at § 899.

(1) **Abuse of Power of Appointment of Special Masters.**—See post, §§ 2011, 522½. For another apparent instance of such abuse, see *Laffoon v. Ives*, 20 A. B. R. 174, 159 Fed. 861 (C. C. A. Wash.), where, it appears, the re-examination of an allowed claim was referred to a special master—clearly an ordinary duty of the referee.

For other instances of such abuse, see *In re Huntenberg*, 18 A. B. R. 697, 153 Fed. 768 (D. C. N. Y.), and *In re Wilcox*, 19 A. B. R. 91, 156 Fed. 685 (D. C. N. Y.), wherein the judge referred to the referee as special master, or master commissioner, applications of claimants for orders on the trustee to surrender certain moneys.

For another instance, *In re Photo Engraving Co.*, 19 A. B. R. 94, 155 Fed. 684 (D. C. N. Y.), wherein the judge referred to the referee "as special master" the question as to whether a city salesman's wages were entitled to priority where the adjudication of bankruptcy occurred before the amendment of 1906.

For another instance, *In re Strobel*, 19 A. B. R. 109, 160 Fed. 916 (D. C. N. Y.), wherein the judge referred to the referee "as special master" the motion of an adverse claimant to property.

Instance, *In re Bevier Wood Pavement Co.*, 19 A. B. R. 462, 156 Fed. 583 (D. C. N. Y.), wherein the court appointed a special master to determine the validity of a claim for royalties against a bankrupt corporation.

Instance, *In re Gregnard Lith. Co.*, 19 A. B. R. 743, 155 Fed. 699 (D. C. N. Y.), wherein a "special commissioner" was appointed to determine the priority of expenses of administration where the estate was too small to pay in full.

Instance, *In re Schiebler*, 20 A. B. R. 777, 165 Fed. 363 (D. C. N. Y.). Referee appointed as "special commissioner" to determine the reasonableness of attorney's fees prepaid under § 60 (d).

Instance, *In re Huddleston*, 21 A. B. R. 669, 167 Fed. 428 (D. C. Ga.): "The question of the propriety of the fee for Persons & Persons (attorneys for the bankrupt) was referred to the referee in bankruptcy as special master."

Instance, where referee was allowed *extra* compensation, *In re Albert*, 23 A. B. R. 101, 173 Fed. 691 (D. C. N. Y.).

Instance, *In re Fenn*, 22 A. B. R. 833, 172 Fed. 620 (D. C. Vt.). Referee appointed special master to determine amount for which a claim should be allowed for dividends.

(4) **Threats That Creditors "Will Get Nothing" in Case of Bankruptcy.**—It is common to hear threats that creditors "will get nothing" if bankruptcy is resorted to. The following is an observation of a court on the sub-

ject: In re Floyd, 19 A. B. R. 438, 154 Fed. 757 (D. C. N. Car.): "This proposition is seriously contended for in order, it seems, to carry out the promise originally made to the creditors when the assignment was made that bankruptcy would yield them practically nothing in the way of dividends, and the apparent purpose is to carry out this promise by diminution of the assets, if possible, so as to deter other creditors who might have the temerity to resist the ex parte terms of a voluntary assignment. * * * Perhaps another reason for their objection to bankruptcy and to the jurisdiction of this court was that it offered an opportunity for looking into the transaction, which seems to have been suspicious of fraud, and their efforts to consume the assets left to the creditors will not be tolerated in a court of bankruptcy, governed, as it is, by the rules in equity."

(5) **Abuse of Prolonged Receiverships in Conducting Business.**—Compare post, § 388½.

The Bankrupt Act was framed in a manifest spirit of economy and is to be administered economically.

Page 40. In re Ketterer Mfg. Co., 19 A. B. R. 646, 155 Fed. 987 (D. C. Pa.): "Economy in the administration of estates is the policy of the present law, and is to be strictly enforced."

Faulk v. Steiner, 21 A. B. R. 623, 165 Fed. 861 (C. C. A. Ala.): "The Bankruptcy Act was framed with the purpose of securing to the creditors a distribution of the bankrupt's estate at a minimum cost. The policy of the act is one of economy, and to promote this policy, Congress sought to provide against the improvident and unnecessary appointment of receivers."

Hardware Co. v. Huddleston, 21 A. B. R. 731, 167 Fed. 433 (C. C. A. Ga.): "The proceedings of courts of bankruptcy should be so administered as to preserve the assets of the bankrupt estates for the benefit of the creditors."

In re Oakland Lumber Co., 23 A. B. R. 181, 174 Fed. 643 (C. C. A. N. Y.): "Nothing contributed so much to bring about the repeal of the Act of 1867 as the large expense of administration, the small estates being entirely absorbed in fees. The more economical the administration of the present act the longer will it continue as an important adjunct to trade and commerce."

§ 25. Official Forms and Orders in Bankruptcy.

Page 40, note 16. See, in addition, In re Johnson, 19 A. B. R. 814, 158 Fed. 342 (D. C. Ark.).

§ 29. Jurisdiction in Bankruptcy Limited, Though Bankruptcy Courts Not Inferior Courts.

Page 45. In re Steele, 20 A. B. R. 446, 161 Fed. 886 (D. C. Ala.): "The act of Congress creating courts of bankruptcy provides for one court only within the territory prescribed. Courts of bankruptcy have no jurisdiction outside of their territorial limits as prescribed by the act of Congress creating them. A United States district judge, even though a judge of the northern and middle districts of Alabama, has no jurisdiction, while holding court in the middle district thereof, to make an order appointing a referee in bankruptcy for the northern district of Alabama. A United States district judge, even though a judge of the northern and middle districts of Alabama and residing in the middle district, has no jurisdiction or authority to go into the northern district, while the judge of the said northern district is holding court therein, and make an order appointing a referee in bankruptcy and prescribing a rule

for the reference of proceedings in bankruptcy to said referee so appointed by him, without the concurrence of the judge of the said northern district." But compare opinion of conflicting judge, *In re Steele*, 20 A. B. R. 575, 161 Fed. 886 (D. C. Ala.).

Page 45. Bankruptcy courts have no jurisdiction over persons not parties to the bankruptcy proceedings who are in another district, unless they are interested in the res in the custody of the bankruptcy court.

In re Harris Co., 23 A. B. R. 237, 173 Fed. 735 (D. C. N. Y.).

Page 45, note 2. But compare evident misconception of meaning of expression "limited jurisdiction," *In re Marion Contract & Const. Co.*, 22 A. B. R. 81, 166 Fed. 618 (D. C. Ky.): "The bankruptcy courts can hardly be called courts of limited jurisdiction inasmuch as they are vested exclusively with all jurisdiction in bankruptcy proceedings throughout the entire country."

Page 45, note 3. See, in addition, *In re Harris Co.*, 23 A. B. R. 237, 173 Fed. 735 (D. C. N. Y.).

§ 30. Limitations as to Residence, Occupation, etc., Jurisdictional.

Page 46, note 4. See, in addition, *In re Reisler Amusement Co.*, 22 A. B. R. 501, 171 Fed. 283 (D. C. N. Y.). And compare § 414, and "Adjudication," post, § 437, et seq.

Incidentally, it is to be noted that by the Amendment of 1910 the classification of corporations subject to bankruptcy has been changed. See post, § 80.

Page 49. That neither the allegation nor the fact that a corporation is engaged principally in manufacturing, trading, etc., is jurisdictional, has been held by the Circuit Court of Appeals in several cases.

Compare, apparently to this same effect, *In re New England Breeders' Club*, 22 A. B. R. 124, 175 Fed. 501 (C. C. A. N. H., reversing 21 A. B. R. 349, 165 Fed. 517), although the court is careful to state that the record in the case did not affirmatively disclose the lack of jurisdiction, but on the contrary affirmatively alleged it.

Page 51. *In re New York Tunnel Co.*, 21 A. B. R. 531, 166 Fed. 284 (C. C. A. N. Y.): "Although we think these objections are good, still if the appellants and petitioners have called our attention to a jurisdictional defect which makes the adjudication a nullity, we feel bound to consider it. If a petition for adjudication were made by only two creditors, the law requiring three, there would be a jurisdictional defect on the face of the record, making any adjudication void. On the other hand, if the aggregate amount of claims were stated to be \$500 as required by law, and because of setoffs or other reasons was in point of fact less, an adjudication would be an error to be corrected by appeal. So if the petition were against a railroad company there would be on the face of the record such a jurisdictional defect as would make an adjudication void. Whereas, if the corporation might or might not be considered within the act an adjudication, even if erroneous, would have to be corrected by appeal. At the time the adjudication was made in this case, building companies had been held in two districts of this circuit to be within the act; *In re Niagara Contracting Co.*, 11 Am. B. R. 643, 127 Fed. 782; *In re*

Rutland Realty Co., 19 Am. B. R. 546, 157 Fed. 296; In re Church Construction Co., 19 Am. B. R. 549, 157 Fed. 298. We have since decided, In the matter of the Kingston Realty Co., 19 Am. B. R. 845, 160 Fed. 447, that they are not subjects of adjudication. It is, moreover, argued in this case that a tunnel company differs from a building company and is within the act. Lack of jurisdiction cannot be said to have appeared on the face of the record and therefore the adjudication made by the District Court, even if erroneous, is not a nullity, as we have held In the Matter of Altonwood Park Co., 20 Am. B. R. 31, 169 Fed. 448. The petitioners and appellants have proceeded throughout under the Bankruptcy Act. But they are strangers to the bankruptcy proceedings, having no right to prove their claims, to defend or to appeal. The most they can do is to call the attention of the court as *amici curiae* to a want of jurisdiction of the subject-matter appearing on the face of the record. In re Columbia Real Estate Co., 4 Am. B. R. 411, 101 Fed. 965." This case quoted further at § 435½.

Page 51, note 5. In addition, see In re New York Tunnel Co., 21 A. B. R. 531, 166 Fed. 284 (C. C. A. N. Y.), quoted *supra*. Compare, partially to same effect, In re Hudson River Electric Co., 21 A. B. R. 915, 173 Fed. 134 (D. C. N. Y.).

Page 51, note 5. **But Bankruptcy Court Has Jurisdiction to Determine Whether Debtor Belongs to Class Subject to Bankruptcy.**—But the bankruptcy court has jurisdiction to determine whether the debtor actually belongs to a class subject to bankruptcy. Compare, In re Altonwood Park Co., 20 A. B. R. 31, 160 Fed. 448 (C. C. A. N. Y.); In re New England Breeders' Club, 22 A. B. R. 124, 175 Fed. 501 (C. C. A. N. H., reversing 21 A. B. R. 349, 165 Fed. 517); or has had residence or domicile a sufficient length of time. In re Tully, 19 A. B. R. 604, 156 Fed. 634 (D. C. N. Y.).

Page 51. However, the jurisdiction depends on the allegations and not on the proof, and, if the allegations do not show entire lack of jurisdiction, the court has complete jurisdiction to determine whether in fact the particular debtor belongs to a class subject to bankruptcy, and a decree of the court finding him not to be within such class, is not a case of lack of jurisdiction in the court but rather of its due exercise of jurisdiction.

Hill Co. v. Supply & Equipment Co., 24 A. B. R. 84 (App. Ct. of Ill.): "Was the court without jurisdiction? It may be conceded that despite the Supreme Court decision in the Friday case, the decision of the Circuit Court of Appeals in the Hill bankruptcy proceeding determines conclusively, as between these parties, that the Hill company could not have been adjudged a bankrupt in that proceeding. But does it follow from this that the court had no jurisdiction? That it had jurisdiction of the subject matter so far as was necessary to enable it to determine the question of whether or not the company did come within the meaning of the words 'corporation engaged principally in manufacturing,' is admitted. Does an erroneous final adjudication, or even a correct adjudication, that the alleged bankrupt does not come within the class, operate to nullify all intermediate orders of the court, and does it determine that the court had no jurisdiction of the subject matter? If the Court had been without jurisdiction, either originally or from the time that it ordered the petition dismissed, and that, too, either with or without retroactive effect, it could not have adjudged costs or have ordered fees to be paid to the

receiver. *Citizens Bank v. Cannon*, 164 U. S. 319. If a bankruptcy proceeding against a corporation not within the class that can be adjudged bankrupt, or against one who is finally determined to be a wage earner, were like the proceeding in *People v. Weigley*, 155 Ill. 491, no contempt proceedings could be maintained against one who interfered with the receiver's possession. Whether a corporation is or is not principally engaged in manufacturing, and whether or not a man is a wage earner, are not questions of law but questions of fact. The right of the court to proceed with the administration of the estate depends upon the facts; its jurisdiction, however, does not depend upon the correctness of its determination of the facts. The subject matter over which the United States District Court has jurisdiction is bankruptcy—not the acts of specified individuals and corporations provided that they constitute acts of bankruptcy. A decision adjudicating bankrupt a corporation, which in fact is not principally engaged in manufacturing but which the court erroneously finds to be so engaged, would nevertheless be binding until reversed; if reversed, it would be because of the erroneous finding of fact, not because of lack of jurisdiction. And so, too, if the court correctly or erroneously determines that the corporation is not principally engaged in manufacturing, the petition is dismissed, not because the court never had jurisdiction to hear and determine the facts and to do everything permitted by the statute prior to adjudication, but because, on the facts, it would be error to go on with the proceedings. As in our judgment the court had jurisdiction of the parties and subject matter of the bankruptcy proceedings and was by statute specifically vested with power to appoint receivers therein, no action of trespass lies against the party at whose instigation the receiver was appointed."

§ 31. Limitations as to Residence, Domicile or Principal Place of Business.

Page 52, note 6. **Bankrupt under Guardianship in One State, Moving to Another.**—Where the bankrupt is under guardianship in one state, even where insolvency proceedings are there pending against him, if he remove to another state with his guardian's consent, a residence of (the greater portion of) six months in the latter state is sufficient. In *re Kingsley*, 20 A. B. R. 427, 160 Fed. 275 (D. C. Vt.).

§ 33. Not All Three Qualifications, Residence, Domicile and Place of Business, Coincidentally Requisite.

Page 53. **Residence and Domicile Distinguished.**—Compare, In *re O'Hara*, 20 A. B. R. 714, 166 Fed. 384 (D. C. Pa.).

§ 34. "For Preceding Six Months or Greater Portion Thereof" Defined.

Page 54. And this means six months preceding the filing of the petition, not preceding the adjudication, for adjudications of courts refer to the conditions of things as they existed at the date of the commencement of proceedings or as subsequently may be brought into the record by supplementary proceedings.

But compare, apparently contra, In *re Tully*, 19 A. B. R. 605, 156 Fed. 634 (D. C. N. Y.).

Where a voluntary petition has been filed too short a time after the debtor's acquisition of a residence or domicile, the adjudication is to be set aside; but, thereafter, where sufficient length of time has elapsed, it may be reverified and refiled, and a new adjudication be had.

Compare, to this general effect, *In re Tully*, 19 A. B. R. 605, 156 Fed. 634 (D. C. N. Y.), although in this case no reverification nor refileing was had.

§ 35. Actual Principal Place of Business Governs.

Page 55. A corporation's chief executive office and hence its "principal place of business" may be in one state and its plant in another.

In re Pennsylvania Consol. Coal Co., 20 A. B. R. 872, 163 Fed. 579 (D. C. Pa.).

Where a corporation has been placed in the hands of a receiver who is merely proceeding with the liquidation of its affairs, it can hardly be considered as being still "engaged in business" at all, within the meaning of the act. This was, in effect, the holding in a case where a corporation, organized in one state but merely holding its annual meetings there, had been placed in the hands of a receiver in such state, who had taken possession of its assets in another state where it had until that time actually had its principal place of business.

Compare §§ 97, 97½.

In re (Perry) Aldrich Co., 21 A. B. R. 244, 165 Fed. 249 (D. C. Mass.): "The corporation was not continuing the business it had been organized to do, nor was it liquidating its affairs of its own accord through officers of its own selection. It had been ordered by a court having the right to do so, to stop doing that business; and acts done thereafter, merely in order to collect its assets or turn them into money, by officers of that court cannot as it seems to me be what is intended by 'business' in the expression 'principal place of business' as used in the Bankruptcy Act. The petitioners might perhaps have obtained jurisdiction here by filing their petition within three months following December 18th. That period having expired, it seems to me no longer possible to bring the case within the language of § 2 (1)."

Page 55, note 16. And see *In re (Perry) Aldrich Co.*, 21 A. B. R. 246, 165 Fed. 249 (D. C. Mass.). Compare, analogously, *In re Dunlop*, 19 A. B. R. 361, 156 Fed. 949 (C. C. A. Minn.), quoted at § 1753¾.

§ 37. Who May Be Voluntary Bankrupt.

Page 55, note 18. Thus, a farmer, though immune from involuntary proceedings, *obiter*, *Olive v. Armour Co.*, 21 A. B. R. 901, 167 Fed. 517 (C. C. A. Ga.).

Changes Made by Amendment of 1910.—By the Amendatory Act of 1910 corporations are no longer prevented from becoming voluntary bankrupts. However, not all corporations may become voluntary bankrupts: Municipal, railroad, insurance and banking corporations are

not entitled to become voluntary bankrupts. According to the strict terms of the statute *any* corporation may become a voluntary bankrupt, except a municipal, railroad, insurance or banking corporation, even though such corporation might not be, strictly speaking, a "moneyed, business or commercial corporation;" so that any corporation (except a municipal, railroad, insurance or banking corporation) may, doubtless, become a voluntary bankrupt that would be entitled by state law to make an assignment for the benefit of creditors or otherwise affirmatively invoke the action of the courts therein in behalf of creditors.

Page 55, note 18. Bankruptcy Act, § 4 (a), as amended June 25, 1910: "Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this act as a voluntary bankrupt."

§ 38½. Insane Persons.

Page 56. Insane persons may not be voluntary bankrupts.

See post, § 54; (1867) *In re Pratt*, Fed. Cas. No. 11371; (1867) *In re Weitzel*, Fed. Cas. No. 17365; obiter, *In re Kehler*, 18 A. B. R. 596, 153 Fed. 235 (D. C. N. Y., affirmed in 20 A. B. R. 669, 152 Fed. 674, and 19 A. B. R. 513, 159 Fed. 55).

Except in lucid intervals.

Obiter, *In re Kehler*, 18 A. B. R. 596, 153 Fed. 235 (D. C. N. Y., affirmed in 20 A. B. R. 669, 152 Fed. 674, 19 A. B. R. 513, 159 Fed. 55).

§ 41. No Specified Amount of Indebtedness Requisite, Though Debts Must Be "Provable."

By the amendment of 1910 the restriction of bankruptcy to those "owing debts," has apparently been removed with regard to voluntary bankruptcy; but undoubtedly the courts will continue to construe the law as applicable only to those owing debts, since the only jurisdiction vested by the Constitution in Congress in this regard is "over the subject of bankruptcies" and, manifestly, there can be no "subject of bankruptcies" without debts. This elimination was doubtless by inadvertence. The subcommittee of the Judiciary Committee of the Senate, to whom had been entrusted the house bill, had recommended to the whole Judiciary Committee the following amendment: "Any person who owes debts provable under this act to the amount of \$500 or over, except a municipal, railroad, insurance or banking corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." The Judiciary Committee of the Senate as a whole (like the Judiciary Committee of the House) desired to reject and did reject the limitation of \$500, but in doing so the Senate Judiciary Committee also struck out the words "who owes debts provable under this act." as well as the words "to the amount of \$500 or over;" the House, subsequently, during the last hours of the session, concurring in the Senate amendment without change. However, as above noted, it is still necessary that the bankrupt be a person "who owes debts."

§ 44. Corporations May Be Voluntary Bankrupts—Change by Amendment of 1910.

Corporations, by the Amendment of 1910, may petition for their own adjudication as bankrupts.

Bankr. Act, § 4A, as amended 1910. "Any person, excepting a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." Also, see ante, § 37.

§ 44½. What Action By Corporation Necessary.

The amendment of 1910, removing the restriction against the voluntary bankruptcy of corporations, does not, however, prescribe what corporate action is requisite for the voluntary bankrupt. The old Bankruptcy Act of 1867, under which the voluntary bankruptcy of corporations was permitted, in its § 37 specifically authorized the voluntary bankruptcy of the corporation "upon the petition of any officer of any such corporation or company duly authorized by a vote of a majority of the corporators present, at any legal meeting called for the purpose." Doubtless, there being no express regulation in the present act itself, such corporate action will be requisite as would be requisite under the laws of the State for invoking the action of the court in the analogous cases of assignments or of the filing of insolvency petitions therein.

Under the Act of 1867, the term "corporator" as used in the Bankruptcy Act, was held to be in general synonymous with "stockholder." *In re Lady Bryan Mining Co.*, 4 Nat. Bankr. Reg. 144, 394, 1 Sawyer 349; *Ansonia Brass Co. v. Chimney Co.*, 13 Nat. Bankr. Reg. 385, 64 Barber. 435, 91 U. S. 656.

It was also held that the action of the Board of Trustees, though by State law they were in charge of the management of the ordinary business of the corporation, was not sufficient action of the corporators—that the stockholders themselves must have acted. *In re Lady Bryan Mining Co.*, 4 Nat. Bankr. Reg. 394, 1 Sawyer 349; *Ansonia Brass Co. v. Chimney Co.*, 13 Nat. Bankr. Reg. 385, 64 Barber 435, 91 U. S. 656.

Compare, analogously, post, § 167, "Admissions by Boards of Directors of Corporations."

Under the Act of 1867, it appears that a subsequent ratification of an unauthorized corporate petition was ineffective, even though all formalities were observed in the attempted ratification.

(1867) *In re Lady Bryan Mining Co.*, 4 Nat. Bankr. Reg. 394, (D. C. Nev.).

Under the Act of 1867, it was requisite that the voluntary petition of a corporation contain, annexed thereto, a certified copy of the resolution passed by the "corporators" authorizing the filing of the voluntary petition, such resolution to follow substantially the following prescribed form which has been adapted, however, to proceedings under the Act of 1898.

"At a meeting of the stockholders (or, of the Board of Directors or Trustees, as the case may be) of the Company (or Association or Society, etc.) a corporation created under the laws of the State of held at in the County of and State of, on this day of A. D., the condition of the affairs of said corporation having been inquired into, and it being ascertained to the satisfaction of said meeting that the said corporation was insolvent, and that its affairs ought to be wound up, it was voted (or resolved) by a majority of the corporators (or stockholders, or directors or trustees) present at such meeting (which was duly called and notified for the purpose of taking action upon the subject aforesaid) that be and thereby authorized, empowered and required to file a petition in the District Court of the United States for the District of, within which said corporation has had its residence, domicile or principal place of business during the greater portion of the preceding six months, for the purpose of having the same adjudged Bankrupt; and that such proceedings be had thereon as are provided by the act of Congress entitled "An act to Establish a Uniform System of Bankruptcy throughout the United States," approved July 1st, 1898, and acts amendatory thereof.

In Witness Whereof, I have hereunto subscribed my name as of said Corporation and affixed the seal of the same this day of 19.....

[Seal]

.....
of said Corporation.

For suggested form of voluntary petition of a corporation, see post, § 190 note.

At any rate, authority granted at a meeting of stockholders called and held in conformity with the express statutory requirements of the old Act of 1867, and the forms of the Supreme Court provided thereunder, would doubtless be held equally valid authorization under the present law, in the absence of express statutory or Supreme Court rule.

Page 58. The law of 1867, under which voluntary bankruptcy of corporations was permitted, prescribed what corporate action was requisite to that end. It required the "petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators, at any legal meeting called for the purpose." No such requisite appears in the Amendment of 1910. In the absence of any expression, it would seem that at least such corporate action would be requisite for authorizing the filing of a voluntary corporate petition, as would be requisite to commit the 5th act of bankruptcy. The decisions as to what is requisite to bind the corporation in the commission of the 5th act of bankruptcy will, perhaps, be the nearest, in analogy, for determining what authority and action is requisite on the part of a corporation to authorize a voluntary petition in bankruptcy.

Compare post, §§ 167, 168.

§ 45. Who May Be Adjudged Involuntary Bankrupt.

Any natural person, having sufficient legal capacity, except a wage

earner, or a person engaged in farming or the tillage of the soil, any unincorporated company, and any moneyed, business or commercial corporation, except a municipal, railroad, insurance or banking corporation, owing debts to the amount of \$1,000 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and will be subject to the provisions and entitled to the benefits of the act.

Page 59, note 28. Bankr. Act, § 4 (B), as amended in 1910. See, in addition, *Carpenter v. Cudd*, 23 A. B. R. 463, 174 Fed. 603 (C. C. A. S. C.).

Changes as to Corporations by Amendment of 1910.—The classes of corporations which may be adjudged bankrupts involuntarily has been changed by the Amendment of 1910, so that now not only may those corporations which are engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits be adjudged involuntary bankrupts, but, in addition thereto, any moneyed, business, or commercial corporation may be so adjudged, except a municipal, railroad, insurance or banking corporation.

Page 59. See post, § 80. Also, see Bankr. Act, § 4b, as amended June 25, 1910: "Any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act."

§ 46. "Wage Earners" and "Farmers," etc., Excluded.

Page 59, note 29. See, in addition, *Sutherland Medicine Co. v. Rich & Bailey*, 22 A. B. R. 85 (Ref. Ga.).

These exceptions, of wage earners and farmers, exclude from the operation of involuntary bankruptcy the vast majority of those engaged in the industrial life of the country; and indicate an adherence, more or less accurate, to the original restriction of bankruptcy proceedings to traders and merchants.

Page 60. *First Nat. Bank of Wilkesbarre v. Barnum*, 20 A. B. R. 439, 160 Fed. 245 (D. C. Pa.): "By this, it is evidently intended to relieve from adverse proceedings those who, not being engaged in business or trade, depend for a living upon the result of individual labor effort, without the aid of property or capital." Quoted further at § 47.

Page 60. The fact that the debtor has made an assignment will not alter the case.

Olive v. Armour & Co., 21 A. B. R. 901, 167 Fed. 517 (C. C. A. Ga.).

Any more than if he had committed any other act of bankruptcy: he does not waive himself of his privilege by divesting himself of the means of carrying on his occupation.

§ 47. "Wage Earner" Defined.

But the mere fact that the debtor is in receipt of a salary of less than \$1,500 per annum is not conclusive that he is a "wage earner." Thus, where a sole owner of a mercantile business transferred the business to a corporation, bearing his own name, three-fourths of the stock of which he retained, being also interested in a real estate business and being worth \$90,000 outside of his holdings of stock in the corporation, it was held that he was not a "wage earner," exempt from involuntary bankruptcy, though he received only \$900 salary for his services as president of the corporation, the court saying that manifestly Congress did not intend to exempt persons such as this from the operation of the law.

Carpenter v. Cudd, 23 A. B. R. 463, 174 Fed. 603 (C. C. A. S. C.).

The mere incidental earning of wages is not sufficient to make one a "wage earner" within the meaning of the act.

In re *Naroma Chocolate Co.*, 24 A. B. R. 154, — Fed. — (D. C. R. I.): "A person who is engaged in a manufacturing or trading business does not come within the ordinary usage of the term 'wage earner' merely because while engaged as a manufacturer or trader, he may earn wages by working for another in a different occupation."

A music teacher giving lessons at so much an hour is not a "wage earner."

First Nat. Bk. of *Wilkesbarre v. Barnum*, 20 A. B. R. 439, 160 Fed. 245 (D. C. Pa.): "By this it is evidently intended to relieve from adverse proceedings those who, not being engaged in business or trade, depend for a living upon the result of individual labor or effort, without the aid of property or capital. But not all of this class are exempt, as is shown by the limit of \$1,500. And the work done must be such as is compensated by wages, salary, or hire, other earnings not being put in the same category. These terms mean much the same thing, and are no doubt collectively used in order to cover the different possible kinds of employment comprehended within the general idea. Wages, as distinguished from salary, are commonly understood to apply to the compensation for manual labor, skilled or unskilled, paid at stated times, and measured by the day, week, month, or season. *Commonwealth v. Butler*, 99 Pa. 535; *Lang v. Simmons*, 64 Wis. 525, 25 N. W. 650; *Campfield v. Lang* (C. C.), 25 Fed. 128; *Henry v. Fisher*, 2 Pa. Dist. R. 7; *Louisville, etc., R. R. v. Barnes*, 16 Ind. App. 312, 44 N. E. 1113; *Fidelity Ins. Co. v. Shenandoah Valley R. R.*, 86 Va. 1, 9 S. E. 759, 19 Am. St. Rep. 858; *State v. Haun*, 7 Kan. App. 509, 54 Pac. 130. And also by the piece. *Pennsylvania Coal Co. v. Costello*, 33 Pa. 241; *Swift Mfg. Co. v. Henderson*, 99 Ga. 135, 25 S. E. 27; *Ford v. St. Louis R. R.*, 54 Iowa 728, 7 N. W. 126; *Seider's Appeal*, 46 Pa. 57; *Adcock v. Smith*, 97 Tenn. 373, 37 S. W. 91, 56 Am. St. Rep. 810. But not by the job. *Heebner v. Chave*, 5 Pa. 115; *Berkson v. Cox*, 73 Miss. 339, 18 South. 934, 55 Am. St. Rep. 539; *Morse v. Robertson*, 9 Hawaii, 195; *Henry v. Fisher*, 2 Pa. Dist. R. 7. Nor including profits on the services of others. *Smith v. Brooke*, 49 Pa. 147; *Sleeman v. Barrett*, 2 H. & C. 934; *Riley v. Warden*, 2 Exch. 59. Neither is it so broad a term as 'earnings,' which comprehend the

returns from skill and labor in whatever way acquired. *People v. Remington*, 45 Hun, 338; *Matter of Stryker*, 73 Hun, 327, 26 N. Y. Supp. 209; *id.*, 158 N. Y. 526, 53 N. E. 525, 70 Am. St. Rep. 489; *Jenks v. Dyer*, 102 Mass. 236; *Nuding v. Urich*, 169 Pa. 289, 32 Atl. 409; *Goodhart v. Pennsylvania R. R.*, 177 Pa. 1, 35 Atl. 191, 55 Am. St. Rep. 705; *Hoyt v. White*, 46 N. H. 45. Indeed the act itself in exempting wage earners recognizes that there are other kinds. Salary, on the other hand, has reference to a superior grade of services. *Hartman v. Nitzel*, 8 Pa. Super. Ct. 22. And implies a position or office. *Bell v. Indian Live Stock Co. (Tex.)*, 11 S. W. 346. By contrast, therefore, 'wages' indicate inconsiderable pay for a lower and less responsible character of employment. *South Alabama R. R. v. Falkner*, 49 Ala. 115; *Gordon v. Jennings*, 9 Q. B. Div. 45. Where salary is suggestive of something higher, larger, and more permanent. *Meyers v. N. Y.*, 69 Hun, 29, 23 N. Y. Supp. 484; *White v. Koehler*, 70 N. J. Law, 526, 57 Atl. 124; *State v. Duncan*, 1 Tenn. Ch. App. 334; *Palmer v. Marquette Rolling Mill*, 32 Mich. 274. The word 'hire' is rather associated with the act of employment than the reward for services done; and in the latter connection is more on the plane of wages than of salary, although in a sense it comprehends both; and is also applied to engaging the use of property. We hire a coachman, a gardener, or a cook; or a carriage to take a ride. And may also be said to hire a superintendent, a bookkeeper, or a clerk, although it would seem more correct, in the latter instances, to say engage or employ. * * * From these considerations, as it seems to me, but one conclusion can be drawn. A person, like the respondent, giving music lessons at so much an hour, is not a wage earner within the meaning of the act. Teaching is a profession, denoting a nicer relation and involving a finer character of work; and entitled, like that of the lawyer, doctor, the engineer, the architect, or the minister, to be regarded as upon a higher plane. His work is mental, not physical. He labors with his head, not his hands. And while that may not be distinctly conclusive, it has its weight. He is the tutor, or instructor, of his pupil, not his servant; his, of the two, being the master mind. This is not to say that one who works for a salary, like the teachers in our public schools, may not be wage earners, within the meaning of the bankruptcy law. The fact of being under a salary makes a difference, and brings the case squarely within the act, although it may be noticed in passing that, in the school laws of the State, teachers are said to be appointed, not employed or hired. But the compensation received by the respondent, in the present instance, is certainly not a salary. Neither is it wages."

Page 60, note 32. Compare post, § 2171.

Page 60. Similarly, a married woman, having a family, pursuing the usual and ordinary domestic duties of a married woman, will not be deemed a "wage earner" within the meaning of Bankr. Act, § 4b, because, at certain times of the year, in her spare time, she, though supported by her husband, performs services for others than the members of her own family.

In re Remaley, 23 A. B. R. 29 (D. C. Pa.).

§ 48. Farmer Must Be Engaged "Chiefly" in Farming, etc.

Page 61. A reviewing court, where the evidence was conflicting, sustained a lower court in finding that a farmer was not "chiefly

engaged," where he also derived income from picnic grounds, whereon he maintained buildings, etc., for letting out to pleasure parties.

Stephens v. Merchants' Bank, 18 A. B. R. 560, 154 Fed. 341 (C. C. A. Ills.).

§ 49. But Incidental Other Occupation Not Fatal to Jurisdiction.

Page 62. Or where, incidentally, also a justice of the peace.

Sutherland Medicine Co. v. Rich & Bailey, 22 A. B. R. 85 (Spec. M. Ga.).

Or where, incidentally, the keeper of a dairy.

Gregg v. Mitchell, 21 A. B. R. 659, 166 Fed. 725 (C. C. A. Ohio).

Or where also the keeper of a commissary.

Sutherland Medicine Co. v. Rich & Bailey, 22 A. B. R. 85 (Spec. M. Ga.).

Or where he is agent for fertilizers and plows as well as being a farmer.

Sutherland Medicine Co. v. Rich & Bailey, 22 A. B. R. 85 (Spec. M. Ga.);
Rice v. Bordner, 15 A. B. R. 298, 140 Fed. 566 (D. C. Pa.).

Page 62, note 42. *Olive v. Armour & Co.*, 21 A. B. R. 901, 167 Fed. 517 (C. C. A. Ga.).

§ 50. "Farming" and "Tillage of Soil" Distinguished.

Page 62. It has been held that partnerships engaged in farming or in the tillage of the soil are exempted.

Sutherland Medicine Co. v. Rich & Bailey, 22 A. B. R. 85 (Spec. M. Ga.). Compare, however, post, § 56

§ 52. Married Women.

Married Women's Rights, as Various Considered in Bankruptcy Reports.—See various instances, post, wherever the subjects of allowance of claims, title of the trustee, marshaling of liens, etc., occur. Where a wife is in partnership with her husband, the proceeds of an insurance policy, after the death of her husband and the bankruptcy of the partnership, are not to be held by her free from the claims of partnership creditors, for the statute does not attempt to exempt such proceeds from the beneficiary's own debts. *In re Day*, 23 A. B. R. 785, 174 Fed. 164 (D. C. Tenn.).

§ 54. Insane Persons and Others under Guardianship.

Page 64, note 56. See, in addition, *In re Ward*, 20 A. B. R. 482, 161 Fed. 753. See ante, "Voluntary Bankrupt," § 38½.

Page 64. And even if he has not been judicially declared insane, yet his actual insanity at the time of the commission of the alleged act of bankruptcy is a sufficient defense, at any rate where the act alleged involves volition on the bankrupt's part.

In re Ward, 20 A. B. R. 482, 161 Fed. 755 (D. C. N. J.): "That is the act of bankruptcy charged against Ward. But if he has been a lunatic and so un-

sound of mind as to have been wholly incapable of managing himself or his estate ever since May 1, 1904, he could not have conveyed his lands in November and December, 1907, 'with intent to hinder, delay and defraud his creditors.' 'An intent to hinder or delay creditors,' says Judge Bradford, in the Wilmington Hosiery Company's case (D. C.), 9 Am. B. R. 579, 120 Fed. 185, 'involves a purpose wrongfully and unjustifiably to prevent, obstruct, embarrass, or postpone them (creditors) in the collection or enforcement of their claims.' Without undertaking to determine the exact boundaries of the jurisdiction of our bankruptcy courts in cases against lunatic bankrupts, it is sufficient to say that, in the present case, the defense of insanity cannot be stricken out of the answer."

In *re Kehler*, 19 A. B. R. 513, 159 Fed. 55, 20 A. B. R. 669, 162 Fed. 674 (C. C. A. N. Y.): "If he (Kehler) committed the acts of bankruptcy alleged in the petition while insane, the adjudication is a wrong which, irrespective of technical objections to the pleadings and proceedings of his committee, should be righted. If, on the other hand, these acts were committed while sane, there was no error in continuing the case even though the bankrupt subsequently became insane. Section 8 of the Bankruptcy Act provides that the insanity of a bankrupt shall not abate the proceedings, and § 1 provides that the word 'bankrupt' shall include a person against whom an involuntary petition has been filed. It is manifest, therefore, that if Kehler committed an act of bankruptcy while sane, and by reason of such act the court obtained jurisdiction, it can continue the proceedings notwithstanding the subsequent insanity of the bankrupt. * * * The district judge correctly states the proposition as follows: 'True, an insane person cannot commit an act of bankruptcy, but if Kehler was compos mentis at the time the acts were committed, the petition by creditors being filed before he was adjudged insane, I think the court acquired jurisdiction of the proceedings.'"

Indeed, the subsequent adjudication of insanity is only *prima facie* proof of the debtor's insanity at the time of the commission of the act charged.

In *re Ward*, 20 A. B. R. 482, 161 Fed. 755 (D. C. N. Y.): "But is the adjudication in the Court of Chancery of New Jersey conclusive on this court in this proceeding? It would not be so in an action at law against the alleged bankrupt. In such a case, 'when an inquisition is admitted in evidence, the party against whom it is used may introduce proof that the alleged lunatic was of sound mind at any period of the time covered by the inquisition.' *Den v. Clark*, 10 N. J. L. 217, 18 Am. Dec. 417. The same rule applies in equity. *Hunt v. Hunt*, 13 N. J. Eq. 161; *Yauger v. Skinner*, 14 N. J. Eq. 389; *Hill's Ex'rs v. Day*, 34 N. J. Eq. 150; 16 Am. & Eng. Ency. Law, 606. I think it is equally applicable to a bankruptcy case where the adjudication of lunacy is made upon proceedings instituted after the petition in bankruptcy has been filed. The *Funk* case (D. C.), 4 Am. B. R. 96, 101 Fed. 244, is distinguishable from this because there the adjudication of lunacy was made, and the property of the lunatic put into possession of his guardian, before the petition in bankruptcy was filed. In the *Kehler* case (D. C.), 19 Am. B. R. 513, 153 Fed. 235, where a petition in involuntary proceedings was filed before the alleged bankrupt had been adjudged a lunatic, Judge Hazel denied the motion to dismiss the petition because the jurisdiction of the bankruptcy court attached before the alleged bankrupt was adjudged insane, and because of the presumption of the alleged bankrupt's sanity at the time the acts of bankruptcy were

committed. It is not necessary to decide, in the present case, what may be the effect of an adjudication of lunacy and the appointment of a guardian or committee for the lunatic under a writ de lunatico inquirendo before a petition in bankruptcy is filed against the lunatic. It may be that in such a case the bankruptcy court acquires no jurisdiction."

And it is questionable whether the petitioning creditors will have the right to a personal examination of the alleged lunatic before trial.

In re Ward, 20 A. B. R. 482, 161 Fed. 755 (D. C. N. J.).

It has been held that a person under guardianship in one state may remove to another state, his guardian consenting, and acquire a new residence in the latter state, sufficient for adjudication of bankruptcy, where the laws in the latter state hold that the ward's disability does not follow him into other jurisdictions than that of the guardian's appointment.

In re Kingsley, 20 A. B. R. 424, 160 Fed. 275 (D. C. Vt.).

§ 55. Decedents.

Where a partnership is dissolved by the death of a partner, it has been held that it is not subject to bankruptcy, and that the voluntary petition of the surviving partner affects only his individual estate.

In re Evans (Rudolph v. Evans), 20 A. B. R. 406, 161 Fed. 590 (D. C. Ga.).

But the contrary has been held, in the case of an involuntary petition filed after the death of one partner where the surviving partners continue the business under the old articles of partnership.

In re Coe, 19 A. B. R. 618, 157 Fed. 308 (D. C. N. Y.), quoted at § 57.

§ 56. Partnerships Included.

All kinds of partnerships and unincorporated companies may be adjudged involuntary bankrupts, except perhaps those "chiefly engaged in farming or the tillage of the soil." Likewise they may be adjudged voluntary bankrupts.

Bankr. Act, § 5.

Page 64. This is so, for the special section of the statute governing partnership bankruptcies contains no restriction, nor is there any restriction elsewhere as to the kinds of partnerships that may be adjudged bankrupt. It simply provides in clause (a) that "A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt." There being a special statute prescribing the requisites in this particular, such special provisions will govern, except where limitations elsewhere laid down may be applicable. Thus, a partnership, even if it be not engaged in manufacturing, trading, printing, publishing, mining or in a mercantile

pursuit, may be adjudged an involuntary bankrupt; also, perhaps, even if it be engaged in farming, although upon this latter point there may be some doubt, owing to the dual capacity of a partnership, as being both an entity, in which capacity it would not be a "natural person" and therefore would not come within the exemption, and also an association of natural persons, in which capacity it would come within the exemption, since they would be "natural persons" "chiefly engaged in farming or the tillage of the soil."

Holding such partnerships exempt from adjudication. *Sutherland Medicine Co. v. Rich & Bailey*, 22 A. B. R. 85 (Special Master Ga.).

§ 57. Only During Continuance of Partnership or Before "Final Settlement."

Page 65. Where the dissolution occurs through the death of one of the partners, it has been held that the partnership is not subject to bankruptcy, and that the voluntary petition of the surviving partner will affect only his individual estate.

In *re Evans* (*Rudolph v. Evans*), 20 A. B. R. 406, 161 Fed. 590 (D. C. Ga.).

On the other hand, in an involuntary case, the contrary has been held.

In *re Coe*, 19 A. B. R. 618, 154 Fed. 162 (D. C. N. Y.): "But the death of Stanley dissolved the firm. Knox and Coe, as surviving partners, were vested with the assets of the firm. The partnership articles provided that the business should be continued by them, as surviving partners, through the year. They made a general assignment for the benefit of creditors, which was an act of bankruptcy, and that was the act of bankruptcy relied on in the petition filed. They, as surviving partners, then constituted the firm entity, and as such could themselves petition or be petitioned against to put the firm into bankruptcy. *Re Meyer*, 3 Am. B. R. 559, 98 Fed. 976; *Re Stein*, 11 Am. B. R. 536, 127 Fed. 547; and see *Vaccaro v. Security Bank*, 4 Am. B. R. 474, 103 Fed. 436. The fifth section of the Bankrupt Act provides that: 'A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.' I understand this provision to apply to any case of a partnership which is dissolved, whether the dissolution be caused by the death of one of its members, or by the expiration of the term, or otherwise. There is no evidence that any new firm was formed by Knox and Coe, after the death of Stanley, and, if there is any presumption to be indulged, it seems to me that the presumption is that the business which was continued after the death of Stanley, in the name of Cadenas & Coe, was the business of Knox and Coe as surviving partners of the old firm, continued pursuant to the provisions of the articles of copartnership permitting it."

§ 58. "Final Settlement"—When.

Page 65. *Holmes v. Baker and Hamilton*, 20 A. B. R. 252, 160 Fed. 922 (C. C. A. Wash.): "The rule is well settled that where assets or debts of a partnership remain after dissolution, the partnership is considered as subsisting as to its creditors until its property is subjected to the satisfaction of their claims."

Page 65, note 59. See, in addition, (1867) *In re Stowers*, Fed. Cas. No. 13516;

(1867) In re Foster, Fed. Cas. No. 4962; (1867) In re Crockett, Fed. Cas. No. 3402; (1867) In re Noonan, Fed. Cas. No. 10292.

§ 59. Partnerships as Entities.

Page 65. *Mills v. Fisher & Co.*, 20 A. B. R. 237, 159 Fed. 897 (C. C. A. Tenn.); "A partnership, under the Bankrupt Act of 1898, is a distinct entity, a 'person.' Section 1, ch. 19. As an entity it may be adjudged to be a bankrupt irrespective of any adjudication against the individual members."

Page 65, note 61. See in addition *Manson v. Williams*, 18 A. B. R. 674, 153 Fed. 525 (C. C. A. Me.), quoted at § 63. In re *Evans* (*Rudolph v. Evans*), 20 A. B. R. 406, 161 Fed. 590 (D. C. Ga.); In re *Ceballos*, 20 A. B. R. 459, 161 Fed. 445 (D. C. N. J.); In re *Solomon & Carvel*, 20 A. B. R. 490, 163 Fed. 140 (D. C. N. Y.); In re *Stovall Grocery Co.*, 20 A. B. R. 537, 161 Fed. 882 (D. C. Ga.); In re *Bertenshaw*, 19 A. B. R. 577, 157 Fed. 363 (C. C. A.).

Page 66. In re *Bertenshaw*, 19 A. B. R. 577, 157 Fed. 363 (C. C. A.): "The decisions under the Act of 1898 concerning the relations of partnership and individual estates have not been overlooked, but upon many phases of these relations they are confusing and inconsistent. The uniform current of authority is that under this act a partnership is a distinct entity separate from the individuals who compose it, that it owns its property, and owes its debts, which are respectively separate and distinct from the individual property and the individual debts of its partners, and that an adjudication of the partnership a bankrupt apart from, or in addition to, the adjudication of its partners bankrupts, is indispensable to the jurisdiction of a court of bankruptcy to administer the partnership property." However, the court In re *Bertenshaw* proceeds to draw extreme deductions from the rule, which, it would seem, are not approved by the weight of authority. See post, §§ 65, 477½, 2232.

In re *Junck & Balthazard*, 22 A. B. R. 298, 169 Fed. 481 (D. C. Wis.): "The authorities all seem to concur in the view that for some purposes at least the partnership is to be considered a person and a separate entity that owns property and owes debts. The marked difference in the phraseology of the Act of 1898 from all other acts can lead to no other conclusion."

§ 60. When Is a Partnership Insolvent.

Page 67, note 63. Compare post, § 1348. Also, see § 247. In addition, see *Boyd v. Boyd et al.*, 20 A. B. R. 330 (Ref. Ga.). Contra, In re *Everybody's Market*, 21 A. B. R. 925, 173 Fed. 492 (D. C. Okla.).

Compare, *Tumlin v. Bryan*, 21 A. B. R. 319, 165 Fed. 166 (C. C. A. Ga.): "It is true that a partnership may be treated as an entity, separate from its individual members, for the purpose of its adjudication as a bankrupt * * * but, in a suit to recover a preference, it is not only the insolvency of an intangible entity, but the insolvency of its responsible component parts, that lies at the foundation of the right to relief. If the component parts of the firm may be made to pay the firm's debts, the suit lacks reason and substance, and it cannot be held that the defendant has obtained a greater percentage of his debt than other creditors of the same class. If the members of the firm are solvent, all creditors may be paid in full. If the individual members of the partnership are not shown to be insolvent at the date of the payments, the preference is not voidable."

Contra, In re *Bertenshaw*, 19 A. B. R. 577, 157 Fed. 363 (C. C. A.): "The only logical conclusion, therefore, from the settled proposition that the partnership

is an entity distinct from its members under this act, is that it is insolvent under this act when the partnership property, the only property this person has, is insufficient to pay the partnership debts, the only debts this person owes. Possibly the opposite conclusion has crept into the opinions of the courts, under this act from the decisions under the insolvency law of Massachusetts and the bankruptcy law of 1867, where that theory necessarily obtains, because under those laws the insolvency or bankruptcy of the partnership was conditioned by the express terms of the statutes by the insolvency or bankruptcy of the partners, and the partnership was not in the conception of those laws a distinct entity, but a mere aggregation of partners. When, however, the Act of 1898 made the partnership a person, required its consideration, adjudication and the administration of its property as a distinct entity, and declared it insolvent when its property was insufficient to pay its debts, the tests of insolvency under the insolvency law of Massachusetts and the Bankruptcy Act of 1867 were inapplicable to cases under it, and the only test was that declared by the act itself, the insufficiency of the property of the person, the partnership, to pay the person's, the partnership's, debts." But this case, it seems, pushes the doctrine of "entity" to an extreme. The dissenting opinion expresses the truer rule.

Page 67. And this has been held to be the rule notwithstanding a private agreement among the partners limiting the liability of one or more members.

In *re Boyd*, 20 A. B. R. 331 (Ref. Ga.); contra, and that the assets of the individual partners are not to be considered, In *re Bertenshaw*, 19 A. B. R. 577, 157 Fed. 363 (C. C. A.); also contra, In *re Everybody's Market*, 21 A. B. R. 925, 173 Fed. 492 (D. C. Okla.).

§ 61. Adjudication in Firm Name.

The partnership may be adjudicated bankrupt without adjudication of its individual members.

In *re Solomon & Carvel*, 20 A. B. R. 490, 163 Fed. 140 (D. C. N. Y.).

Page 67. *Mills v. Fisher & Co.*, 20 A. B. R. 237, 159 Fed. 897 (C. C. A. Tenn.): "A partnership, under the Bankrupt Act of 1898, is a distinct entity, a 'person.' Section 1, cl. 19. As an entity it may be adjudged to be a bankrupt irrespective of any adjudication against the individual members."

§ 62. Adjudication in Name of Ostensible Partner.

Page 68, note 65. Compare, however, In *re Kaufman*, 23 A. B. R. 429, 176 Fed. 93 (C. C. A. N. Y.); In *re Rushmore*, 24 A. B. R. 55 (Ref. Okla.).

§ 63. Only "Actual" Partnership Subject to Adjudication.

Page 68, note 66. Compare, analogously, In *re Stoddard Bros. Lumber Co.*, 22 A. B. R. 435, 169 Fed. 190 (D. C. Idaho).

Page 69. *Buffalo Mill Co. v. Lewisburg Dairy Co.*, 20 A. B. R. 279, 159 Fed. 319 (D. C. Pa.): "A partnership in fact must of course be shown."

In *re Evans (Rudolph v. Evans)*, 20 A. B. R. 406, 161 Fed. 590 (D. C. Ga.): "The purpose of the petition filed by creditors now is to bring the ladies named into the bankruptcy proceeding as partners in the firm of Evans & Co., upon the ground that they made certain statements to creditors and to mercantile

agencies, after the death of their father, to the effect that they are still connected with the firm and liable for its debts. Statements of this sort could not re-establish the firm of Evans & Co. which had been dissolved by operation of law. The statements might render the ladies liable for credits given to Evans & Co. on the faith of such statements, but could not make them members of the firm. The old firm was dead, and I do not see how the statements of these ladies could make a new firm composed of themselves and Evans. While, as I have stated, they might be estopped by their statements from denying liability for credit given on the faith of their representations, they would not in this way establish a new partnership firm."

Page 69. Such was the holding, indeed, in a case where two persons intending to form a corporation, which was, however, never organized, associated themselves in a mercantile business, one contributing a stock of goods and cash, which was deposited in bank and used in the business, the other contributing merely his personal services, the court holding that a partnership in fact existed, and affirming the rule.

Manson v. Williams, 18 A. B. R. 674, 153 Fed. 525 (C. C. A. Me., affirming *In re Hudson Clothing Co.*, 17 A. B. R. 826, 148 Fed. 305): "We will observe, however, that the learned judge of the District Court found that there was a copartnership in fact between the two brothers under the style of the Hudson Clothing Company. He did not rest his conclusion in any way on the hypothesis of a copartnership by estoppel in the strict sense of the expression. This is important, because we regard the law as settled that, in bankruptcy proceedings involving a copartnership, the copartnership is, ordinarily, to be regarded as a true entity, precisely as the individual partners are. Various incidental reasons are given for this, the principal one of which is that otherwise there would be two classes of creditors whose equities otherwise are equal, one of which classes would share in the proceeds of certain property on the ground that two or more persons were estopped as to them from denying a copartnership, while other creditors who had contributed to the same enterprise would be left to what might remain of the property involved in the enterprise after the first class were paid, or to one or more individual estates. The fundamental reason, however, is that all through the various statutes of bankruptcy, whether in the United States or in England, which deal with copartnerships, the individuality and the entity of the copartnership are recognized to the same extent as the individuality and the entity of the several persons involved therein. The entire rule on this topic, so far as we have occasion to refer to it, is well deduced from *Ex parte Sheen*, 6 Chan. Div. (1877), 235, 22 Moak's Eng. Rep. 781."

Page 69, note 67. See, in addition, *Manson v. Williams*, 18 A. B. R. 674, 153 Fed. 525 (C. C. A. Me., affirming *In re Hudson Clothing Co.*, 17 A. B. R. 826, 148 Fed. 305).

Wife of Bankrupt as Partner.—A wife may not be partner in a mercantile partnership with her husband in Arkansas, although a married woman may form such a partnership with another person. *In re Suckle*, 23 A. B. R. 861, 176 Fed. 828 (D. C. Ark.).

§ 64. Individual Members Joinable with Partnership, in Either Voluntary or Involuntary Proceedings.

Page 69, note 69. "Consent" requisite only for administration of assets,

not for adjudication. In *re Everybody's Market*, 21 A. B. R. 925, 173 Fed. 492 (D. C. Okla.).

Page 70. *Holmes v. Baker & Hamilton*, 20 A. B. R. 252, 160 Fed. 922 (C. C. A. Wash.): "It is true that an individual member of a firm cannot be adjudged a bankrupt for an act of bankruptcy not committed by him or in which he did not participate; but that is not the case here presented. The act of bankruptcy in this case was committed by all the members of the firm. It was an act of omission, the failure to discharge the levy of an execution, a duty which vested as much upon the appellant as upon any member of the firm. Notwithstanding the dissolution of the partnership, it remained, as it was before, the appellant's duty to see that the property of the copartnership was devoted to the payment of the partnership debts, as to which he had not been released."

Page 70, note 70. See, in addition, In *re Ceballos & Co.*, 20 A. B. R. 459, 161 Fed. 445 (D. C. N. J.). To same effect in principle, *Mills v. Fisher & Co.*, 20 A. B. R. 237, 159 Fed. 897 (C. C. A. Tenn.). Compare post, § 171.

§ 65. Where Firm, Alone, Adjudicated, Whether Individual Estates Brought in for Administration.

Where only the firm is adjudicated bankrupt and not the individual members also, the better opinion is that, nevertheless, the estates of the individual members are involved and should be administered in bankruptcy.

Page 71, note 71. Obiter, In *re Junck & Balthazard*, 22 A. B. R. 208, 169 Fed. 481 (D. C. Wis.); In *re Latimer*, 23 A. B. R. 388, 141 Fed. 665 (D. C. Pa.); obiter, In *re Ceballos*, 20 A. B. R. 459, 161 Fed. 445 (D. C. N. J.); contra, In *re Bertenshaw*, 19 A. B. R. 577, 157 Fed. 363 (C. C. A.), wherein the dissenting opinion expresses, however, the truer rule. Also, compare § 477½, and post, § 2231.

§ 65¼. Where Solvent Partner Exists and Does Not Consent.

But it has been held that the partnership assets will not be so administered where there is a solvent partner who does not consent.

In *re Solomon & Carvel*, 20 A. B. R. 488, 163 Fed. 140 (D. C. N. Y.); In *re Blair*, 3 A. B. R. 580 (D. C. N. Y.); obiter, In *re Junck & Balthazard*, 22 A. B. R. 298, 169 Fed. 481 (D. C. Wis.).

But it is very doubtful whether § 5 (h) refers to any other than cases of individual bankruptcy wherein it is sought also to administer partnership assets.

See post, § 2232. See dissenting opinion, In *re Bertenshaw*, 19 A. B. R. 577, 157 Fed. 577 (C. C. A.).

§ 65½. Act Must Be That of the Partnership.

The act alleged as the ground for adjudication must be the act of the partnership.

In *re Stovall Grocery Co.*, 20 A. B. R. 537, 161 Fed. 882 (D. C. Ga.): "It will be perceived that the act of bankruptcy alleged here is the transfer by an individual member of a firm of property with the intent to defraud individual

creditors and firm creditors. This is not an act of bankruptcy on the part of the firm. The partnership entity must act, and what is relied on must be its act."

This subject is further considered in detail under the subject of "Imputed Acts of Bankruptcy—Agents of Corporations and Partnerships," post, § 171; also under the germane subject of "Transfers by Individual Partners Not Voidable as Preferences in Firm Bankruptcies," etc., post, § 2268½.

§ 66. Act Need Not Be Actually Committed by All Partners.

Page 72. Impliedly, *Holmes v. Baker & Hamilton*, 20 A. B. R. 252, 160 Fed. 922 (C. C. A. Wash.), quoted at §§ 64 and 171.

But the individual members may not also be adjudicated bankrupt unless they have each committed an act of bankruptcy.

In *re Ceballos*, 20 A. B. R. 459, 161 Fed. 445 (D. C. N. J.).

§ 67. But All Partners to Be Made Parties.

Where one of them is dead, it is questionable whether partnership adjudication may be had.

Page 73. In *re Evans* (*Rudolph v. Evans*), 20 A. B. R. 406, 161 Fed. 590 (D. C. Ga.).

§ 69. Individual Petitions Not Amendable to Include Partnership.

Page 73, note 74. Compare, In *re Kaufman*, 23 A. B. R. 429, 176 Fed. 96 (C. C. A. N. Y.), quoted at § 70.

§ 70. Secret or Silent Partners, on Discovery, Brought in.

However, where an adjudication is in form that of an individual, the subsequent discovery of a secret partner, the partnership doing business under the individual name, will not authorize the converting of the individual adjudication into a partnership adjudication by mere order; there must be allegations made by formal petition of the existence of a partnership and opportunity be given to the alleged partners to make the controversies authorized in partnership bankruptcy cases.

In *re Kaufman*, 23 A. B. R. 429, 176 Fed. 96 (C. C. A. N. Y.): "Counsel for Lena Kaufman contends that the record does not sustain the finding that she was a partner with her husband, but it is not necessary to go into that branch of the case. For the purposes of this appeal it may be assumed that for some time prior to the filing of the petition in bankruptcy there was a firm in the district doing business under the name of 'Isaac Kaufman,' the partners in which were Isaac Kaufman and Lena Kaufman. The existence of the firm, however, was not known or even suspected and in consequence the proceeding was instituted not against any partnership but against Isaac Kaufman individually. The difficulty with the order is that, after proceedings against the individual has progressed for a considerable time, much testimony having been taken, it undertakes to establish the pendency *pari passu* of another proceeding against the firm, which was never begun by filing any petition against it, and to put that second proceeding in the same condition as the first. In our opinion this cannot be done by a mere order; such a pro-

cedure would deprive the firm and the partner now sought to be brought in of the opportunity which the statute gives them to controvert the facts alleged in the petition and to have, if they so desire, a trial by jury on the question of insolvency and any act of bankruptcy alleged to have been committed. Sections 18d, 19a. This case is to be distinguished from those cited on the brief where the original proceeding was against a firm and, upon the discovery of a partner not originally named or known, he was brought in as one of the members of the firm."

§ 72. Remaining Partners Not Joining, Petition Treated as Involuntary as to Nonconsenting Partner but Voluntary as to Creditors.

Page 77. *In re Ceballos & Co.*, 20 A. B. R. 459, 161 Fed. 445 (D. C. N. J.): "But this proceeding is voluntary as to the petitioner, and involuntary as to his two copartners."

In re Junck & Balthazard, 22 A. B. R. 298, 169 Fed. 481 (D. C. Wis.): "It thus appears that for certain purposes at least the petition, so far as Balthazard is concerned, is to be regarded as involuntary. * * * In the case of a nonassenting partner, the procedure as to him is the same as in an involuntary case; but as to creditors the petition is voluntary, and there is no room for the issue which the creditor Saveland attempts to raise by his intervention, and his answer may be stricken from the files."

§ 73. No Act of Bankruptcy Requisite, Even Where Not All Join.

Page 77, note 80. See, in addition, *In re Junck & Balthazard*, 22 A. B. R. 298, 169 Fed. 481 (D. C. Wis.), quoted also at § 72.

Page 77. *In re Junck & Balthazard*, 22 A. B. R. 298, 169 Fed. 481 (D. C. Wis.): "This disposes of the objection * * * that the petition was so far involuntary that it was defective without an averment showing that the firm had committed an act of bankruptcy. The better rule seems to be that in such case the ordinary averment that the firm has not sufficient assets to pay its obligations, and is willing to submit its property for distribution, is sufficient, and the filing of such a petition by one of the partners is of itself considered the equivalent of an act of bankruptcy."

Page 77. One case, however, has specifically held the filing of a petition in bankruptcy by one partner against his copartners cannot be deemed an act of bankruptcy on the part of the partnership.

Obiter, *In re Ceballos & Co.*, 20 A. B. R. 459, 161 Fed. 445 (D. C. N. J.).

But this ruling is probably based upon a rejection of the doctrine that the filing of a voluntary petition is itself the commission of the fifth Act of Bankruptcy (see post, §§ 102, 164), and that it lies within the implied authority of a partner to make such a written admission as will bind the firm (see post, § 169). However, even the case mentioned was rightly decided, for the firm and the petitioning partner were both adjudged bankrupt, though the non-consenting partners were not adjudged bankrupt for lack of any individual acts of bankruptcy committed by them.

§ 74. Not All Defenses Available, but Only Insolvency; Though Entitled to Jury on That Issue.

Page 78, note 82. In re Junck & Balthazard, 22 A. B. R. 298, 169 Fed. 481 (D. C. Wis.), quoted at §§ 72, 73.

§ 76. Creditors May Not Intervene.

Page 78, note 85. See, in addition, In re Junck & Balthazard, 22 A. B. R. 298, 169 Fed. 481 (D. C. Wis.), quoted at § 72.

§ 79. Private Bankers.

Page 79, note 89. See, in addition, In re Oregon Trust and Sav. Bk., 19 A. B. R. 484, 156 Fed. 319 (D. C. Ore.).

§ 80. Classes of Corporations Included and Excluded.

Page 80, note 90. See, in addition, In re Wentworth Lunch Co., 20 A. B. R. 29, 159 Fed. 413 (C. C. A. N. Y.).

Changes Made by Amendment of 1910.

The original restrictions of the Act of 1898 as to the corporations subject to bankruptcy, to those engaged in "manufacturing, trading, printing, publishing, mining, or mercantile pursuits" have been removed by the Amendment of 1910, which has restored, with exceptions, the limitations of the old law of 1867; so that now, "any moneyed, business or commercial corporation," may be subjected to involuntary bankruptcy, except that no "municipal, railroad, insurance, or banking corporation" may be so adjudged.

Page 80. See Bankr. Act, § 4b, as amended June 25, 1910: "Any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act."

Compare (1867) *Winter v. Iowa, M. & N. P. Ry. Co.*, 7 Nat. Bankr. Reg. 289, 2 Dill. 487, Fed. Cas. No. 17, 890: "The first ground of demurrer is that the defendant is not a 'moneyed, business, or commercial corporation,' within the meaning of the Bankrupt Act, and hence that the provisions of that act do not apply to it. 'The provisions of this act shall apply to all moneyed, business, or commercial corporations, and joint stock companies.' Section 37. Except as otherwise provided, corporations are within the Bankrupt Act (§ 48) and in my judgment the purpose of Congress in the use of the language above quoted from § 37 was to include all corporations of a private nature, organized for pecuniary profit. Instead of undertaking to enumerate by name or description the various kinds of such corporations, language broad enough to include them, and which would exclude corporations of a public, civil or municipal character, as well as those organized purely and strictly for religious, charitable, educational, and like purposes, was employed."

Compare (1867) *Adams v. Boston, H. & E. Ry. Co.*, 4 Nat. Bankr. Reg. 314,

Fed. Cas. No. 47. "Public corporations, created for municipal or political purposes, and such private corporations as are ecclesiastical, or eleemosynary, or established for the advancement of learning, are clearly not made subject to the provisions of the act. Private corporations are divided into ecclesiastical and lay. Lay corporations are divided into civil and eleemosynary. Civil Corporations are created for an infinite variety of purposes; such as affording facilities for obtaining loans of money, the making of canals, turn-pike roads, and the like. The words of the thirty-seventh section, 'moneyed, business or commercial corporations,' would seem to have been intended to embrace all those classes of corporations that deal in or with money or property in the transactions of money, business or commerce for pecuniary gain, and not for religious, charitable or educational purposes. Accordingly, district courts of the United States in various districts have treated manufacturing, mining and similar corporations, and in one circuit at least, railway corporations, as subject to be dealt with under the provisions of the Bankrupt Act. But it is contended that the public purposes for which railways are created, and the public duties they are bound to perform, make them public corporations; and therefore such a construction should be given to the words of the statute as would exclude them from its operation. In the popular meaning of the term, nearly every corporation is public, inasmuch as they are created for the public benefit. But if the whole interest does not belong to the government, or if the corporation is not created for the administration of political or municipal power, the corporation is private."

Compare (1867) *Rankin v. Florida, A. & G. C. Ry. Co.*, 1 Nat. Bankr. Reg. 647, Fed. Cas. No. 11, 567: "A corporation created for the purpose of carrying on or pursuing any lawful business, defined by its charter and clothed with power so to do for the sake of gain, is clearly such a corporation. Now, this corporation is a common carrier, takes tolls, purchases, sells and mortgages property, contracts debts and other obligations, may sue and be sued. What more is necessary to fix upon it the character of a business corporation?"

Thus, were it not for the exception in the statute, railroad corporations might be subject to bankruptcy.

Compare (1867) *Winter v. Iowa, M. & N. Ry. Co.*, 7 Nat. Bankr. Reg. 289, 2 Dill. 487, Fed. Cas. No. 17,890: "Railways fall within the designation of business or commercial corporations. * * * The question whether railroad companies are within the operation of the Bankrupt Act (Act of 1867) has several times been before the courts, and so far as the researches of counsel have extended, it has been uniformly decided that they were. * * * Under the laws of the state, railroads may mortgage their property, or it may be subjected to the payment of their debts by proper judicial order, and in this manner sold and transferred, and really the only question is whether insolvent railway companies shall be made to pay their debts under the collection laws of the state, or under the mode provided by the Bankrupt Act."

It will be noted that the classification of the law of 1867 has not been readopted in its entirety, for the needed exceptions which were felt to be lacking in the law of 1867 have been engrafted in the Amendment of 1910. Thus, municipal, railroad, insurance, and banking corporations are not eligible nor subject to adjudication of bankruptcy.

Compare (1867) *Winter v. Iowa, M. & N. P. Ry. Co.*, 7 Nat. Bankr. Reg. 289, 2 Dill. 487, Fed. Cas. No. 17, 890: "There may be practical difficulties or embarrass-

ments in the administration in bankruptcy of a railway company, owing to the nature of the property, and this might suggest reasons to congress for excepting such corporations from the act, or for providing a special mode of proceeding; but it affords no sufficient grounds for a forced construction of the present statute so as to exclude such corporations from the scope of its operation."

Thus, railway corporations excepted from bankruptcy by the Amendment of 1910, were held to be subject to bankruptcy under the law of 1867.

Compare (1867) *Winter v. Iowa, M. & N. P. Ry. Co.*, 7 Nat. Bankr. Reg. 289, 2 Dill. 487, Fed. Cas. No. 17, 890, quoted supra; *Adams v. Boston, H. & E. Ry. Co.*, 4 Nat. Bankr. Reg. 314, 5 Am. Law Rev. 375, Fed. Cas. No. 47, quoted supra; *In re California Pacific Ry. Co.*, 11 Nat. Bankr. Reg. 193, Fed. Cas. No. 2315; *Sweatt v. Boston, H. & E. Ry. Co.*, 5 Nat. Bankr. Reg. 234, Fed. Cas. No. 13, 684 quoted post, this section.

It will be observed with regard to the voluntary bankruptcy of corporations, that the Amendment of 1910 is broader than the old law of 1867, inasmuch as *any* corporation, "except a municipal, railroad, insurance or banking corporation," may, under the Amendment of 1910, petition for its own adjudication as bankrupt, whether or not it be a "moneyed, business or commercial corporation," whilst, under the old law of 1867, only "moneyed, business or commercial corporations" could do so; and yet, on the other hand, the Amendment of 1910, so far as relates to the involuntary bankruptcy of corporations, is not so broad as the old law of 1867 because it excepts "municipal, railroad, insurance and banking corporations."

Thus, it is possible that an educational institution, although neither a "moneyed, business or commercial corporation," may voluntarily petition for its own adjudication as bankrupt, under the Amendment of 1910, though not subject to involuntary bankruptcy.

Compare *McLeod v. Lincoln Med. Col. of Cotner University (Nebr.)*, 96 N. W. Rep. 266.

Thus, it is possible that, under the Amendment of 1910, "trust companies," so called, may be held subject to bankruptcy as not being "banking" corporations.

Compare, inferentially, *Hobbs v. National Bank of Commerce*, 101 Fed. Rep. 75.

Thus, insurance corporations, excepted by the Amendment of 1910, were held subject to bankruptcy under the law of 1867.

Compare, *In re Independent Ins. Co.*, 6 Nat. Bankr. Reg. 200, Fed. Cas. No. 7017; *In re Hercules Mut. Life Assur. Soc.*, 6 Nat. Bankr. Reg. 338, Fed. Cas. No. 6402; *In re Merchants' Ins. Co.*, 6 Nat. Bankr. Reg. 43, s. s. Biss. 162; *Hill v. Reed (N. Y.)*, 16 Barb. 287.

Thus, banking corporations excepted by the Amendment of 1910, would, but for that exception, otherwise be subject to bankruptcy.

Compare *Gillett v. Moody*, 3 N. Y. 479; *Robinson v. Bank of Ithaca*, 21 N. Y. 406; *Mut. Ins. Co. v. Erie County Supervisors*, 4 N. Y. 442; *Talmadge v. Peel*, 7 N. Y. 347; *Hobbs v. National Bank of Commerce*, 101 Fed. Rep. 75.

Doubtless, steamship and steamboat companies, canal corporations and express companies are subject to voluntary and involuntary bankruptcy under the Amendment of 1910.

Compare *obiter* (1867) *Sweatt v. Boston, H. & E. R. Co.*, 5 Nat. Bankr. Reg. 234, Fed. Cas. No. 13,684: "Steamship and steamboat companies, when incorporated and engaged in accomplishing the purpose for which they are created, and canal corporations not of a public character, are undoubtedly commercial corporations within the meaning of that phrase as employed in the Bankrupt Act, and as such are clearly subject to the provisions contained in § 39 of the same act. Created as railways are for the same general purpose as the other corporations named, they are legally known by the same denomination and are properly included in the same classification. All such corporations transact immense amounts of business, and may, perhaps, in view of that fact, be well enough called business corporations, but their true legal and constitutional denomination, in the opinion of the court, is that of commercial corporations, as they are erected for the purpose of transporting passengers and freight, which is a commercial business, as it involves intercourse and an interchange of commodities. Commerce among the states, as well as foreign commerce, is subject to the regulation of congress, and it is well settled law that the word 'commerce' includes navigation as well as traffic, and that the power to regulate extends to the vehicles of intercourse as well as to the commodities to be exchanged."

"Municipal corporations" are towns, cities, counties, parishes and the like, which are created and continued for public purposes.

Compare, impliedly (1867), *Sweatt v. Boston, H. & E. R. Co.*, 5 Nat. Bankr. Reg. 234, Fed. Cas. No. 13,684.

§ 81. Jurisdiction Over Corporations More Limited under Act of 1898 than under Act of 1867.

Jurisdiction over corporations was more limited under the present law, before the Amendment of 1910, than under the old law of 1867.

In re Toledo Portland Cement Co., 19 A. B. R. 117, 156 Fed. 83 (D. C. Mich.); *Walker Roofing Co. v. Mer. & Evans Co.*, 23 A. B. R. 185, 173 Fed. 771 (C. C. A. Va.).

Page 80, note 91. See, in addition, *In re Wentworth Lunch Co.*, 20 A. B. R. 29, 159 Fed. 413 (C. C. A. N. Y.); *In re Toledo Portland Cement Co.*, 19 A. B. R. 117, 156 Fed. 83 (D. C. Mich.); *Walker Roofing Co. v. Mer. & Evans Co.*, 23 A. B. R. 185, 173 Fed. 771 (C. C. A. Va.); *Friday v. Hall & Kaul Co.*, 209 U. S. 543, 23 A. B. R. 610.

Changed by Amendment of 1910.—By the Amendment of 1910 the classification of corporations subject to bankruptcy under the Act

of 1867 has, with certain exceptions, been restored, so that now "any moneyed, business or commercial corporations," excepting a "municipal, railroad, insurance or banking corporation," may be subject to involuntary bankruptcy.

See Bankr. Act, § 4b, as amended June 25, 1910. See ante, §§ 37, 80.

§ 82. Commonly Accepted and Popular Meaning Given to Classes.

Page 81, note 92. Impliedly, *Friday v. Hall & Kaul Co.*, 209 U. S. 543, 23 A. B. R. 610, quoted at § 84; *Toxaway Hotel Co. v. Smathers*, 216 U. S. 439, 23 A. B. R. 626, quoted on other points at § 83. See, as to changes in classification made by the Amendment of 1910, ante, § 80.

Page 81. Inferentially, *In re Wentworth Lunch Co.*, 20 A. B. R. 29, 159 Fed. 413 (C. C. A. N. Y.): "In one sense of the word transformation of raw provisions into cooked dishes is manufacturing but no one would ever speak of a cook as a manufacturer."

Hall & Kaul Co. v. Friday, 19 A. B. R. 841, 158 Fed. 593 (C. C. A. Pa., reversed on other grounds sub nom. *Friday v. Hall & Kaul Co.*, 209 U. S. 543, 23 A. B. R. 610): "In construing the Bankruptcy Act, as in construing other acts of legislation, the words used must be given their ordinary and every day meaning, unless they are shown to have been used in some special or technical sense differing from that meaning. The construction given to the words referred to by the court below seems to us to violate this rule and to enlarge the class of persons or corporations to whom congress intended to make applicable the provisions of the Bankruptcy Act."

In re Concord Motor Car Co. (*Cate v. Cornell*), 23 A. B. R. 73, 173 Fed. 445 (C. C. A. Mass.): "The words descriptive of the various pursuits which bring a corporation within the scope of the Bankruptcy Act are words in common use, and are to be given their every day meaning."

Page 81, note 93. *Toxaway Hotel Co. v. Smathers*, 216 U. S. 439, 22 A. B. R. 626, quoted on other points at § 83.

§ 83. Definitions of "Trading" and "Mercantile Pursuits."

Page 82, note 96. See, in addition, *In re Wentworth Lunch Co.*, 20 A. B. R. 29, 159 Fed. 413 (C. C. A. N. Y.). See, as to changes in classification made by the Amendment of 1910, ante, § 80.

Page 83, note 98. See, in addition, *Laker v. Stapely Co.*, 21 A. B. R. 303 (D. C. Ohio).

Page 83. Dealing in real estate is not such trading.

In re Kingston Realty Co., 19 A. B. R. 845, 157 Fed. 303 (C. C. A. N. Y.): "The second enquiry is whether dealing in real estate—the buying and selling of improved and unimproved properties—is either trading or a mercantile pursuit, within the meaning of the statute. The words 'mercantile pursuits' have in general a slightly broader significance than the term 'trading.' Trading is a mercantile pursuit, but all mercantile pursuits may not involve trading. * * * It will be observed that the same distinction between real and personal property involved in defining the term 'manufacturing' arises in interpreting the terms 'trading' and 'mercantile pursuits.' Dealing in articles of commerce—goods and merchandise—alone constitutes trading or a mercantile

pursuit as those terms are used in the statute. A dealer in land is neither a trader nor a merchant."

Page 83, note 99. See, in addition, *In re Wentworth Lunch Co.*, 20 A. B. R. 29, 159 Fed. 413 (C. C. A. N. Y.); *In re Kingston Realty Co.*, 19 A. B. R. 845, 157 Fed. 299 (C. C. A. N. Y.), quoted *supra*.

Page 83. The transmitting of electricity to consumers by means of wires cannot be considered a "mercantile pursuit."

In re H. R. Elec. Power Co., 23 A. B. R. 191, 173 Fed. 934 (D. C. N. Y.).

An innkeeper is not a "trader," nor is innkeeping a "mercantile pursuit."

Toxaway Hotel Co. v. Smathers, 216 U. S. 439, 23 A. B. R. 626: "Until changed by a parliamentary declaration in 1825, Act 6, Geo. IV, chap. 16, defining the persons included under the term 'trader,' as used in the bankrupt and insolvency acts, it was held that an innkeeper was not a tradesman: * * * He defined a tradesman 'as substantially the same as shopkeeper.' In the case styled *Re Smith*, 2 Low. Dec. 69, Fed. Cas. No. 12981, the same learned judge adopted the definition of Bouvier, who defines a tradesman as 'one who makes it his business to buy merchandise or goods or chattels to sell again for the purpose of making a profit.' If the occupation of inn keeping is not 'trading,' it is not a 'mercantile pursuit,' for little more than a broader significance can be given to that term than to 'trading.' It is, in fact, trading in the larger sense. 'Mercantile' is defined 'as having to do with trade or commerce; of or pertaining to merchants, or the traffic carried on by merchants' (*Century Dictionary*). To be principally engaged in a mercantile pursuit, one must be carrying on commerce in some of its branches." Quoted further at § 86.

Amendment of 1910.—The Amendment of 1910 to Bankruptcy Act, § 4 [see ante, § 80], whereby the classification of corporations subject to bankruptcy has been changed, has rendered unimportant the above definitions, except as to cases started before June 25, 1910, the time the amendatory act took effect.

§ 84. Definitions of "Manufacturing."

Page 83, note 100. *Friday v. Hall & Kaul Co.*, 23 A. B. R. 610, 216 U. S. 449, quoted at §§ 85, 87. See, as to changes in classification made by the Amendment of 1910, ante, § 80.

Page 83. *Friday v. Hall & Kaul Co.*, 216 U. S. 449, 23 A. B. R. 610: "It must be conceded that the word 'manufacturing,' as used in the Bankruptcy Act, has no definite legislative meaning by reason of adoption from other bankrupt acts; as is the case with the words 'trader' or 'trading,' and perhaps other words with well-understood common-law meanings. Though British bankrupt acts were in existence from the time of Henry VIII, they applied only to 'traders' until 1860, when they were extended to other persons. Our own original act, that of 1800, applied only to traders, bankers, brokers, and underwriters. The Act of 1841 added 'merchants.' The Act of 1867 extended practically to all persons and corporations. That of 1898 limited the wide application of the Act of 1867 to the class of business corporations enumerated. Thus it is that the words 'manufacture' and 'manufacturing' have no meaning

derived from adjudications of any former law. Undoubtedly Congress intended that that class of business corporations engaged in any class of manufacturing, as its principal business, and not as a mere minor incident to some larger work, should be subject to the law; and this intention should be regarded by giving to doubtful words and terms a liberal rather than a narrow meaning. 'Manufacturing' has no technical meaning. It is not limited by the means used in making, nor by the kind of product produced."

Page 83, note 101. *Friday v. Hall & Kaul Co.*, 23 A. B. R. 610, 216 U. S. 449 Compare, *In re Wentworth Lunch Co.*, 20 A. B. R. 29, 159 Fed. 413 (C. C. A. N. Y.), quoted ante, § 82; *In re H. R. Elec. Power Co.*, 23 A. B. R. 191, 173 Fed. 934 (D. C. N. Y.), although here the generating of electricity would seem after all to be a manufacture quite as much as the extraction of metal from the ore in which it is imbedded.

Page 83. *Friday v. Hall & Kaul Co.*, 216 U. S. 449, 23 A. B. R. 610: "In *Kidd v. Pearson*, 128 U. S. 1, 20, * * * 2 Inters. Com. Rep. 232, Mr. Justice Lamar said that 'manufacture is transformation,—the fashioning of raw materials into a change of form for use.' In *Tidewater Oil Co. v. United States*, 171 U. S. 210, 216, * * * Mr. Justice Brown, referring to the expansion of the meaning of the word 'manufacture,' said that 'the word is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product.'"

Kidd v. Pearson, 128 U. S. 1: "Manufacture is transformation—the fashioning of raw materials into a change of form for use."

The word "manufacturing" as used in the Bankruptcy Act, has no definite legislative meaning by reason of adoption from other bankruptcy acts, as is the case with the words "trader" and "trading."

Friday v. Hall & Kaul Co., 216 U. S. 449, 23 A. B. R. 610, reversing 19 A. B. R. 841, quoted supra.

Page 84, note 102. See, in addition, *Walker Roofing Co. v. Mer. & Evans Co.*, 23 A. B. R. 185, 173 Fed. 771 (C. C. A. Va.), quoted post, § 94.

Page 84. *In re Kingston Realty Co.*, 19 A. B. R. 845, 157 Fed. 303 (C. C. A. N. Y.): "Is the building of houses manufacturing? It strains the term to so use it. Goods, wares and merchandise are manufactured; houses are constructed. Houses are real estate. They are not articles of commerce and the term manufacturing as used in the statute does not apply to their construction. 'The distinction would seem to run along the line of those articles which are more or less fixed in place, and not ordinarily the subjects of bargain and sale as articles of commerce, as contradistinguished from those which are movable and ordinarily regarded as subjects of sale and manual transfer—articles of trade in the common course of mercantile business.' *Columbia Iron Works v. National Lead Co.*, 11 Am. B. R. 340, 127 Fed. 99, 102—Court of Appeals, Sixth Circuit. If this corporation had been engaged in constructing houses upon other persons' land instead of upon its own, there might possibly be more ground for claiming that the statute applies. But it is held that construction companies are not engaged in manufacturing."

Page 84. *Friday v. Hall & Kaul Co.*, 216 U. S. 449, 23 A. B. R. 610, reversing *Hall & Kaul Co. v. Friday*, 19 A. B. R. 841, 158 Fed. 593 (C. C. A. Pa.): "The production of concrete arches or piers or abutments is the result of

successive steps. The combination of raw material—the sand, the limestone, the cement, and the water—produced a product which undoubtedly was ‘manufactured.’ This concrete had then to be given shape. That required the manufacture of moulds, which remain in place until hardening occurs. If the concrete is reinforced, as is the case where great strength is required, then the adjustment of the bars of steel within the moulds was another step. Do all of these steps, each a step in ‘manufacturing,’ cease to be ‘manufacturing’ because the moulds into which the concrete is poured, when in a fluid state, are upon the spot where the finished product is to remain? That the operation of making and shaping the concrete is done at the place used seems rather a matter of convenience, due to the quick hardening in moulds and difficulties of transportation. But, as we may take notice, the operation which, in the end, is to produce an arch or abutment or pier or house, is not necessarily a single operation, but one of successive repetitions of the process. The business is not identical with that of a mere builder or constructor who puts together the brick or stone or wood or iron, as finished by another. If the builder made his brick, shaped his timbers, and joined them all together, he would plainly be a manufacturer as well as a builder; and if the former was the principal part of the business, he would be within the definition of the Bankrupt Act. To say that one who makes, and then gives form and shape to the product made, is not engaged in manufacturing because he makes his product and gives it form and shape in the place where it is to remain, is too narrow a construction.”

Amendment of 1910.—The Amendment of 1910 to Bankruptcy Act § 4, changing the classification of corporations subject to bankruptcy [see ante, § 80] has rendered unimportant the above definitions, except as to cases pending on June 25, 1910, the time when the amendatory act took effect.

§ 85. Must Be “Principally” So Engaged.

Page 84, note 103. In re Excelsior Cafe Co., 23 A. B. R. 701, 174 Fed. 295 (D. C. N. Y.); Toxaway Hotel v. Smathers, 216 U. S. 439, 23 A. B. R. 626, quoted at § 86 and on other points at § 83; Friday v. Hall & Kaul Co., 216 U. S. 449, 23 A. B. R. 610; In re Concord Motor Car Co. (Cate v. Connell), 23 A. B. R. 73, 173 Fed. 445 (C. C. A. Mass.).

Page 84, note 104. Toxaway Hotel Co. v. Smathers, 216 U. S. 439, 23 A. B. R. 626, quoted at § 86 and on other points at § 83; In re Excelsior Cafe Co., 23 A. B. R. 701, 174 Fed. 295 (D. C. N. Y.). See, in addition, Walker Roofing Co. v. Mer. & Evans Co., 23 A. B. R. 185, 173 Fed. 771 (C. C. A. Va.), quoted post at § 94; In re Concord Motor Car Co. (Cate v. Connell), 23 A. B. R. 73, 173 Fed. 445 (C. C. A. Mass.). Friday v. Hall & Kaul Co., 216 U. S. 449, 23 A. B. R. 610, quoted at §§ 84, 87.

Amendment of 1910.—The Amendment of 1910 to Bankruptcy Act, § 4, renders the proposition of this paragraph immaterial, except as to cases pending on June 25, 1910. See ante, § 80. Compare concluding clause of Amendment of 1910, “Time When This Act Shall Go into Effect.”

§ 86. How, if Engaged in Different Occupations, Some within and Others without the Classes.

Page 85. *Obiter*, In re Kingston Realty Co., 19 A. B. R. 845, 157 Fed. 303 (C. C. A. N. Y.); impliedly, In re Mfg. & Pub. Ser. Co., 21 A. B. R. 878, 166 Fed. 964 (D. C. Ga.), where a paper manufacturing concern incidentally operated a water and electric light plant; compare, also, In re Concord Motor Car Co. (*Cate v. Connell*), 23 A. B. R. 72, 173 Fed. 445 (C. C. A. Mass.); In re Excelsior Cafe Co., 23 A. B. R. 701, 174 Fed. 295 ((D. C. N. Y.). See, as to changes in classification made by the Amendment of 1910, ante, § 80.

Page 85. *Toxaway Hotel Co. v. Smathers*, 216 U. S. 439, 23 A. B. R. 626: "‘Engaged principally’ are plain words of no ambiguous meaning. They need no construction. Amenability to the statute must turn upon the facts of the case where, as here, the same corporation was engaged in ‘mercantile pursuits’ in addition to inn keeping. There is no way to settle whether it was ‘engaged principally’ in the one or the other but by a comparison of the two. When we do this it is easy to see that the mercantile business which it did was of minor character, and was largely an incident to the location of the hotels of the company in a thinly settled mountainous region. The stores were country stores—that is, stores dealing in a great variety of ordinary necessities. From two-thirds to three-fourths of the goods handled were used in the running of the hotels, upon order of the stewards. Much of the remainder were sold to the employees, and the rest to customers at large, who paid in money or bartered country supplies for goods. The average stocks carried were from three to four thousand dollars in value. They were, in a large sense, hotel commissaries. The business was done but for one season. If we compare the volume of that done by the inn-keeping business proper with that done by the stores, the minor character of the latter is plain." Quoted also at § 83.

Page 85. But where neither of the distinct lines of business can be termed "incidental" to the other and there is difficulty in estimating which line is the "principal" line, the court will not be obliged to embark on a sea of guesswork, measurement, balancing and comparison; and jurisdiction will not be taken by the bankruptcy court.

In re *Humphrey Advertising Co.* (*Tribune Co. v. Humphrey Adv. Co.*), 24 A. B. R. 41, 177 Fed. 181 (C. C. A. Ills.): "There are many cases in the bankruptcy reports in which the question as to which is the principal business of a corporation is discussed. Those cases turn largely upon the proposition as to which business is principal and which is incidental. Here, both lines of business are covered by the articles of incorporation, and neither can be said to be in any sense incidental to the other or to the charter powers. The reasoning in the one case is not applicable to the other. The liberality of the Illinois statute permits a situation not contemplated by the framers of the Bankruptcy Act. It cannot be that, as between two separate lines of business, one within, and the other without, the act, and both included in the charter, it is the duty of the bankruptcy court to weigh, measure, estimate, balance and compare the one with the other with a view to ascertaining the relative importance of the several classes of business embraced within the specifically declared objects of the corporation and actually carried on by it, in the absence of clear statutory authority—bearing in mind the strictness with which this section of the act shall be construed. * * * Assuming, as insisted

by appellant, that the other branch of appellee's corporate objects does come within the act, there existed two distinct classes of business in which appellee was engaged, neither of which can be termed its principal business, and both of which stood on the same footing for the purpose of ascertaining what was the principal business of appellee. If the court should assume to decide that one or the other is the business in which the corporation is principally engaged, it could not find that the rejected line of business is incidental thereto, for it is not. The case is novel, and one of first impression, growing out of the language of the Illinois statute. We are of the opinion that the facts of the case create a situation not within the Bankruptcy Act, for the reasons stated."

Amendment of 1910.—The Amendment of 1910 to Bankruptcy Act, § 4 (a) and (b), renders immaterial the above discussion, except as to cases originating before June 25, 1910. See ante, § 80.

§ 87. Actual Occupation Governs.

Page 85, note 105. See, in addition, *Toxaway Hotel Co. v. Smathers*, 216 U. S. 439, 23 A. B. R. 626. See, in addition, *In re Concord Motor Car Co. (Cate v. Connell)*, 23 A. B. R. 72, 173 Fed. 445 (C. C. A. Mass.).

Friday v. Hall & Kaul Co., 216 U. S. 449, 23 A. B. R. 610: "The corporate powers of the company were very broad. It is possible that it might have so limited its functions as not to have come under any reasonable definition of manufacturing; but at last the question of whether it was principally engaged in manufacturing must turn more upon what it was actually doing than upon what it was authorized to do." Quoted further at § 84.

Page 85. And, in any event, the charter is evidence to be taken into account.

Walker Roofing Co. v. Mer. & Evans Co., 23 A. B. R. 185, 173 Fed. 177 (C. C. A. Va.): "While it has been held that the charter of a company is not conclusive in this respect, yet this, among other things, is evidence which should be considered in determining the question as to the character of the business in which this company was engaged."

And it is sufficient, for a prima facie case at any rate, that the corporation be shown merely to be the apparent owner of the business.

Calnan Co. v. Doherty, 23 A. B. R. 297, 174 Fed. 222 (C. C. A. Mass.).

Amendment of 1910.—But the Amendments of 1910 to Bankruptcy Act, § 4 (a) and (b), diminish the importance of the above distinctions. See ante, § 80.

§ 87½. Must Be Actually "Engaged in."

Pages 85, 86. It has been held, that the corporation will be subject to involuntary proceedings, although it has not actually started in the work, if it can be said to be "engaged in" the "pursuit:" it need not yet have done any substantial amount of manufacturing, mining, etc. If it was engaged in even the first stages, as its principal business, it was nevertheless actually "engaged in" the pursuit.

Page 86, note 106. But the case of *In re White M't'n Paper Co.*, 11 A. B. R. 633, 127 Fed. 643 (C. C. A. N. H.) is distinguished in *In re Toledo Portland Cement Co.*, 19 A. B. R. 117, 156 Fed. 83 (D. C. Mich.), and both cases are distinguished in *In re Bloomsburg Brew. Co.*, 22 A. B. R. 625, 172 Fed. 174 (D. C. Pa.).

Ballinger v. Nat'l Bank, 24 A. B. R. 44, — Fed. — (C. C. A. Calif.).

Page 86. *In re Bloomsburg Brew. Co.*, 22 A. B. R. 625, 172 Fed. 174 (D. C. Pa.): "A manufacturing or trading corporation to all intents and purposes engages in business when it starts to carry out the objects for which it was created. And if the incurring of debts on credit is required to satisfy the statute, there certainly was enough of that here."

Page 86. Nevertheless, there must exist an actual engaging in the occupation, else jurisdiction is lacking.

In re New England Breeders' Club, 21 A. B. R. 349, 165 Fed. 517 (D. C. N. H., reversed on other grounds in *In re New England Breeders' Club*, 22 A. B. R. 124, 165 Fed. 517, C. C. A.).

In re Toledo Portland Cement Co., 19 A. B. R. 117, 156 Fed. 83 (D. C. Mich.): "It means that the corporation's business must not only be that of one or more of the classes designated, but it must be 'engaged in' such business, or, if carrying on more than one business, it must be 'principally engaged' in one at least of the commercial or industrial pursuits designated in § 4b. Can a corporation having the authority, but not the means, to manufacture an article of commerce, which has taken no step in the process of manufacturing, be properly said to be engaged in 'manufacturing' that article? 'Engaged' means, in that connection: 'Occupied, employed, busy.' Webster. '(1) To busy oneself; (2) to be occupied or devoted; (3) to take part, as to engage in trade; (4) employ the time of.' Standard Dictionary. See *State ex rel. Dawson*, 39 Ala. 383; *In re Ralph's Trade-Mark*, 25 Ch. Div. 194. A corporation in that stage of its existence cannot be truthfully said to have a manufacturing business, pursuit, or employment. The erection of buildings necessary to the exercise of its authorized powers is neither a manufacturing, trading, printing, publishing, mining, or mercantile pursuit. * * * It seems clear that if Congress meant to make corporations incorporated for the conduct of any of the lines of business mentioned in § 4 of the act subject to adjudication as involuntary bankrupts, before they began the business for which they were created, the most natural expression of that intent would have been the phrase 'incorporated for,' or 'organized for manufacturing or mercantile pursuits.' Either would have demonstrated an unmistakable purpose to bring them within the scope of the act immediately upon incorporation or organization. It is said in *Murphy v. Utter*, 186 U. S. 111, * * * 'Every word or clause used in a statute is presumed to have a meaning of its own independent of other clauses.' If the contention of the petitioners can be maintained under the first clause of § 4, one who has bought or leased a farm with the ulterior purpose of farming, but who is not engaged either personally or by his employees in that vocation, is a person 'engaged chiefly in farming or the tillage of the soil.' The contrary is held *In re Matson* (ante, § 48): * * * By a parity of reasoning it would seem that until a corporation of the classes described has become a factor in the activities of the commercial or industrial world for the purpose of its organization, it is not engaged in manufacturing, trading or other pursuits."

Page 86. It is the actual occupation at the time of the filing of the bankruptcy petition and a reasonable time prior thereto that governs, not some distant period.

In re Interstate Paving Co., 22 A. B. R. 572, 171 Fed. 604 (D. C. N. Y.).

Effect of Amendment of 1910.—But the Amendment of 1910 to Bankruptcy Act, § 4 (a) and (b), makes the above distinctions of little importance as to cases begun after the Amendment took effect. See ante, § 80.

§ 89. Quasi Public Corporations.

Page 86, note 108. See, as to changes in classification made by the Amendment of 1910, ante, § 80.

Page 86. Likewise, "public service" corporations are exempt.

In re Hudson River El. Co., 21 A. B. R. 915, 173 Fed. 934 (D. C. N. Y.). Also, see § 94.

§ 90. Manufacturing Corporations.

Page 86, note 109. See, as to changes in classification made by the Amendment of 1910, ante, § 80.

Page 86, note 110. See, in addition, *Friday v. Hall & Kaul Co.*, 216 U. S. 449, 23 A. B. R. 610, reversing *Hall & Kaul Co. v. Friday*, 19 A. B. R. 841, 158 Fed. 593.

Page 86. Corporations engaged in building houses have been held in some cases to be "manufacturing" corporations and to be within the jurisdiction of bankruptcy.

In re Rutland Realty Co., 19 A. B. R. 546, 157 Fed. 296 (D. C. N. Y.); also, In re Church Construction Co., 19 A. B. R. 549, 157 Fed. 298 (D. C. N. Y.).

But in other cases they are held not to be within the jurisdiction.

Obiter, In re Kingston Realty Co., 19 A. B. R. 845, 157 Fed. 303 (C. C. A. N. Y.).

At any rate, where building houses on their own land.

In re Kingston Realty Co., 19 A. B. R. 845, 157 Fed. 299 (C. C. A. N. Y.), quoted at § 84; obiter, In re New York Tunnel Co., 21 A. B. R. 531, 166 Fed. 284 (C. C. A. N. Y.).

And the better rule is that house building corporations are not "manufacturing" corporations, whether building on their own or on other's lands.

Paper making corporations are manufacturing corporations and are subject to bankruptcy.

Page 86, note 112. See, in addition, In re Mfg. & Pub. Service Co., 21 A. B. R. 878, 164 Fed. 964 (D. C. Ga.).

Page 86. Although incidentally operating water and electric light plants.

In re Mfg. & Pub. Service Co., 21 A. B. R. 878, 166 Fed. 964 (D. C. Ga.).

Page 86. Likewise, fish packing corporations, which operate plants for carrying on the business of preserving, packing and marketing fish, are manufacturing corporations, subject to bankruptcy.

In re Alaska American Fish Co., 20 A. B. R. 712, 162 Fed. 498 (D. C. Wash.).

Inextricable Commingling of Affairs of Two Different Corporations Organized in Different States.—Where a California corporation organized with the object of becoming the successor of a Washington corporation and of taking over its property and assuming its obligations, had its home office in Oakland, California, but the business was conducted by a manager at Tacoma, who was also the manager of the Washington corporation, the business transactions of both corporations being so intermingled that a separation of the two concerns in bankruptcy would be impossible, the bankruptcy court in Washington, having first acquired jurisdiction of both corporations, had the right to deal with them as joint parties. In re Alaska American Fish Co., 20 A. B. R. 712, 162 Fed. 498 (D. C. Wash.).

Likewise, corporations engaged in making concrete arches, buildings, bridges, walls, etc., on the premises where the structure is to be erected, are subject to bankruptcy.

Friday v. Hall & Kaul Co., 216 U. S. 449, 23 A. B. R. 610, quoted at §§ 84, 85, 87.

Amendment of 1910.—The Amendment of 1910, extending the classes of corporations subject to involuntary bankruptcy, to "all moneyed, business or commercial corporations," obviously includes "manufacturing" corporations. See ante, § 80.

§ 91. Trading Corporations and Those Engaged in Mercantile Pursuits.

Page 87, note 115. See, as to changes in classification made by the Amendment of 1910, ante, § 80.

§ 92. Printing and Publishing Corporations.

Page 87, note 118. See, as to changes in classification made by the Amendment of 1910, ante, § 80.

§ 93. Mining Corporations.

Page 87, note 119. See, as to changes in classification made by the Amendment of 1910, ante, § 80.

§ 94. Corporations Not within Statutory Classes Exempt.

Page 88, note 120. See, in addition, In re Reisler Amusement Co., 22 A. B. R. 501, 171 Fed. 283 (D. C. N. Y.). See, as to changes in classification made by the Amendment of 1910, ante, § 80.

Page 87. Toxaway Hotel Co. v. Smathers, 216 U. S. 239, 23 A. B. R. 626: "The present act applies only to such corporations as are 'principally en-

gaged' in certain enumerated kinds of business. That of inn-keeping, though as old as civilization, is not specifically enumerated. Unless, therefore, a corporation engaged in the business of hotel keeping is embraced within one or the other of those which are enumerated, it is not liable to an involuntary adjudication."

Thus, livery and boarding stables were exempt, before the Amendment of 1910.

Gallagher v. DeLancey Stables Co., 19 A. B. R. 801, 158 Fed. 381 (D. C. Pa.); In re De Lancey Stables, 22 A. B. R. 406, 170 Fed. 860 (D. C. Pa.); In re Willis Cab & Automobile Co., 23 A. B. R. 593. These cases are no longer authority since the Amendment of 1910. See ante, §§ 44, 45, 80.

Page 89, note 124. Obiter (held subject, however, because only incidentally operating an electric light and water plant), In re Mfg. & Pub. Service Co., 21 A. B. R. 878, 166 Fed. 964 (D. C. Ga.); obiter (electric light and power company), In re H. R. Electric Power Co., 23 A. B. R. 191, 173 Fed. 934 (D. C. N. Y.).

Page 89. Thus it was held, before the Amendment of 1910, that corporations engaged in generating electricity and transmitting it over wires were exempt, because not engaged in "manufacturing" but rather in "gathering" electricity, their occupation having been held nearer akin to mining, though not mining.

In re H. R. Elec. Power Co., 23 A. B. R. 191, 173 Fed. 934 (D. C. N. Y.).

Also that they were not engaged in mercantile pursuits.

In re H. R. Elec. Power Co., 23 A. B. R. 191, 173 Fed. 934 (D. C. N. Y.).

And, in general, it seemed to be the policy of the act to exempt from its operation that class of corporations commonly designated "public service corporations."

In re H. R. Elec. Power Co., 23 A. B. R. 191, 173 Fed. 934 (D. C. N. Y.).

Page 89. Real estate corporations engaged in buying and selling real estate were held, before the Amendment of 1910, not subject to bankruptcy.

In re Altonwood Park Co., 20 A. B. R. 31, 160 Fed. 448 (C. C. A. N. Y.); In re Kingston Realty Co., 19 A. B. R. 845, 157 Fed. 299 (C. C. A. N. Y.), quoted at § 83.

Page 89, note 128. Obiter, Moore & Muir Co., 23 A. B. R. 122, 173 Fed. 732 (D. C. N. Y.).

Stockbrokerage corporations were held not subject to bankruptcy proceedings.

In re Surety Guaranty & Trust Co., 9 A. B. R. 129, 121 Fed. 73 (C. C. A. Ill.); Laker v. (Geo. H.) Stapley Co., 21 A. B. R. 303 (D. C. Ohio).

Page 89, note 131. The case *In re Leighton & Co.*, 17 A. B. R. 275, 147 Fed. 313 (D. C. W. Va.), is disapproved in *Laker v. Stapely*, 21 A. B. R. 303 (D. C. Ohio).

Page 89. Insurance brokerage corporations are exempt.

Page 89. *In re Moore & Muir Co.*, 23 A. B. R. 122, 173 Fed. 732 (D. C. N. Y.). So, also, expressly, under Amendment of 1910.

Page 89. Nor are banking corporations subject thereto.

Page 89. Bankr. Act, § 4 (a) and (b). Also, see ante, § 79; also, *In re Oregon Trust and Sav. Bank*, 19 A. B. R. 484, 156 Fed. 319 (D. C. Ore.); *Burkhardt v. Germ. Am. Bk.*, 14 A. B. R. 222, 137 Fed. 958 (D. C. Ohio). So, also, expressly, under Amendment of 1910, see ante, §§ 44, 45, 80.

Page 89, note 133. See, in addition, *Toxaway Hotel Co. v. Smathers*, 216 U. S. 439, 23 A. B. R. 626, quoted at §§ 83, 86, 94.

Page 90. Likewise, before the Amendment of 1910, restaurant corporations were held exempt.

In re Wentworth Lunch Co., 20 A. B. R. 29, 159 Fed. 413 (C. C. A. N. Y.).

Page 90. Cold storage warehouse corporations were held not subject to bankruptcy.

In re Philadelphia Freezing Co., 23 A. B. R. 508, 174 Fed. 702 (D. C. Pa.). But this decision is no longer authority since the Amendment of 1910.

Page 90. Building and constructing companies were held, before the Amendment of 1910, not to be subject to bankruptcy.

In re Hill Co., 17 A. B. R. 517 (C. C. A. Ills.); *Butt v. MacNichol Construction Co.*, 15 A. B. R. 515, 140 Fed. 840 (C. C. A. Va., affirming *In re Construction Co.*), quoted ante, § 84; *In re MacNichol Construction Co. (Construction Co.)*, 14 A. B. R. 188 (affirmed sub. nom. *Butt v. MacNichol Construction Co.*, supra). But compare, *In re First Nat'l Bk. of Belle Fourche*, 18 A. B. R. 269, 152 Fed. 64 (C. C. A.).

Page 90, note 138. And compare, *Friday v. Hall & Kaul Co.*, 216 U. S. 449, 23 A. B. R. 610, reversing *Hall & Kaul Co. v. Friday*, 19 A. B. R. 841, 158 Fed. 593 (C. C. A. Pa.).

Page 90. Bridge construction companies were held exempt, before the Amendment of 1910, but builders of concrete houses, bridges, etc., who make the concrete blocks on the premises, were held to be subject to bankruptcy.

Friday v. Hall & Kaul Co., 216 U. S. 449, 23 A. B. R. 610, reversing *Hall & Kaul Co. v. Friday*, 19 A. B. R. 841, 158 Fed. 593 (C. C. A. Pa.), quoted at §§ 84, 85, 87.

On principle it would seem that tunnel constructing corporations also should have been held not subject to bankruptcy.

Suggestively, but obiter, In re Tunnel Co., 21 A. B. R. 531, 166 Fed. 284 (C. C. A. N. Y.).

Similarly, a roofing corporation was held exempt, though incidentally it manufactured.

Page 90. Walker Roofing Co. v. Mer. & Evans Co., 23 A. B. R. 185, 173 Fed. 771 (C. C. A. Va.): "In enacting this provision of the bankruptcy law it was evidently the purpose of Congress to exempt construction and other companies from its provisions where manufacturing is incident to the principal business in which they are engaged. While it was the purpose of Congress to subject those engaged in manufacturing, trading, and mercantile pursuits to the provisions of the Bankruptcy Act, nevertheless those who framed the act in question were undoubtedly cognizant of the fact that in many instances manufacturing is a part of and an incident to the main business, and yet in such cases it cannot be said that manufacturing is the principal business in which such companies are engaged. It is the manifest intention of the act to reach those who are engaged in manufacturing as a business, and as such sell their wares on the market and do those things that are usually done by those who not only manufacture their wares and goods but place them on the market for sale either by wholesale or retail. In this instance there is a lack of proof to show that the appellant was principally engaged in manufacturing, trading, or mercantile business. This court in the case of Butt v. MacNichol Construction Co. (C. C. A.), 15 Am. B. R. 515, 140 Fed. 840, held that a construction or contracting company did not come within the term 'manufacture.' That opinion is based upon the principle that, even though such companies may make things for use in their construction work that would be 'manufactured' if made by a company for that special purpose, yet the making of such things by a construction company is only incident to their principal business and constitutes but a step in finishing the final product—such, for example, as a house, which, when completed, is permanently attached to the soil and thereby becomes a part thereof, and in itself is not to be classed among those things that are subject to sale or exchange as incident to manufacturing, trading or mercantile business."

Page 90. Similarly, a corporation engaged, as its actual occupation, in repairing automobiles, and supplying parts thereto, is not a manufacturing corporation, and was held, before the Amendment of 1910, not to be subject to bankruptcy as a trading corporation where it was not shown that the supplying of the parts was its principal business.

In re Concord Motor Car Co. (Cate v. Connell), 23 A. B. R. 73, 173 Fed. 445 (C. C. A. Mass.).

Amendment of 1910.—By the Amendment of 1910, municipal, railroad, insurance and banking corporations alone are excluded from both voluntary and involuntary bankruptcy altogether, whilst those which are not "moneyed," "business" nor "commercial" corporations are further excluded from involuntary bankruptcy. See ante, § 80.

§ 95. Change of Debtor's Class after Commission of Act but before Filing of Petition.

Page 92. But if at the time the debtor committed the act of bank-

ruptcy he belonged to one of the classes of those subject to bankruptcy, the court will not refuse to take jurisdiction, although at the time the petition was filed he had come to belong to one of the privileged or exempted classes.

In re Naroma Chocolate Co., 24 A. B. R. 154, — Fed. — (D. C. R. I.).

Page 92. Such also were the holdings in two cases where merchants, and in one case where a manufacturer, committed an act of bankruptcy, but each became a farmer before the petition was filed against him.

Page 92. *In re Burgin*, 22 A. B. R. 574, 173 Fed. 726 (D. C. Ala.): "The act itself does not otherwise specify the time when the status of the bankrupt is to be determined. Some of the district courts have construed it to refer to the time of the commission of the act of bankruptcy rather than of the filing of the petition, going upon the idea that the law should not be so construed as to permit the bankrupt, by a change of occupation, between the commission of the act of bankruptcy and the filing of the petition, to defeat the operation of the law. The same reasoning would seem to demand a construction of the law that would prevent the bankrupt from incurring debts and acquiring assets in a non-exempt occupation, and then by ceasing to do business in such occupation, and engaging in an exempt occupation, and thereafter committing an act of bankruptcy, to defeat the operation of the law. This construction would require that the status of the bankrupt in this respect be determined as of the period during which he was engaged in the business in which he contracted the debts, and acquired or owned the assets subject to administration."

Flickinger v. Nat'l Bk., 16 A. B. R. 680, 145 Fed. 162 (C. C. A. Ohio).

Page 92, note 143. **Burden of Proof of Bankrupt's Status on Petitioning Creditors.**—The burden of proof of the bankrupt's status, whether he belong to a class of debtors subject to bankruptcy, is upon the petitioning creditors. *In re Burgin*, 22 A. B. R. 574, 173 Fed. 726 (D. C. Ala.).

Page 92. And in other cases where merchants became wage earners.

In re Crenshaw, 19 A. B. R. 502, 156 Fed. 638 (D. C. Ala.); *In re Naroma Choc. Co.*, 24 A. B. R. 154, — Fed. — (D. C. R. I.).

On the other hand, in general, it is the actual occupation at the time of the filing of the bankruptcy petition and for a reasonable period prior thereto that is to govern, not the occupation at a remote period.

In re Interstate Paving Co., 22 A. B. R. 572, 171 Fed. 604 (D. C. N. Y.).

§ 96. Death or Insanity after Commission of Act but before Filing of Petition.

Page 93. The ruling would be the same, it would seem on principle, if he become insane.

Page 93, note 145. Compare ante, § 54. But compare, *In re Kingsley*, 20 A. B. R. 427, 760 Fed. 275 (D. C. Vt.), where the court even held, that with the guardian's consent, he could acquire a new residence in another state, such guardianship disability not being recognized there.

It must not be thought, however, that these rulings would be inconsistent, for the court would refuse jurisdiction in cases where the debtor dies or becomes insane before the petition is filed, simply because the court is not given jurisdiction over the estates of decedents or persons non compos mentis.

Page 93, note 146. *In re Eisenberg*, 8 A. B. R. 551, 117 Fed. 786 (D. C. N. Y.).

Page 93. But, on the other hand, there is apparent authority in support of the contention that, unless there be an adjudication of insanity at the date of the commission of the act, jurisdiction will not be defeated by insanity intervening before the filing of the petition.

Obiter, *In re Kehler*, 19 A. B. R. 513, 159 Fed. 55, 20 A. B. R. 669, 162 Fed. 674 (C. C. A. N. Y.): "The district judge correctly states the proposition as follows: 'True, an insane person cannot commit an act of bankruptcy, but if Kehler was compos mentis at the time the acts were committed, the petition of the creditors being filed before he was adjudged insane, I think the court acquired jurisdiction of the proceedings.'"

In re Kehler, 18 A. B. R. 596, 153 Fed. 235 (D. C. N. Y., affirmed in 19 A. B. R. 513, 159 Fed. 55, 20 A. B. R. 669, 162 Fed. 674): "Counsel for the general guardian of the lunatic place stress upon *In re Funk* (D. C.), 4 Am. B. R. 96, 101 Fed. 244, where it was broadly held that a court of bankruptcy will not entertain jurisdiction of a petition by creditors to have a person adjudged a bankrupt who prior to the filing of such petition had been regularly and duly adjudged insane. In that case, however, the court expressed the opinion that in cases where the insanity had not been adjudged, and creditors sought the adjudication of the bankrupt, a court of bankruptcy might properly exercise jurisdiction and could hold the party responsible for acts committed prior to the ascertainment of his mental incapacity. This principle, in which I concur, would seem to justify a continuance of this proceeding. *In re Eisenberg* (D. C.), 8 Am. B. R. 551, 117 Fed. 786, the court declined to entertain jurisdiction in proceedings in bankruptcy instituted by the committee of a lunatic on the ground that he was not a qualified person to perform the duties required of him by the provisions of the Bankruptcy Act."

§ 97. Dissolution of Corporation, or Its Ceasing Business, before Petition Filed.

Page 93, note 148. See, as to possible effect of change of classification of corporations subject to bankruptcy introduced by Amendment of 1910, ante, § 80, it being no longer necessary to show the corporation to be "principally engaged."

Obiter, *Ballinger v. Nat'l Bank*, 24 A. B. R. 44, — Fed. — (C. C. A. Calif.).

Page 93, note 149. Obiter, *Ballinger v. Nat'l Bank*, 24 A. B. R. 44, — Fed. — (C. C. A. Calif.). Compare analogous proposition in *In re Electric Supply Co.*, 23 A. B. R. 649, 175 Fed. 612 (D. C. Ga.).

Page 93, note 149. **Dissolution by Governor's Proclamation for Nonpayment of Taxes—Entity Still Exists for Purpose of Winding Up.**—Where a corporation has been dissolved by proclamation of the governor for nonpayment of

taxes, its entity is still in existence for the purpose of winding up and it may by resolution declare its inability to pay its debts and willingness to be adjudged bankrupt. In *re Munger Vehicle Tire Co.*, 19 A. B. R. 785, 159 Fed. 901 (C. C. A. N. Y., affirming 19 A. B. R. 914, 159 Fed. 901).

Page 94. In *re Adams & Hoyt Co.*, 21 A. B. R. 161, 164 Fed. 489 (D. C. Ga.): "Assuming that the Adams & Hoyt Company, while insolvent, within four months prior to the filing of the petition in bankruptcy, committed certain acts of bankruptcy, I do not believe that it could escape and avoid the jurisdiction of the bankruptcy court by instituting a proceeding such as was instituted by this company in the superior court. The jurisdiction of the bankruptcy court attached, or its right to act arose, when the company, being insolvent, committed the acts of bankruptcy. Any other view of the matter would destroy the effect of the Bankruptcy Act entirely. It is the paramount law for the administration of estates of insolvents. Its provisions, which seek to bring about equality among creditors of the same class, cannot be avoided in this way. The effect of proceedings such as were instituted by this corporation in the superior court, if sustained, would be that an insolvent corporation could, in clear and gross violation of the Bankruptcy Act, transfer all of its property to one or more of its creditors, to the exclusion of all of its other creditors, and the corporation would thereby create a preference or preferences which would undoubtedly be set aside under the Bankruptcy Act, but the corporation would avoid the operation and effect of the Bankruptcy Act by this new method of procedure. The right of the bankruptcy court to take charge of the corporation's effects and to administer the same in accordance with the Bankruptcy Act, thereby bringing about equality of payment among creditors of the class, arose and was in existence at the time the petition in the superior court was filed. It still exists unaffected, in my judgment, by what was done in the superior court."

Page 94. And it has even been held that the ceasing to do business before the commission of the act of bankruptcy will not defeat the jurisdiction.

Robertson v. Union Potteries Co., 22 A. B. R. 121, 177 Fed. 279 (D. C. Ga.).

§ 97½. Assets in Hands of Receiver or Assignee No Defense.

Page 94. It is no defense to an act of bankruptcy that the assets are already sequestered by the state court nor that the state court's custody of the assets cannot be superseded by that of the bankruptcy court; the question is one of the commission of an act of bankruptcy, not of the custody of the property in the event of adjudication.

In *re Sterlingworth Ry. Supply Co.*, 21 A. B. R. 341, 164 Fed. 591 (D. C. Pa.).

However, such facts may have bearing upon the jurisdictional question, in cases of corporations, of their being principally "engaged in" one or the other of the jurisdictional occupations. (See ante, §§ 35, 97.)

§ 98. Death or Insanity after Filing of Petition, No Abatement.

Page 95, note 150. See ante, §§ 54, 96. In *re Larkin*, 21 A. B. R. 711, 168 Fed. 100 (D. C. N. Y.).

§ 99. Rights of Widow and Children on Bankrupt's Death after Filing of Petition and Before Adjudication.

Page 95. If the bankrupt die, after the filing of the petition but before adjudication, his widow and children will be entitled to the usual allowances.

Compare, *In re Dobert & Son*, 21 A. B. R. 634, 165 Fed. 749 (D. C. Tex.), where, in accordance with State law, the court refused the widow's and children's allowances out of partnership assets.

Page 96, note 157. See post, § 1166½. *Thomas v. Woods*, 23 A. B. R. 132, 178 Fed. 1005 (C. C. A. Kans.), quoted at § 1166½.

Page 96, note 158. See § 1166½. *Obiter*, *Hurley v. Devlin*, 18 A. B. R. 627, 151 Fed. 919 (D. C. Kans.); *Thomas v. Woods*, 23 A. B. R. 132, 178 Fed. 1005 (C. C. A. Kans.), quoted at § 1166½.

§ 101. Dissolution of Corporation after Filing of Petition.

Page 99, note 163. *In re Burgin*, 22 A. B. R. 574, 173 Fed. 726 (D. C. Ala.), quoted on analogous proposition at § 95.

Page 99, note 164. *In re H. R. Elec. Power Co.*, 23 A. B. R. 191, 173 Fed. 934 (D. C. N. Y.).

Page 99, note 165. *In re H. R. Elec. Power Co.*, 23 A. B. R. 191, 173 Fed. 934 (D. C. N. Y.); *Walker Roofing Co. v. Mer. & Evans Co.*, 23 A. B. R. 185, 173 Fed. 771 (C. C. A. Va.), quoted at § 94.

§ 101½. Burden of Proof of Debtor's Class.

Page 99. The burden of proof that a debtor is not a farmer or wage earner is upon the petitioning creditors.

In re Burgin, 22 A. B. R. 574, 173 Fed. 176 (D. C. Ala.).

Also, that it belongs to a class of corporations subject to bankruptcy.

In re H. R. Elec. Power Co., 23 A. B. R. 191, 173 Fed. 934 (D. C. N. Y.).

Page 99. *Walker Roofing Co. v. Mer. & Evans Co.*, 23 A. B. R. 185, 173 Fed. 771 (C. C. A. Va.): "The burden is on the petitioner in a proceeding of this character to show by a preponderance of the evidence that the company conducted a business which could be properly termed 'manufacturing,' 'trading' or 'mercantile.'"

And it is to be established by a fair preponderance of the evidence.

In re H. R. Elec. Power Co., 23 A. B. R. 191, 173 Fed. 934 (D. C. N. Y.); *Walker Roofing Co. v. Mer. & Evans Co.*, 23 A. B. R. 185, 173 Fed. 771 (C. C. A. Va.), quoted *supra*.

§ 102. No Act Requisite in Voluntary Bankruptcy—Petition Itself Act of Bankruptcy.

Page 103. *Contra* (that it is not in itself an act of bankruptcy), *obiter*, *In re Ceballos & Co.*, 20 A. B. R. 459, 161 Fed. 445 (D. C. N. J.): "It is important, in considering the cases decided under the Act of 1867, to bear in mind the

provisions of that act. Section 11 expressly provided that the filing of a voluntary petition should be an act of bankruptcy. The present Bankruptcy Act contains no such provision. The filing of the voluntary petition in bankruptcy, under the present law, is not an act of bankruptcy. It simply institutes a proceeding in which the court acquires jurisdiction to adjudge bankruptcy if the facts warrant adjudication. It follows that the filing of a petition by one partner against his copartners cannot be deemed an act of bankruptcy on the part of the partnership." But this case totally ignores the fact that the insertion of the Fifth Act of Bankruptcy under the present statute, an act of bankruptcy not appearing in the Act of 1876, renders unnecessary any specific mention of the filing of the voluntary petition as an act of bankruptcy. And the decision is obiter, because the partnership was actually adjudged bankrupt without finding any other act of bankruptcy to have been committed by it.

§ 104. First Act of Bankruptcy—Fraudulent Transfers, Removals and Concealments.

Page 104, note 3. See, in addition, *In re Larkin*, 21 A. B. R. 711, 168 Fed. 100 (D. C. N. Y.).

§ 106. Same as Reprobated at Common Law or by Stat. Eliz.

Page 105, note 4. See, in addition, *Coder v. Arts*, 22 A. B. R. 5, 213 U. S. 223, quoted at § 1498.

§ 109. Actual Intent to Defraud Necessary.

Page 106, note 9. See, in addition, *In re McLoon*, 20 A. B. R. 719, 162 Fed. 575 (D. C. Me.); *Coder v. Arts*, 22 A. B. R. 1, 213 U. S. 223, quoted at § 1498.

Page 106, note 10. Instance, *In re Minard*, 19 A. B. R. 485, 158 Fed. 377 (D. C. Ore.).

Page 107. Much less is a fraudulent intent proved where a mortgage was given to raise money to pay to all creditors.

In re McLoon, 20 A. B. R. 719, 162 Fed. 575 (D. C. Me.).

But such intent may exist and the transfer be voidable as to creditors even though full consideration was paid.

Coder v. Arts, 22 A. B. R. 1, 213 U. S. 223, quoted at § 1498.

Page 107. Obiter, *In re Smith*, 23 A. B. R. 864, 176 Fed. 426 (D. C. N. Y.): "So a person may transfer his property for a full and fair consideration, and receive that consideration, but, if it is done with intent on his part to hinder, delay or defraud his creditors, the one making the transfer has committed an act of bankruptcy."

Page 107. The badges of fraud must be considered all together, not separately; for frequently, if separately considered, they are inconclusive, whilst, if considered together, they may, by their number and joint operation, forge an invulnerable chain of proof of fraudulent intent.

See post, §§ 1216½, 1496½; *Houck v. Christy*, 18 A. B. R. 330, 152 Fed. 612 (C. C. A. Kans.).

Failure to file a mortgage may be a badge of a fraudulent intent participated in by the mortgage; but it is rebuttable and may be explained away.

In re McLoon, 20 A. B. R. 719, 162 Fed. 575 (D. C. Me.).

§ 112. Thus, Natural and Probable Consequences of Act Raise Presumption.

Page 107, note 16. Also, rule applied in opposition to discharge, In re Nelson, 23 A. B. R. 37, 179 Fed. 320 (D. C. N. Y.). See citations under corresponding proposition relative to second act of bankruptcy, post, § 132.

Page 108. But it must be proved that the debtor had knowledge of the essential facts which tended to produce the resulting consequences, else the presumption does not arise.

Compare, to this effect, In re McLoon, 20 A. B. R. 719, 162 Fed. 575 (D. C. Me.).

Page 108. Nor does a sale out of the usual course of business, alone raise a presumption of fraudulent intent.

Obiter, Houck v. Christy, 18 A. B. R. 330, 152 Fed. 612 (C. C. A. Kans.).

§ 113. Fraudulent Intent Distinguished from Preferential Intent.

Page 108, note 18. Impliedly, Manning v. Evans, 19 A. B. R. 217, 156 Fed. 106 (D. C. N. J.); Coder v. Arts, 22 A. B. R. 1, 213 U. S. 223; (Van Iderstine) Trustee v. Nat'l. Discount Co., 23 A. B. R. 345, 174 Fed. 518 (C. C. A. N. Y.). Also, see post, §§ 1221, 1498.

§ 114½. Great Latitude in Evidence Proper.

Page 109. Great latitude in the admission of evidence is proper.

In re Luber, 18 A. B. R. 476, 152 Fed. 492 (D. C. Pa.): "In the investigation of questions of fraud, as a rule, great latitude is allowed in the admission of evidence, in order that the jury may be able to determine from all the circumstances whether the transaction was fraudulent or not. Questions of fraud can scarcely ever be proven by direct evidence, hence the necessity for the admission of all the circumstances fairly connected with the transaction."

Impliedly, In re Larkin, 21 A. B. R. 711, 168 Fed. 100 (D. C. N. Y.): "Where a person in debt transfers or conveys his property, all the surrounding circumstances and conditions under which it is done are to be considered in determining whether or not it was done with intent to hinder, delay or defraud his other creditors. The intent may be inferred from the acts done and the circumstances surrounding the transactions."

§ 116. Insolvency of Debtor Not Requisite, Prima Facie.

Insolvency of the debtor need not be shown by creditors under the first act of bankruptcy in order to make a prima facie case.

In re Larkin, 21 A. B. R. 711, 168 Fed. 100 (D. C. N. Y.).

§ 118. Intent to Prefer and Intent to Defraud Different.

Page 110, note 24. Impliedly, *Manning v. Evans*, 19 A. B. R. 217, 156 Fed. 106 (D. C. N. J.); *Coder v. Arts*, 213 U. S. 223, 22 A. B. R. 1; (*Van Iderstine*) *Trustee v. Nat'l. Discount Co.*, 23 A. B. R. 345, 174 Fed. 518 (C. C. A. N. Y.). See post, §§ 1221, 1498.

§ 120. All Elements of Preference Must Exist.

All the elements of a preference must exist and in addition thereto the transfer must have been made with the debtor's intent to prefer.

Instance, *In re Pure Milk Co. of Mobile*, 18 A. B. R. 735, 154 Fed. 459 (D. C. Ala.).

§ 121. Thus, Depletion of Insolvent Estate Implied.

Thus, first, some portion of the debtor's property must have been appropriated by the transaction to the payment of a claim, and the insolvent estate thereby correspondingly diminished, preference implying the depletion of the insolvent fund.

Naylon & Co. v. Christiansen Co., 19 A. B. R. 789, 158 Fed. 290 (C. C. A. Mich.): "Clause (2) of the third section of the Bankrupt Act * * * declares it to be an act of bankruptcy when the person has 'transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors.' To fulfill these conditions three things must concur: The bankrupt must have transferred some part of his property to his creditors; he must have been insolvent at the time; and he must have intended, in doing it, to prefer those creditors over others. The record shows beyond doubt that the alleged bankrupt transferred some of its property to some of its creditors and that it had other creditors."

§ 123. Thus, Creditor's Claim Must Be Pre-Existing Debt.

Page 111, note 31. Definition of "Pre-Existing Debt—Antecedent Debt," see post, § 1314.

§ 124. Thus, Transfer by Debtor Requisite.

Thus, fourth, the debtor must have made a "transfer" of property (or, perhaps, have permitted or "suffered" the creditor to obtain the judgment whose enforcement would have operated to appropriate property of the debtor), preference implying a change of title in the form known as a transfer, namely, by the voluntary action of the debtor, or, perhaps, a seizure by legal proceedings assented to by the debtor.

Page 112. Thus, the voluntary confession of judgment in favor of certain creditors and the permitting of levy and sale thereon, may be a "transfer" under § 3 (a) (2) as well as a "permitting" or "suffering" under § 3 (a) (3).

In re Nusbaum, 18 A. B. R. 598, 152 Fed. 835 (D. C. N. Y.): "When the alleged bankrupt, Philip Nusbaum, being insolvent, voluntarily confessed judg-

ment in favor of certain of his creditors with intent to hinder, delay, and defraud his other creditors, and also with the intent to prefer such creditors over his other creditors, and permitted them, as he knew they would and as they did, to issue executions thereon and levy upon and sell all his property by virtue thereof, and put the proceeds of such sale of such property in their pockets in payment and satisfaction of their respective debts, as he knew they would and intended they should, he transferred same while insolvent, with intent to hinder, delay, and defraud his other creditors, and with intent to prefer the creditors in whose favor he confessed such judgments. It was not a sale by him in form, but it was 'a different mode of disposing of or parting with property, or the possession of property absolutely,' and 'as a security' first, and then, second, 'as a payment' to such preferred creditors. It was an act of bankruptcy under both clause 1 and clause 2 of subdivision 'a' of § 3 of the act, irrespective of clause 3 thereof. It was a 'transfer' within the plain definition of the term found in clause 25 of § 1 of the act. The act of bankruptcy was consummated, the transfer made, when the executions were issued and the sale by virtue thereof actually made, and the petitioning creditors were in time if they filed their petition within four months after such sale, as it is alleged they did. It was a transfer made by the alleged bankrupt who confessed the judgments that executions might be issued, levies made, sales made, and his property or its proceeds conveyed or transferred to his preferred creditors in payment of their debts. It was done to hinder, delay, and defraud his other creditors."

And in another case, on demurrer, the court has intimated that the mere suffering of a judgment to be taken may be a "transfer" under § 3 (a) (2).

Obiter, *In re Tupper*, 20 A. B. R. 824, 163 Fed. 766 (D. C. N. Y.): "She has by such non-action assented to the judgment and preference. The fair inference is that she assents to the lien and desires to aid and take part in preferring these creditors over her other creditors. It may be a fair inference that she has 'transferred' while insolvent by way of security, in one of the modes referred to in subdivision 25 of § 1, this real property to these judgment creditors with intent to prefer such creditors over her other creditors. May not her intent to prefer by this mode of transfer and the intent of Pardo & Hogan to obtain and receive and retain a preference be fairly inferred?"

§ 126. Thus, Debtor Must Have Been Insolvent.

Page 112, note 36. Also see *Naylon & Co. v. Christiansen Co.*, 19 A. B. R. 789, 158 Fed. 290 (C. C. A. Mich.).

§ 127. Must Be within Preceding Four Months or Notorious Possession Be Taken.

So, the fact that the instrument of transfer was executed and delivered within the four months in execution of a prior oral agreement to execute it, does not change the result or prevent the transfer being held a preference.

Page 113, note 39. *In re Smith*, 23 A. B. R. 864, 176 Fed. 426 (D. C. N. Y.), quoted at § 1370; also, on other point at § 130.

§ 128. Must Give Recipient Greater Percentage than Other Creditors.

Thus, where the actual effect was rather to prefer all the other creditors over the one receiving the transfer it will not be a preference, as for instance, where the transfer was by an insolvent debtor to one creditor (a responsible concern), on consideration of the latter's assumption of the former's debts.

Missouri Elec. Co. v. Hamilton Brown Co., 21 A. B. R. 270, 165 Fed. 283 (C. A. Mo.): "In this condition of its affairs the Missouri Company on October 17, 1906, in consideration of the release and satisfaction of its debt to the American Company, its largest creditor, and of the agreement of that creditor to pay its other debts out of the proceeds of the property which it assigned, conveyed to the American Company its bills and accounts receivable, its choses in action, and the proceeds of sales made or to be made of its real estate, plant, machinery, stock, chattels, rights, and franchises; and the American Company, in consideration of that conveyance, executed and delivered to the Missouri Company a written satisfaction and discharge of the latter's debt to it. If these writings had the legal effect which they purported to have, they reduced the indebtedness of the Missouri Company \$139,018.36, transformed it from an insolvent to a solvent corporation, and left all its property and all the proceeds of its property still available for the discharge of its debts to other creditors. * * * The transaction evidenced by the assignment and the release, therefore, did not have the effect to prefer, nor did it evidence any intention of the debtor to prefer the American Company to its other creditors, but it had the opposite effect. It preferred the other creditors to the American Company."

§ 129. Debtor's Intent to Prefer Requisite.

Page 113, note 41. Impliedly, *In re Nusbaum*, 18 A. B. R. 598, 152 Fed. 835 (D. C. N. Y.), quoted on other points at § 124; *In re McLoon*, 20 A. B. R. 776, 162 Fed. 575 (D. C. Me.); *In re Hammond*, 20 A. B. R. 776, 163 Fed. 148 (D. C. N. Y.).

§ 130. Creditor's Intent Immaterial.

In re Smith, 23 A. B. R. 864, 176 Fed. 426 (D. C. N. Y.): "The intent of the one receiving the deed or mortgage [transfer of property, subdivision 25, § 1, of the act] is entirely immaterial on the question whether or not an act of bankruptcy has been committed." Quoted further at §§ 1370, 132.

§ 131. Proof of Intent to Prefer.

Page 115. On the other hand, the fact that payment was made in order to avoid a threatened suit is not proof, in and of itself without more, of intent to prefer.

Lumber Co. v. Atwood, 18 A. B. R. 510, 152 Fed. 978 (C. C. A. Va.).

§ 132. Proof of Intent to Prefer Aided by Presumptions.

Page 115, note 52. Instance, *In re Nusbaum*, 18 A. B. R. 598, 152 Fed. 835 (D. C. N. Y.), quoted at § 124; instance where rule applied in concealment as bar

to discharge, *In re Nelson*, 23 A. B. R. 37, 179 Fed. 320 (D. C. N. Y.). Compare post, § 2637½.

Page 115, note 52. *In re Smith*, 23 A. B. R. 864, 176 Fed. 426 (D. C. N. Y.): "Intelligent and sane men are presumed to intend the well-known and obvious consequences of their own voluntary acts, and it cannot be rationally concluded that in sending for Gridley and executing that mortgage the day after the verdict referred to was rendered and which verdict was to be followed by a judgment and a lien on the real estate, Smith, well knowing he was insolvent, did not intend to prefer Gridley." Quoted further at §§ 130, 1370.

Page 116, note 54. See, in addition, *Naylon v. Christiansen*, 19 A. B. R. 789, 158 Fed. 290 (C. C. A. Mich.), quoted post, also, on other points at § 121.

Page 116. Where, also, the creditor receiving the transfer assumes payment of the debtor's other debts, and is itself a responsible party, intent to prefer cannot be presumed, but rather, is rebutted.

Missouri Elec. Co. v. Hamilton Brown Co., 21 A. B. R. 270, 165 Fed. 283 (C. A. Mo.), quoted at § 128.

Page 116, note 57. Compare, analogously, post, §§ 1401, 1406.

But, of course, the presumption of an intent to prefer creditors, arising from the transfer of property by an insolvent debtor, is affected by the amount of such transfer, and where the transfer is of a comparatively small part of a debtor's property, the presumption does not arise.

Macon Grocery Co. v. Beach, 19 A. B. R. 558, 156 Fed. 1009 (D. C. Ga.): "It will be found, however, that in each of these cases a substantial preference had been made, that the preferential intent was always inferable, and that the consequent injury to other creditors was significant and distinct. The basic reason upon which all of these determinations are founded is substantially that every person of a sound mind is presumed to intend the necessary, natural and legal consequences of his deliberate acts. In each case the insolvency of the bankrupt was conceded or proven. Then, when he has made a payment to a particular creditor, he is presumed to have the intent to prefer him, as it will enable that creditor to obtain a greater percentage of his debt than will inure to others. But if the payment on the debt is of that infinitesimal sort that it can have no perceptible consequence, is an intent to prefer a necessary, natural and legal consequence of such payment? It would seem that the substantial or important character of a payment or transfer must ex necessitate possess large evidential effect to show the intent to prefer. This may be gathered from the statement of Mr. Justice Field, in *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481. Speaking for the court in that case, that great jurist declares: 'It is a general principle that every one must be presumed to intend the necessary consequences of his act. The transfer in any case by the debtor of a large part or all his property while he is insolvent to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him.' If this is true, the converse would seem also true. If the alleged bankrupt, although aware of his insolvency, should make a payment of an amount not a large part of his means, but utterly trivial—a payment to which no creditor, in the absence of litigation, would possibly object—it is at least debatable whether such payment must necessarily demonstrate the unlawful intent to give a preference to one

creditor to the injury of others. The doctrine which we are discussing, and which the courts have so strongly stated, presupposes that the payment is injurious to the other creditors. But where the facts show that no injury, of which the law would or could take an account, would result, the reason of the rule ceasing, it seems that the rule itself would cease. * * * We conclude, therefore, that the payment of 60 cents for soda water, coca cola and one bar of soap, and \$2.15 for a dressed doll, in the absence of all other evidence to that end, does not raise the presumption of an intent to give to the creditor paid a preference over his other creditors."

The mere paying of certain creditors small sums in the usual course of business will not raise the presumption of an intent to prefer.

Thus, the payment of \$3.00 to a creditor a week before the filing of the petition. *In re Stovall Grocery Co.*, 20 A. B. R. 537, 161 Fed. 882 (D. C. Ga.).

Page 116, note 59. But compare, on demurrer, *In re Ball*, 19 A. B. R. 609, 156 Fed. 682 (D. C. N. Y.).

Page 117, note 60. See, in addition, *Naylon v. Christiansen*, 19 A. B. R. 789, 158 Fed. 290 (C. C. A. Mich.).

Page 117. But exactness in knowledge of insolvency is not requisite.

Page 117. *Naylon & Co. v. Christiansen*, 19 A. B. R. 789, 158 Fed. 290 (C. C. A. Mich.): "And no one connected with the company would profess any knowledge of its condition. But we are loath to believe that those who had charge of and were so much interested in the affairs of the company could be and continue so utterly ignorant of the financial condition of their company as the general terms in which their testimony was given would seem to indicate. It might well be that they did not know it exactly or even with any close approximation to the facts, and perhaps that was the test assumed when they gave their testimony. But that they should have no understanding of its condition while it was running down, its trade small, the disparity of its debts and its assets growing more and more apparent, and its inability to pay its debts becoming so acute that it could only pay them in dribbles and when pressed by creditors, we are not prepared to believe. As against the literalness of such statements, we think it safer to rely upon the strong presumption that they had a general knowledge of its condition. However, the knowledge of its insolvency by the respondent is not of itself a material fact. It is only important as it bears upon the question of its intent in making these payments."

Page 117. And the presumption that one intends the natural and probable effects of his own acts is predicated upon proof of his knowledge of the essential facts which tend to produce the resulting consequences.

In re McLoon, 20 A. B. R. 719, 162 Fed. 575 (D. C. Me.).

Thus, mere knowledge of insolvent condition, without more, may not be sufficient to raise the presumption of intent to prefer; as, for example, where one knowing himself to be insolvent gives a mortgage to raise money to pay—not one creditor, nor some creditors, but all creditors.

In re McLoon, 20 A. B. R. 719, 162 Fed. 575 (D. C. Me.).

Page 118, note 65. Instance, failure of partner who long since sold out to remaining partner, to discharge levy by firm creditor on former firm assets, a firm act of bankruptcy. *Holmes v. Baker & Hamilton*, 20 A. B. R. 252, 160 Fed. 922 (C. C. A. Wash.).

Page 119, note 67. See, in addition, *In re Tupper*, 20 A. B. R. 824, 163 Fed. 766 (D. C. N. Y.).

§ 136. "Continuing Consent."

Page 120. Although of course, if active participation by the debtor actually occur, and the sale be completed, then there may exist a preferential "transfer" cognizable under the Second Act of Bankruptcy.

In re Nusbaum, 18 A. B. R. 598, 152 Fed. 835 (D. C. N. Y.), quoted at § 124.

§ 138. Preference Must Have Been Obtained Thereby.

Page 122, note 74. Inferentially, *In re Cement Co.*, 17 A. B. R. 375 (Sp. M. Mich., reversed on other grounds in *In re Toledo Portland Cement Co.*, 19 A. B. R. 117, 156 Fed. 83, D. C. Mich.).

§ 140. Vacating of Preference, Ineffectual unless Accomplished at Least Five Days before Sale.

Page 123, note 79. Impliedly, *In re Hammond*, 20 A. B. R. 776, 163 Fed. 548 (D. C. N. Y.).

§ 141. "At Least Five Days before a Sale, etc."—Meaning of Term.

Page 123, note 80. Compare *In re Tupper*, 20 A. B. R. 824, 163 Fed. 766 (D. C. N. Y.).

Page 124. However, in one case on demurrer, the court expresses the opinion that in states where a judgment operates, ipso facto, as a lien on real estate, the Third Act of Bankruptcy has been committed if the judgment debtor allows the four months to elapse without voluntarily going into bankruptcy or otherwise vacating the lien, even though no time for sale has been set, the court regarding the lapse of the four months period as the equivalent of the "final disposition" prescribed in the statute, a conclusion in which there is much force. Since the obvious purpose of bankruptcy law is to prevent one creditor gaining a preference over other creditors out of the insolvent fund, whether through the debtor's voluntary act or the creditor's own seizure by legal proceedings, it would follow in a well-rounded statute that the permitting of such a preference to become fixed beyond opportunity of nullification should be an act of bankruptcy.

Page 124. *In re Tupper*, 20 A. B. R. 824, 163 Fed. 766 (D. C. N. Y.): "It has been held that this act of bankruptcy is not committed until a sale is at least advertised or the property affected by the preference is to be finally disposed of and the fifth day prior to the proposed sale or proposed final disposition of the property affected has arrived. In the case of personal property, a sale or pro-

posed sale on execution issued on a judgment is, of course, the sale or final disposition intended, as there is no right of redemption. In the case of real estate, an advertised sale on execution or an actual sale would, in my judgment, be a final disposition, notwithstanding there is a right of redemption. In the case of real property, under the law of the state of New York the docketed judgment becomes an absolute lien so soon as docketed in the county where the real property is situated and is 'a disposition of the property,' in a sense, for it has been by operation of law pledged as a security for the debt or amount of the judgment; but under the terms of the Bankruptcy Act such a lien, such a disposition of the real property, does not become final until the expiration of four months from its docketing in the county where the real property is situated. * * * An execution and levy and an advertised sale thereunder were wholly unnecessary to a final disposition of this property. On the 8th day of March, 1908, but for the filing of the petition in bankruptcy, the real property would have passed irrevocably and absolutely under the lien, and, as Tupper had become and was insolvent, it was not in her power to pay or discharge it. * * * Not so with personal property, for there there is no lien until execution is issued and generally levy made, and, even then, the lien ceases if within definite periods a sale is not advertised, and hence there is no final disposition of such property proposed until the same is advertised for sale. It seems to me that effect is to be given to the words 'or final disposition of any property affected by such preference.' 'Final disposition' is not a gift of the property to some third person or a voluntary transfer to the creditor in satisfaction of the preferential judgment, as that would be merely a sale in payment. Congress had in mind, when it enacted this law, the fact that there are different ways or modes of disposing of property, of enforcing executions, judgments, and liens, and it referred to the ordinary method of disposition by way of sale, and then used the words 'or final disposition' to cover every other method of passing the control and dominion of the property from the debtor, insolvent person, to another or to others either absolutely or as security to the preferred creditor to the exclusion of his other creditors. The purpose of the law is that no one creditor shall be preferred over the others by an insolvent person, but that all creditors shall share equally except as to honest liens created more than four months prior to the filing of a petition in bankruptcy. It was not intended that a creditor should obtain a lien on all the real estate of an insolvent person by a judgment filed and docketed, and then lie still, without issuing execution or making a levy and advertising the property for sale for four months and until such judgment had become unimpeachable under the Bankruptcy Act or otherwise, thereby gaining a preference, an absolute security for the debt, and it might be to the extent of the entire property of the insolvent person, and thus excluding other creditors from any share in the estate. It has been held that an advertised or even a proposed sale is not in all cases necessary under subdivision 3 of § 3."

Page 124. In computing the five days time the first day must be excluded and the last day included; thus, where the execution sale was set for the 22nd day of the month, a petition filed on the 17th day is too early.

Bankr. Act, § 31; also *Pittsburgh Laundry v. Imperial Laundry*, 18 A. B. R. 756, 154 Fed. 662 (C. C. A. Pa.).

§ 142. How Vacating Accomplished and How Not.

Page 124. See, in addition, *In re Tupper*, 20 A. B. R. 824, 163 Fed. 766 (D. C. N. Y.).

§ 146. Assignment Must Be General.

Page 128. *Missouri Elec. Co. v. Hamilton Brown Co.*, 21 A. B. R. 270, 165 Fed. 283 (C. C. A. Mo.): "A general assignment conveys all or substantially all the property of the debtor, while an assignment which conveys but a portion of it is a partial assignment, and not a general assignment. * * * This assignment did not convey the real estate of the assignor, which was about one-fourth of its property in value after the amount of the incumbrance upon the real estate had been deducted from its total value. * * * An absolute transfer by a debtor of both the legal and the equitable titles to the assignee in trust for his creditors, so that the grantor retains no control of its use and no power to dispose of it, is indispensable to a valid assignment of such property for the benefit of creditors. *Sandmeyer v. Dakota Fire & Marine Ins. Co.*, 2 S. D. 346, 352, 50 N. W. 353, and cases there cited; *Smith & Keating Imp. Co. v. Thurman*, 29 Mo. App. 186, 191. The conveyance here in question made no such transfer of the real estate of the debtor. A general assignment for the benefit of creditors is ordinarily a conveyance by a debtor without consideration from the grantee of substantially all his property to a party in trust to collect the amounts owing to him, to sell and convey the property, to distribute the proceeds of all the property among his creditors, and to return the surplus, if any, to the debtor. A conveyance of his property by a debtor directly to his creditor, or to his creditors, for their benefit, is not a general assignment for the benefit of creditors because it raises no trust."

Again, the mere appointment of a committee to sell the assets of a corporation is not "a general assignment."

In *re Hartwell Oil Mills*, 21 A. B. R. 586, 165 Fed. 555 (D. C. Ga.).

Provided, however, no "transfer" of title to the committee be made; for, if title be transferred, assuredly it would be precisely a "general assignment for the benefit of creditors."

Thus, a trust instrument for effecting a composition with creditors, wherein the debtor turns over all his property to an agent to sell and to distribute among creditors after reimbursing himself for expenses, is, in effect, a general assignment.

Impliedly (controversy not over its being declared an act of bankruptcy), In *re Hersey*, 22 A. B. R. 856, 171 Fed. 998 (D. C. Iowa).

Thus, also, it has been held where the original deed of assignment has been lost, but the facts are proved that the debtor had intended to make an assignment in usual form and that the assignee had sent out notices as such, etc., the making of a general assignment was sufficiently proved and its specific terms were unnecessary.

Griffin v. Dutton, 21 A. B. R. 449, 165 Fed. 626 (C. C. A. Mass.), quoted post.

But it need not be by a formal deed of assignment.

Page 128. In *re Tomlinson Co.*, 18 A. B. R. 691, 154 Fed. 834 (C. C. A. Okla.): "McConnell took possession of the property conveyed, and proceeded to execute the trust imposed upon him. In our opinion the instrument in question was a general assignment for the benefit of creditors within the true meaning

of the Bankruptcy Act, and was an act of bankruptcy warranting the adjudication. The 'general assignment' there contemplated is to be taken in its generic sense, and embraces any conveyance at common law or by statute by which the parties intend to make an absolute and unconditional appropriation of the property conveyed to raise funds to pay the debts of the vendor, share and share alike. * * * The instrument in question does not contain any of the elements of a mortgage, as insisted upon by bankrupts' counsel. The idea that it was intended as a security for the ultimate payment of the debts of the vendor, or that a reservation of a right to redeem whenever the vendor should pay its debts was intended, is not remotely suggested by any of the terms of the instrument; in other words, there is no right of redemption reserved. The provision at the end of the instrument, requiring a surplus, if any, to be paid to the vendor, cannot be regarded as such reservation. It is nothing more than an expression of what the law implies."

And it is an act of bankruptcy, though it be not a valid assignment for all purposes.

Page 128. *Griffin v. Button*, 21 A. B. R. 449, 165 Fed. 626 (C. C. A. Mass.): "Such an assignment is sufficient in form, and constitutes an act of bankruptcy, if it purports to be a general assignment for the benefit of creditors, signed by the bankrupt and duly ratified by the trustee named therein. Nor is it necessary that the assignment should be valid for all purposes, as, for instance, that the creditors should assent thereto. The language of the Bankruptcy Act is general. It makes no distinction between strictly valid instruments and those which may be invalid for certain purposes. To limit its operation to those assignments which are in all respects valid would be contrary to the intent and purpose of the act."

Canner v. Tapper Co., 21 A. B. R. 872, 168 Fed. 519 (C. C. A. Mass.). And probably if not a general assignment by state law it will not be such in bankruptcy. Impliedly, *Missouri, Elec. Co. v. Hamilton Brown Co.*, 21 A. B. R. 270, 165 Fed. 293 (C. C. A. Mo.), quoted *supra*.

§ 151. Receiverships and Trusteeships as Acts of Bankruptcy.

Page 132, note 108. See, in addition, *In re Pickens Mfg. Co.*, 20 A. B. R. 202, 158 Fed. 894 (D. C. Ga.); *In re Electric Supply Co.*, 23 A. B. R. 647, 175 Fed. 612 (D. C. Ga.), quoted at § 153; *In re Kennedy Tailoring Co.*, 23 A. B. R. 656, 175 Fed. 871 (D. C. Tenn.), quoted at § 157.

§ 152. As to Receiverships Applied for by Debtor—Debtor Must Have Applied Therefor.

Page 132. In cases of corporations, it is not always requisite that there be a formal stockholders' meeting, or a meeting of the Board of Directors: the application for the receiver may still be substantially the act of the corporation, especially where there is fraud or an attempt to evade the provisions of the bankruptcy law.

Mercantile Co. v. Hardware & Steel Co., 24 A. B. R. 216 (238), 177 Fed. 825 (C. C. A. Nev.): "We are not here dealing with the lawful act of the plaintiff in error acting in a lawful corporate capacity, but with the acts of certain individuals holding all the stock of the corporation and constituting its offi-

cers and directors, who, it is alleged, have 'conspired and agreed together to take such measures and do such acts as would hinder, delay and defraud the creditors of said corporation * * * and would evade the provisions of the laws of the United States in reference to bankruptcy, and prevent such creditors from obtaining a knowledge of the true condition of said corporation's affairs, and from having or participating in the choice of a person or persons to act as trustee of said corporation or its property.' With respect to the acts of these parties it is alleged: 'That in pursuance of said conspiracy and agreement said directors and officers acting for and on behalf and as the act and deed of said corporation, which was then and there insolvent as aforesaid, on the 6th day of August, 1908, caused to be filed in the District Court of the First Judicial District of the State of Nevada, in and for the county of Esmeralda, an application praying for the appointment of a receiver with a view to the dissolution of said corporation.' The application for a receiver in the name of the stockholder as set forth in the petition is charged to be the act and deed of the corporation; and it is further charged that the directors and officers of the corporation acting for and on behalf and as the act and deed of the corporation accepted the service issued in the case, and thereupon caused to be filed with the court an appearance and application for the appointment of a receiver. We think these allegations are sufficient and charge the corporation with having committed an act of bankruptcy in applying for a receiver of its property. The corporate entity cannot be so disguised that it can successfully masquerade in the name of a stockholder, and, evading the searching eyes of a court of equity, hinder, delay and defraud its creditors and defeat the provisions of the Bankruptcy Act. A court of equity looks through forms to the substance of things, thus preserving the rights of innocent parties against all forms of deception and fraud."

And it is not a defense that the law of the State does not permit the corporation itself to apply for a receiver.

Mercantile Co. v. Hardware & Steel Co., 24 A. B. R. 216 (238), 177 Fed. 825 (C. C. A. Nev.): "It is further objected that the laws of the State of Nevada do not permit or authorize a corporation to apply for the appointment of a receiver; that the State court did not have jurisdiction over such an application, and that the application for a receiver for a corporation to be an act of bankruptcy under the Bankruptcy Act must be an application made under the laws of the State, that is to say, it must in every respect be a lawful application conforming to the laws of the State. This is not the language of the Bankruptcy Act; nor do we think it was the purpose of Congress to make the act of bankruptcy dependent upon the pretended regularity of the proceedings of the State court. That court may be imposed upon and its jurisdiction invoked to defeat the jurisdiction of the bankruptcy court as charged in this case. It is sufficient that the corporation is insolvent, and, being insolvent, has applied for a receiver whereby the property of the corporation is to be taken possession of and administered and distributed by the State court."

§ 153. Debtor to Be Insolvent at Time of Application and Insolvent According to Bankruptcy Definition.

Page 133, note 111. See, in addition, *In re Pickens Mfg. Co.*, 20 A. B. R. 202, 158 Fed. 894 (D. C. Ga.).

Page 133. *In re Ellsworth*, 23 A. B. R. 284, 173 Fed. 699 (D. C. N. Y.): "If

the company, while insolvent, had voluntarily brought an action to wind up its affairs for the benefit of its creditors, and had applied for the appointment of receivers to take charge of its property, the superior right of the bankruptcy court could not safely be questioned; but the interposition of an answer in an action brought by a contract creditor, admitting therein the truth of the allegations of the bill and joining in the prayer for relief, is not believed to be the equivalent of the term 'being insolvent, applied for a receiver or trustee for its property.' In the equity action, the complainants applied for receivers on the ground that the Edward Ellsworth Company was unable to pay its debts as they matured, and that it would be to the advantage of creditors and stockholders to have its affairs wound up. Nowhere in the bill is it asserted that the corporation is insolvent, as that term is defined by § 1, subd. 15, of the Bankruptcy Act. In fact, the bill contains an affirmative allegation that the defendant is solvent. Such averments, together with the admission by the corporation of their truth and its consent to the appointment of receivers of its property, undoubtedly vested the circuit court, in view of the diversity of citizenship of the parties, with power and authority to act in the premises."

Page 133. But admissions of the debtor, in his application for the appointment of a receiver, that his financial condition is such that he cannot hope to continue his business, that his credit is seriously impaired if not wholly destroyed, that it is impossible to raise the necessary capital with which to meet his maturing obligations, and that he is being threatened with suit which must result in levies, may amount to proof of insufficiency of assets to meet obligations, within the meaning of the Bankruptcy Act, notwithstanding that insolvency may have been formally denied.

In re Electric Supply Co., 23 A. B. R. 647, 175 Fed. 612 (D. C. Ga.): "When, therefore, the defendant alleges that, owing to the gross mismanagement of its affairs, 'its condition is such that it cannot hope to continue its business, that it is impossible to raise the necessary capital to meet its matured and maturing obligations, that its promissory notes, accounts, and other obligations are past due, that it is threatened with suits, which must result in levies and in the depletion of the assets,' it is but an elaborate declaration that it has nothing sufficient to pay its debts. This condition is not mended by its prayer to the State court for leave to surrender its charter and to go out of business, to sell its properties as quickly as possible and turn them into cash, and to stand off through the injunctive power of the State court all persons having claims against it while this process of disintegration is going on. It is true that the alleged bankrupt, with some astucy, is careful to say that it is not insolvent. It is careful also to adopt resolutions expressly denying insolvency. But the denial is unimportant in view of the recitals showing its utter incapacity to pay its debts. * * * It is true that in that case insolvency was distinctly alleged. Here, as we have seen, there is an attempt to deny it; but the averments of the Electric Supply Company, made in its petition to the Superior Court, sworn to by its president, and presented as a part of its answer here, so conclusively show insolvency that there can be no doubt that it was the true and substantial basis of the petition, and the court will not shut its eyes to the truth, * * * notwithstanding the pleader's art may have been utilized to defeat the operation of the bankruptcy law. * * * The court is constrained to make this determination because of consideration

of law and the sworn admission of record made by the bankrupt above set forth."

Page 133. But if the receiver was appointed on the application of the bankrupt, it is not material that insolvency be a ground of receivership under the State law; much less that such insolvency be established by the record of the State court.

Mercantile Co. v. Hardware & Steel Co., 24 A. B. R. 216 (238), 177 Fed. 825 (C. C. A. Nev.): "But our attention has not been called to any case that holds that under the first provision of the statute where the creditors' petition charges a single act of bankruptcy, viz, 'being insolvent applied for a receiver or trustee for his property,' the act of bankruptcy is dependent upon the record in the court to which the application for a receiver is made; that is to say, we do not find any case holding that unless the petition to the court for a receiver states that the application is based upon the insolvency no act of bankruptcy has been committed."

§ 155. As to Receiverships "Because of Insolvency"—Actual Insolvency Not Requisite.

On the other hand it would seem that where the act complained of as ground of bankruptcy is the putting of a receiver in charge because of insolvency, all that would be necessary would be to prove that a receiver was put in charge of the property on the ground of insolvency, no matter whether the debtor actually was insolvent or not.

Inferentially, but obiter, In re Pickens Mfg. Co., 2 A. B. R. 202, 158 Fed. 894 (D. C. Ga.): "Counsel for the petitioning creditors claim that insolvency stands adjudicated against the company by the action of the State court and by the company's action in connection with those proceedings, and that it is precluded thereby from a further hearing here. The language of this amendment of 1903 is peculiar in that it provides that 'being insolvent, applied for a receiver,' etc., and then in the disjunctive 'or because of insolvency a receiver or trustee has been put in charge,' etc. This lends some point to the argument that where insolvency is found as a fact by the state court, and a receiver appointed on that ground, insolvency is adjudicated and will be assumed here. The practice, however, in the courts, so far as there has been a practice established, seems to allow a hearing here on the question of insolvency, notwithstanding the fact of the commission of an act of bankruptcy, under this amendment."

§ 156. Whether Insolvency "Alleged Need Be Insolvency According to Bankruptcy Definition."

And it would also seem to be immaterial what definition may have been given to the word "insolvency" by the court appointing the receiver. Nevertheless, it has been held that the insolvency must have been insolvency according to the Bankruptcy Act's definition.

Compare, *In re Ellsworth Co.*, 23 A. B. R. 284, 173 Fed. 699 (D. C. N. Y.), quoted at §§ 153, 158, 159, 305.

In re Golden Malt Cream Co., 21 A. B. R. 36, 164 Fed. 326 (C. C. A. Ind.): "Section 3, par. 'a,' subdiv. 4, of the Bankruptcy Act provides that it shall be an act of bankruptcy, when because of insolvency, a receiver or trustee has been put in charge of his property under the laws of a state; from which it is argued by petitioners that the act of bankruptcy does not depend upon the actual status of insolvency, as that status is fixed by the Bankruptcy Act, but upon the fact that a finding of insolvency is disclosed in the record of the state court upon the basis of which a receiver was appointed; and that such findings cannot, after bankruptcy proceedings are begun, be recalled. We cannot concur in this view of the law. The word 'insolvency,' as used in the Bankruptcy Act, means insolvency within the meaning of the definition of that act. And though the same words be employed in the finding of the state court to define a set of facts different from the facts intended to be defined by the word in the Bankruptcy Act, the state court is not without power, by appropriate amendment to so change its order that such order will set forth the real facts on which the order was intended to act; for certainly a mere divergence of the definition ought not to have the effect of making that an act of bankruptcy which in fact was not intended by the bankruptcy law to be an act of bankruptcy."

§ 157. But "Insolvency" Must Be Ground for Receivership by State Law, and Appointment Based on That Ground.

Page 134. But compare In re Underwear Co., 18 A. B. R. 620, 153 Fed. 224 (D. C. Conn.): "The only decision in this circuit which offers aid in reaching a conclusion upon the matter under consideration is In re Spalding, 14 Am. B. R. 129, 139 Fed. 245. The law of New York under which, in that case, a receiver was appointed to take charge of Spalding's property, did not cover insolvency as a jurisdictional fact. The creditors' petition therein was granted upon other distinct grounds, and insolvency was only brought in incidentally, and could not influence, much less control, the judgment. In New York a corporation could have been proceeded against because of insolvency, but an individual could not. Under the laws of Connecticut there is no provision for alleging insolvency eo nomine as the cause for obtaining a receivership over the property and affairs of a corporation. * * * It seems to me that upon this record alone it must be apparent to any reasonable mind that the facts found by that court show that it was 'because of insolvency' that the receiver was appointed. The record certainly does not show conclusively that insolvency was not the cause, or one of the causes, which led to the appointment. It may be said to exhibit a prima facie showing of insolvency of sufficient force to put the respondent corporation in this court upon its proofs. If such a rule be adopted, no harm can come to any one hereafter. If applications shall be made to the State courts for receivers in cases where beyond question the corporation is solvent, the record in the state court will undoubtedly proclaim the fact in a convincing way. The situation is so serious that I cannot bring myself to believe that the spirit of the bankruptcy law will permit such a technical construction of section 3, subd. 4, of the Bankruptcy Act * * * as the respondents ask for; nor can I believe that the spirit of In re Spalding commands such action, although I am bound to admit that its letter might not unreasonably be so interpreted."

Page 134. And an allegation that the corporation merely was "in imminent danger of insolvency" has been held insufficient, on what appears, however, to be finely drawn distinctions.

In re (Perry) Aldrich Co., 21 A. B. R. 246, 165 Fed. 249 (D. C. Mass.): "It seems to me clear that the papers in the case wholly fail to show that the receivers appointed were put in charge of the defendant's property 'because of insolvency.' It is impossible to say, on what appears from them, that insolvency as defined in the Bankruptcy Act was one of the grounds upon which the court acted in making its decree. The allegations of the bill do not imply insolvency, they go no further than to say that there is danger of insolvency,—in which sense is left uncertain. Whatever the kind of insolvency meant, the inference is that it does not yet exist. Whether the corporation was actually insolvent or not when the bill was filed or the receivers appointed under it, seems to me wholly immaterial unless it can also be made to appear that the court so found, either upon the evidence before it or the agreements of the parties, and made the fact at least one of the grounds of its action. In this case, the deposition of the learned justice of the Maine Supreme Court who heard the case and made the decree appointing the receivers has been taken by the parties opposing adjudication, and is before me. It leaves no doubt whatever in my mind not only that he understood both parties to say that the corporation was then solvent, but that he told counsel at the hearing that if a receivership was desired on the ground of insolvency it probably could not be granted, in view of the decision, then recent, in *Moody v. Port Clyde Development Co.*, 102 Maine 365—and that, as he expressly states, he did not appoint the receivers by reason of the corporation's insolvency. It seems to me clear that such insolvency entered in no way into the result arrived at by the court. In view of this deposition it seems to me idle to discuss or consider any evidence as to what was or was not said by counsel, witnesses or parties at the hearing. If any one of them stated or argued that the corporation was insolvent, they must have done so without affecting in any way the action of the court."

Page 134. But insolvency need not be a statutory ground for a receiver: it is sufficient if the State law other than that which is statutory makes it such.

In re Kennedy Tailoring Co., 23 A. B. R. 656, 175 Fed. 871 (D. C. Tenn.): "I find no authority holding that in order to constitute an act of bankruptcy under this section of the act, the appointment of a receiver must be made by the state court under a state statute. On the contrary, the fact that a receiver has been put in charge by a state court, although acting under its general equity power, seems to be recognized, implicitly at least, as constituting an appointment under the laws of the state. * * * In *Lowenstein v. Mfg. Co.* (D. C.), 12 Am. B. R. 601, 130 Fed. 1007; *Hooks v. Aldridge* (C. C. A., Fifth Circuit), 16 Am. B. R. 658, 145 Fed. 865, and *Beatty v. Coal Mining Co.* (C. C. A., First Circuit), 17 Am. B. R. 738, 150 Fed. 293. See, also, 1 Remington on Bankruptcy, § 151, p. 132. The case of *Zugalla v. Mercantile Agency* (C. C. A., Third Circuit), 16 Am. B. R. 67, 142 Fed. 927, does not, as I view it, hold to the contrary; the reference in that opinion to the fact that the receiver had not been appointed under the state statute, but under the general equity power of the court, not being made with reference to the question now under consideration, but to show that the appointment of the receiver was made merely for the purpose of taking custody of the property, and not as an appointment of a receiver on the ground of insolvency under the state statute."

Page 134. However, the statute makes no distinction between "temporary" receivers and any other kind of receivers.

Blue Mountain Iron & Steel Co. v. Portner, 12 A. B. R. 559, 131 Fed. 57 (C. C. A. Md.): "That the Bankruptcy Act requires permanent receivers to be appointed would be to read into the statute something the lawmaking department—Congress—did not see proper to put there."

In *re Kennedy Tailoring Co.*, 23 A. B. R. 656, 175 Fed. 871 (D. C. Tenn.): "The Bankruptcy Act furthermore draws no distinction between temporary and permanent receivers, but makes the simple fact of a receiver having been placed in charge of the defendant's property on the ground of insolvency an act of bankruptcy."

Where the receiver is one "applied for" by the bankrupt, insolvency need not be a ground for the appointment of a receiver either under statute or general law.

Mercantile Co. v. Hardware & Steel Co., 24 A. B. R. 216, 177 Fed. 825 (C. C. A. Nev.), quoted ante, §§ 152, 153.

§ 158. And Ground of Receivership, as Being "Insolvency" Provable Only by Record, unless Record Silent.

Page 135, note 115. In *re Kennedy Tailoring Co.*, 23 A. B. R. 656, 175 Fed. 871 (D. C. Tenn.): "It is, however, settled by the weight of authority that, where the order of the state court appointing a receiver does not show the ground upon which it is made, extrinsic evidence may be introduced to establish that fact."

Page 135. In *re Ellsworth Co.*, 23 A. B. R. 284, 173 Fed. 699 (D. C. N. Y.): "Inasmuch as the record in the Circuit Court action does not assert or claim that the Edward Ellsworth Company was insolvent, within the meaning of the Bankruptcy Act, this court is precluded from considering evidence aliunde to contradict the judgment or decree appointing receivers and setting forth the basis of such appointment." Quoted further at §§ 153, 159, 1305, 1909.

Page 135, note 117. Instance contra, In *re Ellsworth Co.*, 23 A. B. R. 284, 173 Fed. 699 (D. C. N. Y.). Analogously, as admission of actual insolvency, where receivership applied for by debtor, In *re Electric Supply Co.*, 23 A. B. R. 647, 175 Fed. 612 (D. C. Ga.), quoted at § 153; In *re Kennedy Tailoring Co.*, 23 A. B. R. 656, 175 Fed. 871 (D. C. Tenn.).

Page 135, note 119. In *re Electric Supply Co.*, 23 A. B. R. 647, 175 Fed. 612 (D. C. Ga.), quoted at § 153. But compare, that it is to be strictly construed, In *re Ellsworth Co.*, 23 A. B. R. 284, 173 Fed. 699 (D. C. N. Y.), quoted at §§ 153, 159, 305.

Doctrine Not Applicable to Cases of Receivership Applied for by Bankrupt.

—The doctrine of § 158 is not applicable to cases of receivership applied for by the debtor. *Mercantile Co. v. Hardware & Steel Co.*, 24 A. B. R. 216 (238), 177 Fed. 825 (C. C. A. Nev.), quoted at §§ 152, 153.

Page 136. Insolvency need not be the sole ground of the appointment.

In *re Beatty*, 17 A. B. R. 743, 150 Fed. 293 (C. C. A. Mass.); In *re Electric Supply Co.*, 23 A. B. R. 647, 175 Fed. 612 (D. C. Ga.); In *re Kennedy Tailor-*

ing Co., 23 A. B. R. 656, 175 Fed. 871 (D. C. Tenn.); *Hooks v. Aldridge*, 16 A. B. R. 662, 145 Fed. 865 (C. C. A. Texas).

§ 159. Receiver Appointed but Not on Ground of Insolvency, Not This Act of Bankruptcy.

Page 136. If the receivership is applied for by others than the debtor himself and the application therefor is not made on the ground of insolvency, it is not an act of bankruptcy, although the debtor may, in fact, be insolvent.

Compare, although perhaps rightly to be considered application by corporation itself, being by complaining stockholders, *In re (Perry) Aldrich Co.*, 21 A. B. R. 246, 165 Fed. 249 (D. C. Mass.), quoted at § 157.

Page 138. And equity proceedings for the winding up of insolvent corporations and their reorganization have sometimes been upheld, by giving strict and literal interpretation to the terms. (See post, § 305.)

Page 138. *In re Ellsworth Co.*, 23 A. B. R. 284, 173 Fed. 699 (D. C. N. Y.): "True, it is claimed that there was collusion between the parties to the equity suit to defeat the operation of the Bankruptcy Act; but it is not contended that there was fraud or wrongful act by either of the parties to confer jurisdiction upon the circuit court. Such being the fact, the particular object sought to be accomplished in the equity action, the winding up of the business of the corporation or perhaps its reorganization, or readjustment of its affairs or any wrongs to dissatisfied creditors, that are supposed to ensue therefrom, are not thought material on this application." Quoted further at §§ 153, 158, 305.

§ 164. Voluntary Petition Itself a Commission of Fifth Act of Bankruptcy.

Page 139, note 123. *Contra*, *In re Ceballos & Co.*, 20 A. B. R. 459, 161 Fed. 445 (D. C. N. J.): But this case seems to consider it conclusive that such a filing is not specifically mentioned as an act of bankruptcy under the present law whilst it was so mentioned under the law of 1867, failing altogether to observe that the Fifth Act of Bankruptcy under the present law renders such special mention now unnecessary.

§ 165. Admission to Be Unqualified.

Page 140. Likewise, a mere resolution of a board of directors authorizing an attorney to represent the corporation in any bankruptcy proceedings that might be brought thereafter and to consent to the appointment of a receiver is not sufficient.

In re Southern Steel Co., 22 A. B. R. 476, 169 Fed. 702 (D. C. Ala.).

§ 166. Mere Admission of Insolvency Insufficient.

Page 140, note 125. See, in addition, *Conway v. German*, 21 A. B. R. 577, 166 Fed. 67 (C. C. A. Md.). quoted on other points at §§ 257, 268, 271.

§ 167. Admissions by Board of Directors of Corporations.

Page 141, note 126. See, as to authority sufficient to file voluntary petition in behalf of a corporation under the Amendment of 1910, ante, § 44.

Page 141. In re Lisk Mfg. Co., 21 A. B. R. 674, 167 Fed. 44 (D. C. N. Y.): "Neither the state statute nor the by-laws of the corporation prohibited the directors from making a general assignment for the benefit of creditors; and hence the written admission, signed by the secretary of the corporation by order of the majority of the board of directors, was sufficient to authorize the creditors to institute the bankruptcy proceeding in question."

Page 141. And it has been held that, in general, officers of a corporation who have power to make a general assignment have power to make the admission.

In re Lisk Mfg. Co., 21 A. B. R. 674, 167 Fed. 411 (D. C. N. Y.): "Officers who have power to make a general assignment under the laws of the state have power to make the specified admission."

Page 141. And even where some of the directors, living or sojourning in another state, were not notified of the director's meeting at which the resolution was passed.

In re Lisk Mfg. Co., 21 A. B. R. 674, 167 Fed. 411 (D. C. N. Y.): "It is claimed in behalf of the bankrupt that the statute of the state (§ 29 of the general corporation law [Laws N. Y. 1901, p. 507, c. 214]) substantially provides that the business of the corporation shall be conducted by a majority of the directors at a meeting duly assembled, etc., and it is pointed out that the requirement of the by-laws of the Lisk Manufacturing Company indicates that such meeting of the board of directors was not regularly assembled or convened. Under § 5 of the by-laws of such corporation, special meetings of the directors were held at any time by oral notice or by notice in writing duly signed by each director. The by-laws do not provide that such meetings of the directors shall be held in Canandaigua, the place of business of the bankrupt. In view of the manner in which previous business meetings were held by the directors, it was not absolutely necessary that oral notice should have been given, in the absence of bad faith, to directors living or sojourning in a distant state. For this reason, in my opinion, it was not necessary that C. D. McLaughlin, the director residing in Omaha, should have notice of the meeting. The situation was thought by a majority of the directors, after consultation with their counsel and thorough examination of the financial affairs of the corporation, to require immediate action by the board of directors, and under all the circumstances to secure the consent of the absent director was obviously unnecessary. * * * J. L. McLaughlin, another director, knew of the proposed meeting and its object. He must be deemed to have acquiesced in the action of the other directors or waived notice of the meeting."

Page 141. Also that it is within their power though for several years the corporation had ceased to do business and though its charter had been declared void by the governor's proclamation for failure to pay taxes.

In re Munger Vehicle Tire Co., 19 A. B. R. 785, 159 Fed. 901 (C. C. A. N. Y.).

Page 142, note 129. In re Quartz Gold Mining Co., 19 A. B. R. 667, 157 Fed. 243 (D. C. Ore.).

Page 142. And of course an officer cannot by writing a letter in the name of a corporation bind the corporation to this act, unless expressly authorized to do so.

In re Southern Steel Co., 22 A. B. R. 476, 169 Fed. 702 (D. C. Ala.).

But an unauthorized admission may perhaps be ratified.

In re Lisk Mfg. Co., 21 A. B. R. 674, 167 Fed. 411 (D. C. N. Y.): "Moreover, the Lisk Mfg. Co. in view of the facts must be held to have acquiesced in or ratified the action of its secretary in signing the resolution setting forth an admission of its inability to pay its debts, and its willingness to be adjudged a bankrupt. * * * The business of the bankrupt has been conducted by the receivers for more than six months with the evident assent of the new directors, the stockholders, and parties in interest; and under the circumstances the latter are equitably estopped to claim at this time that the resolution which is the foundation of this proceeding was unauthorized or was improvidently passed at a meeting of which all the directors were not notified and did not attend."

But not, of course, where the board of directors themselves would not have had the power to make the admission originally.

In re Burbank Company, 21 A. B. R. 838, 168 Fed. 719 (D. C. N. H.).

And it has been held, in a case the reasoning of which in this particular cannot be upheld, that where the United States Circuit Court has already taken possession of the assets through a receiver in an equity suit appointed on the ground of insolvency, the board of directors may not make such a written admission, and that they may be punished for contempt if they do so.

In re H. R. Electric Power Co., 23 A. B. R. 191, 173 Fed. 934 (D. C. N. Y.).

Such holding manifestly confuses the jurisdiction to determine the status of the debtor as a bankrupt with the jurisdiction to prevent interference with property of the debtor already in the custody of a court.

§ 169. Admissions by Partners.

In re Northampton Portland Cement Co., 24 A. B. R. 61, — Fed. — (D. C. Pa.): "The reasoning of the court in support of this ruling [*West Co. v. Lea*, 174 U. S. 590, 2 A. B. R. 463] applies with equal force when the petition is based upon the bankrupt's admission that he cannot pay his debts and is willing to be adjudicated upon that ground."

Page 143, note 134. Compare ante, §§ 73, 102, 164. But compare, In re Ceballos, 20 A. B. R. 459, 161 Fed. 445 (D. C. N. J.), quoted at §§ 102, 164.

§ 170. Insolvency Not Requisite, Nor Is Solvency Competent as Defense.

It is not necessary to prove the debtor to be in fact insolvent.

But compare erroneous doctrine of *In re Ceballos & Co.*, 20 A. B. R. 459, 161 Fed. 445 (D. C. N. J.), criticised at §§ 73, 102, 164.

Page 143, note 137. See in addition *In re Lisk Mfg. Co.*, 21 A. B. R. 674, 167 Fed. 411 (D. C. N. Y.).

§ 171. Imputed Acts of Bankruptcy—Agents of Corporations and Partners.

Page 144, note 138. See similar proposition relative to opposition to discharge, post, §§ 2484, 2485, 2486. Also, see ante, §§ 64, 65½.

Page 144. *In re Stovall Grocery Co.*, 20 A. B. R. 537, 161 Fed. 882 (D. C. Ga.): "It will be perceived that the act of bankruptcy alleged here is the transfer by an individual member of a firm of property with intent to defraud individual creditors and firm creditors. That is not an act of bankruptcy on the part of the firm. The partnership entity must act, and what is relied on must be its act."

Page 145. *Obiter*, *Mills v. Fisher & Co.*, 20 A. B. R. 237, 159 Fed. 897 (C. C. A. Tenn.): "But it is not an act of bankruptcy for which a firm may be adjudged a bankrupt, that one of its members, out of his individual estate, prefers one of his own or one of a firm's creditors. In bankruptcy the assets of a bankrupt partnership must be first applied to the payment of partnership debts and the individual assets to the payment of the individual debts. The joint creditors are only entitled to share in the surplus of the individual assets and the individual creditors only in the surplus of joint or firm assets. Bank. Act 1898, § 5. The application by one partner of his individual property to the payment of one firm creditor would be an individual act, and not the joint act of the firm, and, therefore, not an act for which the firm could be adjudged bankrupt. * * * Although the intent be to prefer a firm creditor, it is not enough to sustain a proceeding against the firm." But in this case adjudication of the individual eventually was had on the ground that the transfer by the individual partner from his own estate diminished pro tanto the residuary funds to which firm creditors might be entitled to resort, and against which they might prove their claims. *Hartman v. Peters*, 17 A. B. R. 61, 146 Fed. 82 (D. C. Pa.); (1867) *In re Redmond*, Fed. Cas. 11, 632, 9 A. B. R. 408; (1867) *In re Lloyd*, Fed. Cas. 8429; (1867) *In re Melick*, Fed. Cas. No. 9399; (1867) *In re McLean*, Fed. Cas. 8879; (1867) *In re Jewett*, Fed. Cas. 7306. Also, see post, § 1291.

Page 145, note 139. See ante, §§ 73, 169.

Page 145. Likewise, the failure of a member of a partnership, long since dissolved, to vacate a preferential execution levy on former partnership property, he having sold out to his co-partner, has been held sufficiently an act of the partnership and of each member to warrant adjudication both of the firm and all members.

Holmes v. Baker & Hamilton, 20 A. B. R. 252, 160 Fed. 922 (C. C. A. Wash.): "It is true that an individual member of a firm cannot be adjudged a bankrupt for an act of bankruptcy not committed by him or in which he did not participate * * *; but that is not the case here presented. The act of bankruptcy in this case was committed by all the members of the firm. It was an act of omission, the failure to discharge the levy of the execution, a duty which rested as much upon the appellant as upon any member of the firm.

Notwithstanding the dissolution of the co-partnership, it remained, as it was before, the appellant's duty to see that the property of the co-partnership was devoted to the payment of the partnership debts, as to which he had not been released."

Page 146. A transfer by one partner of all his individual property to pay a firm debt may constitute a preference, since the estate of each partner is—in its due order of priority after payment of individual debts—a fund to which partnership creditors may resort; and its depletion to satisfy one firm creditor over others is, pro tanto, a depletion of partnership assets.

Mills v. Fisher & Co., 20 A. B. R. 237, 159 Fed. 897 (C. C. A. Tenn.): "Nevertheless, the right of a partnership creditor to share in the separate estate of the members of the copartnership gives him such an interest in the separate property of its members as to entitle him to prove his claim against the separate estate and to make such a claim the basis for an adjudication of bankruptcy against a member of a firm who has given a preference out of his estate. This was well settled under the former act and in this respect the present law has not changed the rule." Quoted supra, also, at § 1291.

Page 146, note 142. Also, In re Ceballos, 20 A. B. R. 459, 161 Fed. 445 (D. C. N. J.).

§ 172. Burden of Proof in Prosecuting Bankruptcy Petition on Creditors.

Page 146, note 143. See, in addition, In re McLoon, 20 A. B. R. 719, 162 Fed. 575 (D. C. Me.). Also burden of proof that debtor belongs to class of corporations subject to bankruptcy is on creditors. Walker Roofing Co. v. Mer. & Evans Co., 23 A. B. R. 185, 173 Fed. 771 (C. C. A. Va.).

§ 174. Insolvency Requisite in All Instances, Except "Fraudulent Transfers," "Assignments," "Receiverships" "Because of" Insolvency, and "Written Admissions."

Page 147, note 146. As to proof of insolvency, see post, §§ 1343, 1344, et seq.

Page 147. "Fair valuation" is the valuation which the bankrupt itself could have gotten—the market value. In re Marine Iron Works, 20 A. B. R. 390, 159 Fed. 753 (D. C. N. Y.).

Page 147, note 146. **Instances of Proof of Insolvency under Petition for Adjudication.**—Bankrupt's guaranties to be counted among liabilities, even his oral guaranties, since the fact that the obligations are not in writing goes simply to the proof, not to the validity of the obligation itself. Hutting Mfg. Co. v. Edwards, 20 A. B. R. 349, 160 Fed. 619 (C. C. A. Iowa).

Fraudulently conveyed property not to be counted in, but preferentially conveyed property to be counted in. Acme Food Co. v. Meier, 18 A. B. R. 550, 153 Fed. 74 (C. C. A. Mich.).

But property which *might be, but is not, claimed by third parties* to be recoverable, as transferred to the bankrupt in fraud of such third parties' rights, is not to be excluded. In re Aschenbach Co., 23 A. B. R. 95, 174 Fed. 396 (C. C. A. N. Y.).

§ 175. When Creditors to Prove Insolvency in Chief It Must Be Insolvency at Time Act Committed.

Page 148. *Acme Food Co. v. Meier*, 18 A. B. R. 550, 153 Fed. 74 (C. C. A. Mich.): "If the act of bankruptcy be the giving of a preference under subdivision 2, or the permitting of a preference through a legal proceeding under subdivision 3 of the same section, there must be a state of insolvency at the time of the preference and solvency or insolvency at the time of the filing of the petition can only have a reflex importance, if any."

§ 176. When Insolvency not Part of Creditors' Case but Solvency Available as Affirmative Defense, Date of Solvency, Date of Petition.

Page 148, note 147. See in addition *Acme Food Co. v. Meier*, 18 A. B. R. 550, 153 Fed. 74 (C. C. A. Mich.), quoted at § 177.

§ 177. Insolvency Not Necessary Element of Creditors' Case under First Act, but Solvency Complete Bar, in Defense.

Page 149. *In re Larkin*, 21 A. B. R. 711, 168 Fed. 100 (D. C. N. Y.): "Some acts of bankruptcy must be committed while the person is insolvent. The first act of bankruptcy defined may be committed by the person charged when perfectly solvent. If a solvent person conveys or transfers, conceals or removes, or permits to be concealed or removed, any part of his property with the intent to hinder, delay, or defraud his creditors, or any of them, he commits an act of bankruptcy; and if within the ensuing four months he becomes insolvent, and a petition is thereupon filed against him, such petition may allege such acts as the act of bankruptcy, and the person may be adjudicated a bankrupt accordingly. Subdivision 'b' of § 3 provides: 'A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act.' The wisdom of this provision is perfectly apparent. The First Act of Bankruptcy, so far as it relates to the conveyance or transfer of property, differs from the Second Act of Bankruptcy in this: That in the first there is a conveyance or transfer with intent to hinder, delay, or defraud creditors, while in the second the transfer is made with the intent simply to prefer one creditor or more over the other creditors. In the second case the transfer must have been made while the person making it was insolvent. The very tendency of the acts mentioned in the First Act of Bankruptcy is to create insolvency so far as creditors are concerned. The person is not to be permitted to convey, transfer, conceal or remove any part of his property with intent to hinder, delay, or defraud his creditors, and on becoming insolvent within four months thereafter to escape the bankruptcy law by showing that he was solvent when he so conveyed, transferred, concealed, or removed his property."

Page 149. *Acme Food Co. v. Meier*, 18 A. B. R. 550, 153 Fed. 74 (C. C. A. Mich.): "Solvency when the petition was filed is important only as a defense to an act of bankruptcy under subdivision one of § 3, and the burden of showing this is on the defendant."

Page 149. The burden of proof of solvency is, of course, on the bankrupt.

Page 149. *In re Crenshaw*, 19 A. B. R. 502, 156 Fed. 638 (D. C. Ala.).

§ 179. But Debtor to Appear and Also Produce Books at Trial, to Afford Discovery.

Page 150, note 152. **Interlocutory Order Requiring Alleged Bankrupt, Who Denies Insolvency, to File List of Creditors and Schedule of Assets.**—It appears to have been the practice, without question as reported in one case, to require an alleged bankrupt, who was denying insolvency, to amend his answer by attaching a list of creditors and assets. *Young & Holland Co.*, 20 A. B. R. 512, 162 Fed. 663 (C. C. A. R. I.). Also, see post, § 334½.

§ 188½. Date of Joining of Sufficient Creditors, When Controls.

Page 154. It has been held that where two of three petitioning creditors in an involuntary petition containing no averment that the creditors were less than twelve, were not shown thereby to be creditors, rendering the petition insufficient to authorize an adjudication, and after the lapse of more than three months other creditors join in the petition, the four months period within which preferential transfers under § 60b, or fraudulent transfers under § 67e, as amended, commences to run is from the time the petition was made sufficient by the joinder of other creditors, and conveyances made more than five months previous to such time cannot be set aside under either of said sections. *Manning v. Evans*, 19 A. B. R. 217, 156 Fed. 106 (D. C. N. J.).

§ 189. Computation of Time of Four Months Period.

Page 154, note 164. Compare, analogously, *In re Holmes*, 21 A. B. R. 339, 165 Fed. 225 (D. C. Vt.). Compare, analogously, *Pittsburgh Laundry v. Imperial Laundry*, 18 A. B. R. 756, 154 Fed. 662 (C. C. A. Pa.).

§ 190. Points of Difference between Voluntary and Involuntary Petition—Duplicate Petitions—Schedules.

Page 158, note 2. **Form of Voluntary Petition of Corporation.**—In the absence of a special form prescribed by the Supreme Court of the United States, the following form is suggested for the voluntary petition of a corporation:

To the Honorable.....

Judge of the District Court of the United States,

For the District of

The petition of, of in the County of..... and District and State of, a corporation, engaged in and not a municipal, railroad, insurance nor banking corporation, respectfully represents:

That it has had its principal place of business (or has resided or had its domicile) for the greater portion of the six months next immediately preceding the filing of this petition at, within said judicial district; that it owes debts which it is unable to pay in full; that it is willing to surrender all its property for the benefit of creditors, and desires to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A and verified by the oath of your petitioners' proper officer, contains a full and true statement of all its debts, and (so far as it is possible to ascertain) the names and places of resi-

dence of its creditors and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B and verified by the oath of your petitioners' proper officer, contains an accurate inventory of all its property, both real and personal and such further statements concerning said property as are required by the provisions of such acts.

That an authentic copy of the vote or resolution authorizing the filing of this petition is as follows, [or is attached hereto as Exhibit "C"]*

Wherefore your petitioner prays that it may be adjudged by the Court to be a bankrupt within the purview of said acts.

United States of America, District ofss.:

I,, the [here insert the official capacity of the affiant] of the corporation which is the petitioning debtor mentioned and described in the foregoing petition, and do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

.....Petitioner

Subscribed and sworn to before me thisday of
A. D. 19....

.....
Official Character.

The form of the involuntary petition of a corporation should show that it is a "moneyed," "business" or "commercial" corporation and that it is not a "municipal, railroad, insurance or banking corporation." The form of the voluntary petition of a corporation, however, probably need not show that the corporation is a "moneyed," "business" nor "commercial" corporation. See ante, § 37.

§ 191. Voluntary Petition to Show Residence, etc., and Existence of Debt.

Page 159, note 5. See ante, § 41.

§ 194. Signature and Verification.

Voluntary Petition of Corporation.—The Amendment of 1910, authorizing the voluntary bankruptcy of corporations, does not prescribe what action is necessary on the part of the corporation to that end, nor what officer shall verify the petition.

See ante, § 44½.

In the absence of any rule of the Supreme Court the signature to, as well as the verification of, the petition should be made by whomsoever may have been expressly authorized by corporate action for that purpose. In the absence of any express authorization, it would seem that such signature and verification should be made by whatever officer or agent would be competent for a similar purpose under the assignment or insolvency laws of the State.

*The form of such resolution may be found, ante, at § 44.

§ 202. But Date of Filing Petition Determines How Many Must Join, and Total Indebtedness and Subsequent Payment or Assignment of Claims, or Offset Ineffectual.

Page 165, note 10. *Stroheim v. Perry & Whitney Co.*, 23 A. B. R. 695, 175 Fed. 52 (C. C. A. Mass., affirming *Perry v. Whitney Co.*, 22 A. B. R. 772).

Page 166. An offset accruing after the filing of the petition is unavailable to reduce a claim.

Obiter, inferentially, *In re Bevins*, 21 A. B. R. 344, 165 Fed. 434 (C. C. A. N. Y.).

Page 166. Indeed, in one case it has been held that the date of the occurrence of the act of bankruptcy—an assignment—was the date for ascertaining whether the total amount of indebtedness was less than \$1,000, in that case the assignee and debtor having settled with sufficient creditors before the filing of the petition to reduce the total indebtedness below the requisite \$1,000.

In re Jacobson, 21 A. B. R. 921 (Ref. Mass.).

However, in that case the settlement having been made through the assignee under the avoided assignment, the case should not be taken as modifying the rule of the main proposition herein.

Page 166. But the fact that the claim of one of the petitioning creditors was a claim acquired by assignment after the debtor had committed the act of bankruptcy—even though such act of bankruptcy be an assignment for the benefit of creditors—is no disqualification.

In re Perry & Whitney Co., 22 A. B. R. 772, 172 Fed. 744 (D. C. Mass.).

Page 166. In one case it has apparently been held that a creditor purchasing a claim after the filing of the bankruptcy petition is not qualified to be a petitioning creditor.

Stroheim v. Perry & Whitney Co., 23 A. B. R. 695, 175 Fed. 52 (C. C. A. Mass., affirming *Perry v. Whitney Co.*, 22 A. B. R. 772, 172 Fed. 744).

But such a rule would be too broadly stated, preventing bona fide transfers of interests in pending choses in action; and the case of *Stroheim v. Perry & Whitney Co.*, in which the apparent rule is made is better brought within the rule of § 203 (a), as being a claim where the petitioning creditor was only colorably the assignee, the real party in interest being the sister of the bankrupt and the real holder of the note therein involved.

§ 203. Different Claims Purchased in by One Creditor Lose Separate Identity.

Page 166, note 17. Instance held not bought in by one creditor, *In re Bevins*, 21 A. B. R. 344, 165 Fed. 434 (C. C. A. N. Y.).

§ 203¼. Actuality of Purchase of Claim.

The court will inquire into the actuality of the purchase of claims by petitioning creditors.

In *re Perry & Whitney Co.*, 22 A. B. R. 772, 172 Fed. 744 (D. C. Mass.). Also compare *In re Perry & Whitney Co.*, 22 A. B. R. 780, 172 Fed. 752 (D. C. Mass.), although, in the latter case, the lack of actuality purchase does not stand out clearly. But compare, *In re Halsey Elec. Generator Co.*, 20 A. B. R. 738, 163 Fed. 118 (D. C. N. J.), quoted at § 203½.

Thus, where one of the petitioning creditors was a corporation, whose business it was to purchase insolvents' assets and which had contracted for claims in order to qualify for involuntary proceedings, all doubts as to the actuality of the purchase will be resolved against the petitioning creditor.

Lowenstein v. McShane, 12 A. B. R. 601, 130 Fed. 1007 (D. C. Md.), quoted at § 203 of vol. 1.

Thus, where the sister of a debtor assigns notes held by her against him to different parties, in order to enable the assignees thereof to be petitioning creditors, but without consideration, the court will disregard the assignment as being merely colorable and not actual, and as creating an artificial condition.

In *re Stroheim v. Perry & Whitney Co.*, 23 A. B. R. 695, 175 Fed. 52 (C. C. A. Mass., affirming *Perry v. Whitney Co.*, 22 A. B. R. 772): "The petition was filed on September 23, 1908. On September 10, 1908, a sister of Stroheim held several notes of the debtor. At that time she transferred to Skelly one note without any substantial consideration, for the sole purpose of enabling her brother's copartnership to secure a sufficient number of creditors to proceed with the bankruptcy petition. Beaumont came into possession of another note under the same circumstances and for the same reason. Evidently they were not creditors when they joined the petition, because evidently the whole transaction was purely colorable, and the notes still belonged to Stroheim's sister. Therefore they could not lawfully make the required oath to the involuntary petition. We concur fully with the conclusion of the learned judge of the District Court so far as these two signatures are concerned."

§ 203½. Assignee of Valid Claim Competent.

But if claims actually are purchased by a creditor, or by one who later becomes a petitioning creditor, there is no good reason nor law why such purchase, if it be actually made, should change the debt. It is still a "provable" debt, and the motive of the purchaser will not detract from the legal rights of the parties, nor render him incompetent to act as a petitioning creditor.

Page 167. In *re Halsey Elec. Generator Co.*, 20 A. B. R. 738, 163 Fed. 118 (D. C. N. J.): "It also appears that Murray and Van Slyck each hold an assigned claim, that neither of them has any financial interest in the claim held by him, and that each of them holds his claim solely for the benefit of his

assignor. This fact, however, does not disqualify either of them as a petitioning creditor. The assignments were made by persons who originally claimed to be separate creditors of the alleged bankrupt for the respective amounts of the claims assigned. Murray and Van Slyck are trustees for their respective assignors, and, as they hold the legal title to the claims assigned, they are the owners of those claims, and, if they be valid claims, are creditors. There is no dispute as to the validity of any of the claims, except that of Murray." Quoted further at § 204.

Page 167. In re Hanyan, 24 A. B. R. 72, — Fed. — (D. C. N. Y.): "There is nothing in this section, or in any other provision of the Bankruptcy Act, requiring that a petitioning creditor should have been one at the time of the act of bankruptcy. All that the act requires is that he have a provable claim against the alleged bankrupt when the petition is filed. With entire respect for those who have intimated a different opinion, I am not able to see upon what ground courts have the right to impose additional conditions, not stated in the Bankruptcy Act, upon the right of any creditor having a provable claim to join in an involuntary petition."

But it would seem from some rulings that where the purchase does not occur after the filing of the bankruptcy petition, the purchaser may not then join as one of the petitioning creditors, for the petitioning creditors must have been creditors at the time of the commission of the act or at the latest at the time of the filing of the bankruptcy petition.

Page 167. In re Perry & Whitney Co., 22 A. B. R. 780, 172 Fed. 752 (D. C. Mass.): "The adjudication in involuntary proceedings, for which the bankruptcy act provides, seems to me intended to be the result of the respective rights and obligations of the debtor, and his creditors as they exist at the time of the act of bankruptcy, or of the filing of the petition. Whether there shall be adjudication or not concerns them, and does not properly concern anyone between whom and the debtor no relations existed at either of those times. I do not believe it to have been intended that adjudication should result from or depend upon an altered situation arising later, still less a situation artificially created in order to affect the proceedings, by one with whom the debtor has never dealt in any way. If the petitioner, Leahy, is recognized as a creditor entitled to maintain this petition, and adjudication is ordered, the respondent will have been adjudged bankrupt, not because there are three creditors having a right to complain of its assignment made September 10, who desired this result, but because Charles Jacobs, to whom the debtor owed nothing when the assignment was made, and who never had any claim of any sort upon the debtor, until more than four months had passed since the assignment was made, has now undertaken to interfere in proceedings with which he had until now no concern at all, for the purpose, openly declared by him, to have been his sole purpose, of enabling his sons, the attorneys for the original petitioners, to prevail in the controversy regarding adjudication."

But it is doubtful that such a rule is to be adopted as a general proposition, and the cases under it are better brought under different propositions. Of course, however, even under this rule, a creditor who

acquires his rights from one who is already a petitioning creditor, would be himself competent as such.

See post, § 238.

§ 204. Creditor's Claim Not to Be Split Up to Obtain Jurisdictional Number.

A creditor's claim may not be split up into several demands in order to create the requisite number of petitioning creditors.

Compare, where two notes held by one creditor, were, by an agent of the creditor, without authority transferred to two different parties, to make them competent as petitioning creditors. In *re Perry & Whitney Co.*, 22 A. B. R. 722, 172 Fed. 744 (D. C. Mass.).

Page 167. In *re Halsey Elec. Generator Co.*, 20 A. B. R. 738, 163 Fed. 118 (D. C. N. J.): "It is contrary to the policy of the Bankruptcy Act to permit a creditor to split up his claim against the debtor and assign some of the parts to other persons for the purpose of qualifying them as joint petitioners in a bankruptcy proceeding." Quoted further at § 203½.

§ 207. Erroneous Averment of Less than Twelve.

If the petitioner erroneously avers that there are less than twelve creditors altogether and if less than three have joined as petitioners the case is not thereupon to be dismissed, but the bankrupt or answering creditor must point out the remaining creditors and notice must be given them and also opportunity for sufficient of them to join.

State *B'k v. Haswell*, 23 A. B. R. 330, 174 Fed. 209 (C. C. A. Iowa).

§ 208. Bankrupt to Supply List of Creditors, if He Claims Averment Erroneous.

The bankrupt or the answering creditor, as the case may be, must file with his answer a sworn list of all the creditors, where he claims the petitioning creditor erroneously has averred the total number of creditors to be less than twelve.

As to bankruptcy, *Gage v. Bell*, 10 A. B. R. 696, 124 Fed. 371 (D. C. Tenn.).

As to answering creditor, State *B'k v. Haswell*, 23 A. B. R. 330, 174 Fed. 209 (C. C. A. Iowa).

Page 171, note 26. And the same duty rests upon an answering creditor where the bankrupt himself does not answer. State *Bank v. Haswell*, 23 A. B. R. 330, 174 Fed. 209 (C. C. A. Iowa); *Gage v. Bell*, 10 A. B. R. 696, 124 Fed. 371 (D. C. Tenn.).

§ 210. Joining of Additional Creditors.

Page 172, note 28. See, in addition, State *Bank v. Haswell*, 23 A. B. R. 330, 174 Fed. 209 (C. C. A. Iowa).

And a creditor who files a petition in bankruptcy, has the right to

request others to intervene, when such intervention becomes necessary to preserve the proceedings.

In re Smith, 23 A. B. R. 864, 176 Fed. 426 (D. C. N. Y.).

§ 213. Time of Joining and Whether Counted in.

Page 172, note 34. See, in addition, In re Crenshaw, 19 A. B. R. 502, 156 Fed. 638 (D. C. Ala.); In re Perry & Whitney Co., 22 A. B. R. 770, 172 Fed. 745 (D. C. Mass.).

And they may so join even though the original creditors had not provable claims or were insufficient in number, or were otherwise disqualified.

Page 173. Obiter, In re Crenshaw, 19 A. B. R. 502, 156 Fed. 638 (D. C. Ala.): "The first contention on the part of the respondent is that some of the original petitioners could not institute this proceeding on the ground or suggestion that said petitioners connived at a 'fraud on the law,' or attempted a fraud on the other creditors. * * * But, assuming that the rule invoked applied to this case as originally instituted, it would have no effect now because a sufficient number of creditors other than the original petitioners have entered their appearance and joined in the petition. Creditors other than the original petitioners may, at any time, enter their appearance and join in the petition, and creditors so joining in a petition subsequent to its filing may be reckoned in making up the number of creditors and amount of claims required by the act to support the petition."

Page 173. And the words "at any time" are obviously not to be taken in an absolutely unlimited sense; there must at least be a petition pending before the court.

Page 173. Obiter, In re Perry & Whitney Co., 22 A. B. R. 770, 172 Fed. 745 (D. C. Mass.).

Whether Doctrine of Laches Applicable.—It has been held that though no time has been fixed by statute yet, as proceedings in bankruptcy are of an equitable nature, the court might perhaps apply the ordinary rules of laches. *Stroheim v. Perry & Whitney Co.*, 23 A. B. R. 695, 175 Fed. 52 (D. C. Mass.).

Yet, it is not precisely true to say that the Bankruptcy Act specifies no time, since § 59f says: "Creditors, other than original petitioners may *at any time* enter their appearance and join in the petition or file an answer and be heard in opposition to the prayer of the petition," which would seem to indicate that the broadest liberality should be allowed as to the time of such joining.

§ 214. Whether Only Creditors Competent Whose Claims against Debtor Existed at Time of Commission of Act.

It has been held that only creditors who were such at the time of the commission of the alleged act of bankruptcy or who held their right, against the bankrupt at the time, may petition the debtor into bankruptcy; but such ruling is doubtful.

In re Perry & Whitney Co., 22 A. B. R. 772, 172 Fed. 745 (D. C. Mass.).

At any rate the claims need not have been owned by the present creditor at the time of the commission of the act.

In re Perry & Whitney Co., 22 A. B. R. 772, 172 Fed. 745 (D. C. Mass.).

The better rule, however, is that it is only necessary that the debt have existed at the time of the commission of the Act of Bankruptcy, not that the particular petitioning creditor have been at the time a creditor of the bankrupt.

In re Hanyan, 24 A. B. R. 72, — Fed. — (D. C. N. Y.): "There is nothing in this section, or in any other provision of the Bankruptcy Act, requiring that a petitioning creditor should have been one at the time of the Act of Bankruptcy. All that the act requires is that he have a provable claim against the alleged bankrupt when the petition is filed. With entire respect for those who have intimated a different opinion, I am not able to see upon what ground courts have the right to impose additional conditions, not stated in the Bankruptcy Act, upon the right of any creditor having a provable claim to join in an involuntary petition."

§ 215. Relatives, Officers, Directors, etc., Competent Petitioners.

Page 174, note 41. Compare post, § 888.

§ 216. Solicitation by Bankrupt to File Involuntary Petition, or by Creditors Not to Resist Adjudication, Not Improper.

Page 174, note 42. Nor is it improper for a debtor to request creditors to file an involuntary petition. (1867) In re Ordway Bros., 19 Nat. Bankr. Reg. 171.

Page 174, note 43. Creditor's attorney's promise to pay another creditor's claim himself, for joining in involuntary petition, is valid and enforceable against attorney. *Bernard v. Fromme*, 22 A. B. R. 585, 132 App. Div. (N. Y.) 922, 116 N. Y. Supp. 807.

Page 175. A creditor who files a petition in bankruptcy has the right to request others to intervene, especially when such intervention becomes necessary to preserve the proceeds.

In re Smith, 23 A. B. R. 864, 176 Fed. 426 (D. C. N. Y.).

§ 217. Partnership Creditors Competent to Petition against Individual Partner.

Page 175, note 45. See, in addition, *Mills v. Fisher & Co.*, 20 A. B. R. 237, 159 Fed. 897 (C. C. A. Tenn.), quoted at §§ 1291, 2263½. See also, §§ 1291, 1387½, 2268½.

§ 220. Secured Creditors Competent to Extent of Deficit.

Page 175. In re Smith, 23 A. B. R. 864, 176 Fed. 426 (D. C. N. Y.): "I find nothing in the Bankruptcy Act which, even by implication, denies the right to a secured creditor or a judgment creditor to file a petition in bankruptcy against the one owing the debt. * * * All claims may be proved, unless of a

class or classes of which this is not one, and, if there be a partial security by way of lien or otherwise, same may be allowed for the balance over the security, and in certain cases the lien or incumbrance or preference must be surrendered before the claim can be allowed."

Page 175, note 48. Compare post, § 751.

§ 222. Mere Proving of Claims under General Assignment or Receivership No Estoppel.

Page 176, note 50. See, in addition, *In re Canner*, 21 A. B. R. 199 (Ref. Mass.). Apparently contra, except in cases where the debtor has induced the proof by misrepresentation, obiter, *Canner v. Tapper Co.*, 21 A. B. R. 872, 168 Fed. 519 (C. C. A. Mass.), quoted at § 224.

§ 224. And Actual Connivance at or Express Assent to General Assignment May Suffice to Effect Estoppel.

Page 178, note 53. See, in addition, *In re Perry & Whitney Co.*, 22 A. B. R. 772, 172 Fed. 745 (D. C. Mass.).

Express Assent by Mere Agent of Creditor.—Previous assent by agent to other assignments, acquiesced in by creditor, may bind the creditor as to a present assent, where not repudiated. *Stroheim v. Perry & Whitney Co.*, 23 A. B. R. 695, 175 Fed. 52 (C. C. A. Mass.).

But, in any event, where the express assent has been induced by the misrepresentations of the bankrupt, it will not operate as an estoppel.

Page 178. *Canner v. Tapper Co.*, 21 A. B. R. 872, 168 Fed. 519 (C. C. A. Mass.): "That a creditor who has become a party to a general assignment may not ordinarily join as a petitioning creditor in bankruptcy proceedings is settled. * * * Where the petitioning creditor has become a party to the assignment, relying upon the false representations of his debtor, the general rule stated in *Moulton v. Coburn* and in *In re Romanow* does not apply, and the exception to the rule suggested in the former case has its proper application. The false representations thus relied on need not be sufficient to form the basis of an action of deceit. The debtor who offers a general assignment to his creditors is bound to a fair disclosure of his circumstances without concealment or falsehood."

Page 178, note 56. Criticised in *In re Canner*, 21 A. B. R. 199 (Ref. Mass.).

§ 227. Creditors Holding Provable Claims, and Only Such, Competent.

Page 179, note 60. *In re Bevins*, 21 A. B. R. 344, 165 Fed. 434 (C. C. A. N. Y.).

§ 228. Must Be Provable at Time of Filing Petition.

The provability must be at the time of the filing of the petition.

In re Bevins, 21 A. B. R. 344, 165 Fed. 434 (C. C. A. N. Y.).

The claim need not be provable at the time of the commission of the alleged act of bankruptcy, although perhaps the original obligation must have existed in some form at that time.

§ 229. Claims Arising after Filing of Petition Insufficient.

Page 179, note 62. But the mere purchase, after the filing of the petition, of a claim already existing at the time of the filing of the petition, is not prohibited, although compare, apparently though not really contra. *Stroheim v. Perry & Whitney Co.*, 23 A. B. R. 695, this decision being better analyzed as coming under the rule of § 203¼, ante. See further § 203¼.

§ 230. Contingent Claims Insufficient.

Page 179, note 64. In *re Grant Shoe Co.*, 12 A. B. R. 349, 130 Fed. 881 (C. A. N. Y.), affirmed sub nom. *Grant Shoe Co. v. Laird Co.*, 21 A. B. R. 484, 212 U. S. 445.

§ 232. Unliquidated Claims Sufficient if Provable.

Page 180, note 68. See post, §§ 704, 709.

Page 180. Damages for breach of warranty upon a sale of personal property are claims arising on contract, and are provable although the amount thereof is undetermined and although an independent claim purely in tort, for deceit, might also lie.

Page 180, note 69. See, in addition, *Grant Shoe Co. v. Laird*, 21 A. B. R. 484, 212 U. S. 445 (affirming *In re Grant Shoe Co.*, 12 A. B. R. 349, 130 Fed. 881), quoted on other points at § 639½.

§ 234. Attaching Creditors and Other Creditors Obtaining Liens By Legal Proceedings.

An attaching creditor whose lien was acquired within the four months may be a petitioning creditor, for he has a provable claim—merely his lien is null and void.

See post, § 777.

In *re Smith*, 23 A. B. R. 864, 176 Fed. 426 (D. C. N. Y.): "I am not disposed to hold that judgment creditors who have obtained judgments within four months, on discovering that their debtors in fraud of the Bankruptcy Act have disposed of their property, may not abandon remedies by execution and supplementary proceedings in aid thereof and themselves institute bankruptcy proceedings, inasmuch as their liens, if any, fall the moment an adjudication in bankruptcy is pronounced. In view of the fact that all liens created within four months of the filing of the petition fall of their own weight under the provisions of the section quoted, reason and justice dictate that creditors having such liens, on discovering the true condition of the alleged bankrupt, and that the pursuit of remedies under their liens and to enforce same would be unavailing, may institute proceedings in bankruptcy and enforce the provisions of the Bankruptcy Act. If they have reduced their claims to judgment duly docketed, and have thereby created a lien on the

real estate of their creditor, are they compelled to proceed to issue execution, levy and advertise a sale, with full knowledge that other creditors may institute bankruptcy proceedings, and make their efforts and expense fruitless? I think not. Having such a lien, they may file a petition in bankruptcy, and proceed under the law. They know their lien as such is made void by the very act they invoke in case adjudication is made. It is not an experiment with the law, or an attempt to evade it, or to enforce their lien and the Bankruptcy Act at one and the same time. From the necessities of the case, in view of the Bankruptcy Act, it is the honest method to pursue."

§ 235. Validity of Petitioning Creditor's Claim May Be Disputed.

Page 183, note 78. **Other Instances as to Provability of Claims Sought to Be Used in Involuntary Petitions.**—Trust agreement not bill of sale. In re Halsey Elec. Generator Co., 20 A. B. R. 738, 163 Fed. 118 (D. C. N. J.).

§ 236. Withdrawal of Petitioning Creditors.

Leave of court to petitioning creditors to withdraw an involuntary petition will be refused where the creditor's claim was settled by the bankrupt in order to induce withdrawal.

Page 184. Obiter, In re Stovall Grocery Co., 20 A. B. R. 537, 161 Fed. 882 (D. C. Ga.): "Two creditors have withdrawn their claims, leaving the total amount of indebtedness contained in the petition less than \$500. I doubt if this can be done, especially in view of what seems to be the fact that these two claims that were withdrawn were purchased by a son of the members of the bankrupt firm. While the amount paid for the claims is not shown, such conduct, if tolerated, allows an alleged bankrupt, after bankruptcy proceedings have been instituted, to buy up the claims of creditors filing a petition against him, and thereby give the creditors whose claims are so purchased a preference; doing in this way the very thing which it is the purpose of the Bankruptcy Act to prevent."

§ 237. Disqualification of Part of Petitioning Creditors.

Page 185, note 81. See, in addition, In re Crenshaw, 19 A. B. R. 502, 156 Fed. 638 (D. C. Ala.), quoted at § 213.

§ 242. Corporation to Be Brought within Class Subject to Bankruptcy.

Amendment of 1910.—Since the Amendment of 1910 it must be shown that such corporation is either a "moneyed," "business," or "commercial" corporation, and that it is not a "municipal, railroad, insurance or banking corporation."

Bankr. Act, § 4b, as amended in 1910: " * * * and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance or banking corporation. * * * "

§ 243. Natural Persons to Be Shown Not within Excepted Classes.

Page 187, note 91. See, in addition, Conway v. German, 21 A. B. R. 577, 166

Fed. 67 (C. C. A. Md.); impliedly, *Armstrong v. Fernandez*, 19 A. B. R. 746, 208 U. S. 324; impliedly, *In re Crenshaw*, 19 A. B. R. 502, 156 Fed. 638 (D. C. Ala.).

§ 244. Exceptions Not Mere Matter of Defense.

Page 187, note 92. Compare also, *Conway v. German*, 21 A. B. R. 577, 166 Fed. 67 (C. C. A. Md.), quoted at §§ 268, 271.

§ 245. Negating of Exceptions Not Necessarily by Direct Denial but Statement of Actual Occupation Sufficient.

Page 188. *In re Crenshaw*, 19 A. B. R. 502, 156 Fed. 638 (D. C. Ala.): "A further contention is that the petition does not allege that the respondent was not a wage earner or farmer, and therefore it is insufficient. The original petition alleges that the respondent was engaged in trade under the firm name and style of *Crenshaw & Co.*, which clearly implies that he was engaged in some mercantile pursuit, if it does not affirmatively show that he was not a wage earner or farmer." However, the court's statement of the rule is too lax.

§ 247. Insolvency of Individual Partners Whether to Be Alleged in Partnership Cases.

In partnership cases, where insolvency is an essential element of the act of bankruptcy, it has been held that the petition must show not only that the partnership assets are insufficient to pay firm debts, but that the excess of the individual assets of its members over their respective individual indebtedness would not add sufficient assets to make up for the deficiency.

But the contrary has also been held.

In re Everybody's Market, 21 A. B. R. 925, 173 Fed. 492 (D. C. Okla.).

And it would seem, on principle, that the allegation that the debtor proceeded against, namely, the partnership, is insolvent should be all that would be requisite, and that the further question of the insolvency of the individual members would relate merely to the proof as to whether or not the debtor, the partnership, was in fact insolvent.

§ 250. Multifariousness.

Page 190. Whether the bankruptcy court will or will not have jurisdiction over assets of the estate in the possession of a state court receiver, or other court officer, is not an issue that can be raised on the hearing of the petition for adjudication of bankruptcy.

In re Kingsley, 20 A. B. R. 424, 160 Fed. 275 (D. C. Vt.): "It is claimed by the guardian that he holds the property of the bankrupt under the insolvency laws of New Hampshire, which are not suspended by the bankruptcy enactments of Congress and, therefore, this court of bankruptcy cannot administer upon the estate of his ward. It is unnecessary to discuss that ques-

tion now. The real question is that of jurisdiction of the court in adjudging Austin N. Kingsley a bankrupt. Having been a resident of Vermont for a period of more than six months gives him a right to apply to the court of bankruptcy for relief from all of his creditors, whether they are within or without the jurisdiction of Vermont or New Hampshire. The fact that he is under guardianship in New Hampshire and proceedings are pending there in the Probate Court,—a court that has no power to relieve an insolvent debtor except as to creditors residing in that State, or voluntarily coming within its jurisdiction,—does not deprive the bankrupt of seeking the benefits of the national acts of bankruptcy in the Federal court having jurisdiction of the district where the bankrupt has been domiciled for six months previous to the filing of his petition."

§ 257. Petition to Set Forth Essential Facts of Act Charged, Definitely and Certainly.

Page 192, note 115. It has been held essential to allege insolvency at the date of the transfer. *In re Hammond*, 20 A. B. R. 776, 163 Fed. 548 (D. C. N. Y.), quoted at § 262½.

Likewise, as to allegations of the Second Act of Bankruptcy, preferential transfers.

Page 193. *Mills v. Fisher & Co.*, 20 A. B. R. 237, 159 Fed. 897 (C. C. A. Tenn.): "The general averment that the firm of J. H. Fisher and Company have, within four months, 'paid out large sums of money in the settlement of the debts of the firm and thereby making preferences among creditors,' etc., is a vague drag net, specifying no act of preference which under any rule of pleading would justify an adjudication. * * * The dismissal of the petition, so far as an adjudication against the firm is sought, was not error."

In re Pure Milk Co., 18 A. B. R. 735, 154 Fed. 682 (D. C. Ala.): "The averment in the petition that the alleged bankrupt had within four months paid money to one or more creditors, with intent to prefer such creditors over its other creditors, is insufficient as an averment of an act of bankruptcy."

Conway v. German, 21 A. B. R. 577, 166 Fed. 67 (C. C. A. Md.): "The second and third paragraphs of section 4 of the petition were clearly insufficient, the first because too general, in that it did not state of what, or to whom the alleged transfer was made, with intent to give preference to one creditor over another."

And similarly, as to allegations of the Third Act of Bankruptcy—failure to vacate preferential legal proceedings.

Page 193. *In re Hammond*, 20 A. B. R. 776, 163 Fed. 548 (D. C. N. Y.): "The next ground of objection is that the petition states that judgments were suffered to be entered against the bankrupts, but does not state that they were not vacated within five days before a sale or final disposition. * * * The demurrer will be sustained on all three grounds."

Page 193. Thus, likewise, as to allegations of the Fifth Act of Bankruptcy,—written admission of inability to pay debts and willingness to be adjudged bankrupt on that ground.

Conway v. German, 21 A. B. R. 577, 166 Fed. 67 (C. C. A. Md.): "* * * and the second, that they had admitted their inability to pay their debts, if

intended to show the defendants admission of such facts, and the willingness to be adjudicated bankrupts, should have averred that such acknowledgment, as well of inability to pay, as the willingness to be adjudicated bankrupts, was made in writing. (Bankruptcy Act 1898, § 3, sub-section 5.)"

§ 259. Prescribed Bankruptcy Forms to Be Adhered to as Closely as Facts Permit.

Page 195. Where the prescribed forms are followed, or substantially followed, the allegation would, generally, be considered sufficient.

Page 195. Impliedly, *Conway v. German*, 21 A. B. R. 577, 166 Fed. 67 (C. C. Md.), quoted at § 268.

§ 261. Amendments.

Page 195, note 124. See, in addition, *In re Nusbaum*, 18 A. B. R. 598, 152 Fed. 835 (D. C. N. Y.); instance, *In re Hammond*, 20 A. B. R. 776, 163 Fed. 548 (D. C. N. Y.); inferentially, *Ryan v. Hendricks*, 21 A. B. R. 570, 166 Fed. 94 (C. C. A. Wis.); *Conway v. German*, 21 A. B. R. 577, 166 Fed. 67 (C. C. A. Md.), quoted at § 271; instance, *In re Marion Contr. & Const. Co.*, 22 A. B. R. 81, 166 Fed. 618 (D. C. Ky.).

Page 196. *Armstrong v. Fernandez*, 19 A. B. R. 746, 208 U. S. 324: "The errors assigned in reference to the action of the referee and of the court in permitting the amendments of the verification and other amendments we regard as without merit. The power of a court of bankruptcy over amendments is undoubted and rests in the sound discretion of the court. We think there is no abuse of discretion here and that the court was fully justified in its orders in reference to amendments."

Page 196. And, in a proper case, it is error for the court to refuse to permit amendment.

Conway v. German, 21 A. B. R. 577, 166 Fed. 67 (C. C. A. Md.), quoted at § 271.

§ 262. Must Be "Something to Amend by."

Page 196, note 125. See, in addition, *In re Crenshaw*, 19 A. B. R. 503, 156 Fed. 638 (D. C. Ala.). Obiter, *In re Hamrick*, 23 A. B. R. 721, 175 Fed. 279 (D. C. Ga.), quoted on other points at § 264.

§ 262½. Whether Other Acts May Be Added.

The addition of other acts of bankruptcy is not ordinarily permitted.

In re Pure Milk Co., 18 A. B. R. 735, 154 Fed. 682 (D. C. Ala.).

But may be permitted.

In re Nusbam, 18 A. B. R. 598, 152 Fed. 835 (D. C. N. Y.).

And it is a matter within the sound judicial discretion of the court whether to permit amendment by the inserting of additional acts of bankruptcy.

Pittsburg Laundry v. Imperial Laundry, 18 A. B. R. 756, 154 Fed. 662 (C. C. A. Pa.).

It has been held, that where an alleged bankrupt fails to answer or plead to an involuntary petition, it may not thereafter be amended so as to allege acts of bankruptcy prior to the acts of bankruptcy set forth in a second petition.

In re Harris, 19 A. B. R. 204, 156 Fed. 875 (D. C. Ala.).

Indeed, the general allegation of "other preferences" or the general allegation merely that preferential payments have been made, is sufficient to amend by.

Page 196. Impliedly, In re Hammond, 20 A. B. R. 776, 163 Fed. 548 (D. C. N. Y.): "The third ground of objection is that preferential payments are alleged to have been made, but no particular payments are recited, and no allegation is made that any transfer of property referred to was with intent to prefer the creditors to whom the property was transferred. Each of these grounds of demurrer is good in the sense that the objection is as to a jurisdictional fact which must be established in order to keep the estate in bankruptcy, but, inasmuch as other creditors' rights have accrued, and inasmuch as the petition was dated upon the 9th day of April, whereas the transfer in question was made upon the 4th day of April, in order to secure a past indebtedness, and as the petition contains the general statement that preferential payments have been made to creditors while the alleged bankrupts were insolvent, this would seem to be a proper case for amendment of the petition rather than for absolute dismissal."

Of course, this rule does not prohibit the joinder of additional creditors, permitted expressly by the statute; nor does it prevent the insertion of jurisdictional "allegations," as to the nature of the claims, occupation of the debtor, etc., even where totally omitted from the original petition.

State Bank v. Haswell, 23 A. B. R. 330, 174 Fed. 290 (C. C. A. Iowa), quoted at § 269.

§ 264. Acts Occurring within Four Months of Application to Amend, Added.

Page 196. And acts of bankruptcy, occurring within the four months before the filing of the application for leave to amend, may be added.

Page 197, note 127. Instance, In re Nusbaum, 18 A. B. R. 598, 152 Fed. 835 (D. C. N. Y.).

Even though occurring after the filing of the original petition.

In re Hamrick, 23 A. B. R. 721, 175 Fed. 279 (D. C. Ga.): "The additional grounds of bankruptcy set out by amendment in this case are later than the ground stated in the original petition, and counsel have urged that only acts of bankruptcy committed earlier than that originally alleged can be attached by amendment. As I have stated, I think the general order and the decisions on that have no application whatever to a case like this, where only one petition is filed, and the question here as to the allowance of the amendment is controlled by the general rule on the subject of amendments. I think the

special master correctly held that the amendment should be allowed, and also correctly held that the facts did not sustain the original ground of bankruptcy, but did sustain the additional grounds, and that an adjudication should be entered in the case."

§ 265. But Occurring before and Not Originally Referred to, Not to Be Added.

Page 197, note 128. See, in addition, *In re Walker*, 21 A. B. R. 132, 164 Fed. 680 (C. C. A. Calif.). Compare, *In re Harris*, 19 A. B. R. 204, 156 Fed. 875 (D. C. Ala.).

Page 197. *In re Pure Milk Co.*, 18 A. B. R. 735, 154 Fed. 682 (D. C. Ala.): "If the petition originally filed was insufficient in averring an act of bankruptcy, then it in effect averred no act of bankruptcy. Leave to amend may be granted, but will not generally be granted when the proposed amendment would introduce into the petition entirely new acts of bankruptcy. New acts of bankruptcy will not be permitted to be introduced into the petition after the four months' period has expired. A fortiori, where no act of bankruptcy is averred in the original petition, should an act of bankruptcy be permitted to be introduced after the four months' period has expired? * * * Here the petition avers no specific act of bankruptcy and the amendment is founded upon an act which it appears was committed more than four months before the amendment is proposed to be made, which, it seems to me, is a much stronger case against the petitioner's claim than when a new act of bankruptcy is sought to be introduced."

And the same rule applies to intervening petitions.

In re Walker, 21 A. B. R. 132, 164 Fed. 680 (C. C. A. Calif.).

§ 266. Except, Where Two Petitions Consolidated or Pending at Same Time, Earlier Acts in One May Be Adopted into Other.

Page 197, note 129. But, for limitations of rule, see *In re Harris*, 19 A. B. R. 204, 156 Fed. 815 (D. C. Ala.).

§ 268. Failure to Show Requisite Number, and Amount or Nature of Claims Amendable.

Page 198, note 133. See, in addition, *State Bank v. Haswell*, 23 A. B. R. 330, 174 Fed. 290 (C. C. A. Iowa).

Page 199. *Ryan v. Hendricks*, 21 A. B. R. 570, 166 Fed. 94 (C. C. A. Wis.): "The amendments related to the number of the petitioning creditors and the amount and nature of their claims, and to the occupation of the debtor. There is no doubt that at the time the original petition was filed Logerman was a bankrupt and all the conditions existed which made it proper for his estate to be administered under the bankruptcy law. If the original petition failed to set forth these conditions fully and clearly, the court did right in allowing the amendments; and the amendments, when made, related back to the time of the filing of the original petition and had the same effect as if originally incorporated therein."

Conway v. German, 21 A. B. R. 577, 166 Fed. 67 (C. C. A. Md.): "If, by this language of the lower court, it was meant to say that the statement of the

amount and nature of the petitioner's claims as set forth in the petition was insufficient, we are inclined to disagree with the court, as the claims seem to be so stated as to give the defendants a full and clear understanding of what the debts are, and are in substantial conformity with the form prescribed by the supreme court of the United States for use of creditors filing involuntary bankruptcy petitions (Form No. 3). If insufficient, however, the defect could have been remedied by filing an itemized or fuller statement of the petitioner's claim, which is in effect what was asked in the second paragraph of the application to amend, which we think also should have been allowed."

Page 199, note 135. See, in addition, *Conway v. German*, 21 A. B. R. 577, 166 Fed. 67 (C. C. A. Md.), quoted *supra*.

Page 199, note 136. See, in addition, *State Bank v. Haswell*, 23 A. B. R. 330, 174 Fed. 290 (C. C. A. Iowa), quoted at § 269.

Page 199. And it makes no difference that attaching creditors' rights are affected by the amendment.

Page 199. *Ryan v. Hendricks*, 21 A. B. R. 570, 166 Fed. 94 (C. C. A. Wis.), quoted on other point, *supra*.

§ 269. Omission or Defects in So-Called "Jurisdictional" Averments Amendable.

Page 199. *State Bank v. Haswell*, 23 A. B. R. 330, 174 Fed. 290 (C. C. A. Iowa): "This rule is also applicable to cases where jurisdictional facts which existed at the time the original petition was filed are subsequently made to appear for the first time by an amendment."

Page 199, note 140. See, in addition, *Armstrong v. Fernandez*, 19 A. B. R. 746, 208 U. S. 324; *In re Crenshaw*, 19 A. B. R. 502, 156 Fed. 175 (D. C. Ala.); *Ryan v. Hendricks*, 21 A. B. R. 570, 166 Fed. 94 (C. C. A. Wis.), quoted at § 268; *Conway v. German*, 21 A. B. R. 577, 166 Fed. 67 (C. C. A. Md.), quoted at § 271.

Page 200, note 142. See, in addition, *In re Marion Contr. & Const. Co.*, 22 A. B. R. 81, 166 Fed. 618 (D. C. Ky.).

Page 200. And an intervening, joining, petition may be amended to supply jurisdictional facts omitted from the original petition, as well as to supply sufficient joining creditors.

Page 200. *State Bank v. Haswell*, 23 A. B. R. 330, 174 Fed. 290 (C. C. A. Iowa): "The amendment as made in this case did not constitute the petition, within the meaning of § 60. It did not by its terms purport to be a petition. It alleged no new act of bankruptcy. It consisted merely in striking out such allegations of the original petition and substituting such other allegations as were requisite to show the joinder of the necessary parties, authorized by § 59d, and their status as creditors. The original petition then remained as if all the averments of the amendment had been bodily incorporated in it. Congress, by the provisions of § 59, which seems to have been enacted to meet just such condition of things as is disclosed by this record, very manifestly intended, not that the original petition should be supplanted by the amendment there provided for, but that it might be supplemented by the joinder of other necessary creditors. This is made clear, not only by the pro-

visions of subdivision 'd,' but by the provisions of subdivisions 'e' and 'f' of the same section. They all contemplate the retention of the original petition as the pleadings upon which subsequent proceedings should be had. The general rule as repeatedly recognized by this court is: 'That the amendment to a petition which sets up no new cause of action, but merely amplifies and gives greater precision to the allegations in support of the cause of action originally presented, relates back to the commencement of the action.' *Crotty v. Chicago Great Western Ry. Co.* (C. C. A.), 169 Fed. 593, and cases cited. This rule is also applicable to cases where jurisdictional facts which existed at the time the original petition was filed are subsequently made to appear for the first time by an amendment."

§ 271. Amendment May Be Refused.

Page 201. It may be refused where the proposed amended pleading fails to state a cause of action.

Page 201. Compare, analogously (petition to recover preferences), *Johnson v. Anderson*, 11 A. B. R. 294, 70 Nebr. 233.

Page 201. Impliedly, *Pittsburg Laundry v. Imperial Laundry*, 18 A. B. R. 756, 154 Fed. 662 (C. C. A. Penn.): "No reasons for the refusal are stated by the court, but they are readily apparent from an inspection of the amendments proposed, as they all lack the specific particularity requisite to the statement of an act of bankruptcy, or to sufficiently distinguish them from acts not in violation of the bankrupt law. * * * The other assignments of error refer to the refusal of the court below to allow the amendments to the petition above referred to. The whole matter of permitting or refusing amendments, is entirely within the judicial discretion of the court, and, in accordance with the general rule, will not be interfered with by a reviewing court, unless abuse of such discretion has been shown. As the record discloses no ground for such interference in this case, the decree of the court below is affirmed."

Page 201. But, in a proper case, it may be error to refuse to permit amendment.

Conway v. German, 21 A. B. R. 577, 166 Fed. 67 (C. C. A. Md.): "In our judgment, the lower court erred in not allowing the amendment prayed for by appellants, with respect to the points now under consideration. Clearly petitioners should have been allowed to strike out the two sections of their petition referred to, if such action was deemed proper after the demurrer thereto was sustained; and it would not affect the petition if it otherwise contained proper averments, giving to the court jurisdiction, to adjudicate the defendants bankrupts. Sustaining the demurrer as to these two sections of paragraph 4, would not have caused the petition to be dismissed if otherwise sufficient, nor would the appellants have failed in their case, either because they did not sustain the particular averments by proof, or had been allowed to strike them out. The amendment showing that the defendants did not belong to the class subject to be adjudged involuntary bankrupts, in that they were neither wage earners, nor persons engaged chiefly in farming, or the tillage of the soil, should have been allowed. Such an averment so far as this case is concerned, is a mere negative one, and not of a jurisdictional character. There is no contention made here by the defendants that they belong to the inhibited class, and hence cannot be adjudicated bankrupts, and as a matter of fact they do not belong to that class. Were they seeking to come within the inhibited

class, it would be essential for them to make proof of their averment, but they are not, and while technically speaking it should have been stated in the petition, that they were not persons coming within that class, still it was not essential so to do, and in no sense affected the merits of the case, and the amendments desired should have been permitted."

§ 273. Amendment Relates Back to Date of Filing of Original.

Page 202, note 146. See, in addition, *Ryan v. Hendricks*, 21 A. B. R. 570, 166 Fed. 94 (C. C. A. Wis.); *State Bank v. Haswell*, 23 A. B. R. 330, 174 Fed. 290 (C. C. A. Iowa).

§ 274. Cause of Error to Be Stated in Application to Amend.

Page 202. In *re Pure Milk Co.*, 18 A. B. R. 735, 154 Fed. 682 (D. C. Ala.): "Moreover the application to be allowed to amend does not comply with Rule XI. No showing is made why the act of bankruptcy now proposed to be averred was not set out in the original petition."

§ 277½. Who to Verify for Partnership; for Corporation.

Page 203. A member of the firm may verify for a partnership, and the president for a corporation.

Page 203. In *re Walker*, 21 A. B. R. 132, 164 Fed. 680 (C. C. A. Calif.): "It cannot be doubted that, since a corporation must act through some agent, a verification in its behalf may be made by its president. Nor can it be doubted that a member of a partnership may properly verify a claim made on behalf of the firm of which he is a member."

But, doubtless, they are not the sole persons qualified for such purpose.

It is not necessary that the treasurer of a corporation verify an involuntary petition, where the corporation is a petitioning creditor. Such requirement concerns only proofs of debt after adjudication.

Page 203. But the verification should be positive, not on information and belief.

In *re Ball*, 19 A. B. R. 609, 156 Fed. 682 (D. C. N. Y.): "The Petition is to be followed by a verification. 'United States of America, District of, ss.:,,, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition subscribed by them are true.' It would seem from the language of the prescribed form that a petition in involuntary bankruptcy is looked upon in the same light as a complaining affidavit in the matter of a criminal charge. The language 'your petitioners further represent that' is the statement of a conclusion and of an allegation which it is apparent must in all cases be made upon hearsay, information and knowledge derived from sources other than the actual personal knowledge of the party making the petition. The language of the verification is to the effect that the petitioners swear that the statement made by them is true. This statement is that they 'represent' or allege to the court the doing of certain things by the alleged bankrupt. The affiant swears that he charges certain acts against the bankrupt, and he implies that he has verified them so as to be willing to stand by the conse-

quences of his charge. He is not testifying as to what he has seen or done. The verification is not equivalent to an oath that the person making the verification has actual knowledge that certain acts were done, because they occurred in the presence of the petitioner. The oath is not subject to the rules of competency with respect to hearsay testimony. On this account the insertion of the words in a petition, that it is made upon information and belief, neither add to nor detract from the strength of the allegation, and likewise in the verification the additional statement, that the petitioners believe the matters which are stated to be alleged upon information and belief to be true, is mere surplusage, and while the language should not be used, it is no ground for dismissing the petition. The cases cited are not, in the opinion of the court, in contradiction of this view."

See Supreme Court Form No. 3. "..... do hereby make solemn oath that the statements contained in the foregoing petition subscribed by them are true."

§ 280. Amendment of Verification Permitted.

Page 204, note 152. See, in addition, *Armstrong v. Fernandez*, 19 A. B. R. 746, 208 U. S. 324, quoted at § 261.

§ 285. Deposit for Costs.

Page 206, note 161. **Clerk Entitled to \$5 Per Diem Compensation for Days When Voluntary Petitions Referred during Absence of Judge.**—The clerk is entitled to his statutory compensation of \$5.00 per diem for days on which voluntary petitions in bankruptcy filed during the absence of the judge from the district are referred. *United States v. Marvin*, 212 U. S. 275, 22 A. B. R. 717.

§ 293. Petition in District of Domicile First to Be Heard.

Page 213, note 1. See, in addition, *In re Isaacson*, 20 A. B. R. 430, 161 Fed. 779 (D. C. N. Y.); *In re Isaacson*, 20 A. B. R. 437, 161 Fed. 777 (D. C. N. Y.).

Page 213. And the "district of his domicile" is the district wherein he has had his domicile for the preceding six months or the greater portion thereof.

In re Isaacson, 20 A. B. R. 430, 161 Fed. 779 (D. C. N. Y.); *In re Isaacson*, 20 A. B. R. 437, 161 Fed. 777 (D. C. N. Y.).

§ 296. Court Making First Adjudication Retains Jurisdiction.

Page 213, note 6. **Compensation of Receivers (before Amendment of 1910) on Transfer.**—*In re Isaacson*, 23 A. B. R. 98, 174 Fed. 406 (C. C. A. N. Y.).

§ 297. But Court Having Right to Retain, May Relinquish.

Page 214, note 7. Instance where relinquishment refused, *In re Pennsylvania Consol. Coal Co.*, 20 A. B. R. 872, 163 Fed. 579 (D. C. Penn.).

Page 214. *In re Isaacson*, 20 A. B. R. 433, 161 Fed. 779 (D. C. N. Y.): "It may be assumed that General Order No. 6 is subject to the provisions of § 32 of the bankruptcy law, and that the case may be transferred and consol-

idated for the convenience of the parties, if brought within the provisions of § 32, in spite of the direction in the General Order that the court first adjudicating shall retain jurisdiction until the proceedings are closed."

§ 298½. Which Petition to Be First Heard.

General order No. 7 provides:

"Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated."

But this general order No. 7 has no applicability where only one of the petitions is answered at all, for the unanswered petition is then the first to be heard.

In re Harris, 19 A. B. R. 204, 156 Fed. 875 (D. C. Ala.).

§ 304½. Consolidation of Partnership, Corporation and Individual Petitions.

Page 217. Where not only a partnership and its members have been adjudicated bankrupts, but also a corporation, the principal part of whose stock is owned by one of the partners (the corporate entity being, furthermore a mere fiction), even such apparently distinct proceedings have been ordered consolidated.

Salt Lake Valley Canning Co. v. Collins, 23 A. B. R. 716, 176 Fed. 91 (C. A. Mont.).

§ 305. Whether Bankruptcy Proceedings Have Precedence over Federal Equity Proceedings in Same District.

But, unless the equity proceedings come within the rules of superse-dence laid down post, § 1582, et seq., the custody of the res will not be superseded.

Page 218. Compare, In re Ellsworth Co., 23 A. B. R. 284, 173 Fed. 699 (D. C. N. Y.): "The Bankruptcy Act has not superseded the right and power of a court of equity to take charge of the property of an insolvent corporation for the protection of stockholders and creditors, marshal the same, recognize and enforce valid liens and priorities, and equitably distribute the surplus proceeds among its creditors. It is only where a receiver has been

appointed in another court because of insolvency, as that term is defined in the bankruptcy law, or where the corporation on its own initiative has applied for the appointment of a receiver or custodian of its property, that an act of bankruptcy under § 3a, subd. 4, has been committed. This provision of the bankruptcy law must be strictly construed. * * * If the company, while insolvent had voluntarily brought an action to wind up its affairs for the benefit of its creditors and had applied for the appointment of receivers, the superior right of the bankruptcy court could not be questioned." Quoted further, ante, §§ 153, 158, 159.

DIVISION 4.

JOINDER OF DEBTORS WHO ARE NOT PARTNERS.

305¹/₄. Nothing Less than Actual Partnership Sufficient for Joinder of Parties: Nothing Less than an Actual Partnership Will Permit of a Joinder of Parties Defendant.

Page 218, note 23. Compare § 40; also, § 63.

§ 305¹/₂. Inextricable Commingling of Corporate Affairs.

It has been held that where a corporation was organized in one state to take over the business of another corporation in another state and their affairs had become so commingled that they could not be extricated, the two might be joined, and that the court of the district first obtaining jurisdiction over both might retain it.

Page 218, note 24. In re Alaska American Fish Co., 20 A. B. R. 712, 162 Fed. 498 (D. C. Wash.).

And partnership, corporation and individual bankruptcies have been consolidated in cases where the fiction of corporate entity may be ignored.

See ante, § 304¹/₂.

§ 315. Answer Day.

Page 221, note 19. In re Cooper Bros., 20 A. B. R. 392, 159 Fed. 956 (D. C. Pa.).

§ 316. May Be Extended.

Page 221, note 20. In re Cooper Bros., 20 A. B. R. 392, 159 Fed. 956 (D. C. Pa.).

§ 321. Mere Lienholder, unless Also Creditor, May Not Intervene.

Page 223, note 8. Where erroneous averment of less than twelve creditors, intervening creditor to give list if bankrupt fails to do so, see ante, §§ 207, 208.

Page 224. But it has been held that a receiver of a corporation appointed in an equity suit before the bankruptcy on the ground of insolvency, is a competent party to intervene to oppose adjudication.

In re H. R. Elec. Power Co., 23 A. B. R. 191, 173 Fed. 934 (D. C. N. Y.).

But this ruling is not to be approved, because the receiver is merely a custodian of assets, not a rightful party in determining the debtor's status as a bankrupt.

§ 323. Answer.

Either the bankrupt or any creditor may, within five days after the return day or within such further time as the court may allow, appear and plead to the petition.

In re Cooper Bros., 20 A. B. R. 392, 159 Fed. 956 (D. C. Pa.).

§ 324. Demurrer to Petition.

Page 225, note 1. Instance, In re Hammond, 20 A. B. R. 776, 163 Fed. 548 (D. C. N. Y.).

§ 325. Amendment after Demurrer Sustained.

Page 225, note 2. Instance, In re Hammond, 20 A. B. R. 776, 163 Fed. 548 (D. C. N. Y.).

§ 327. Form of Answer.

The answer must be verified.

In re Harris, 19 A. B. R. 204, 156 Fed. 875 (D. C. Ala.).

But verification may be supplied by amendment.

In re Harris, 19 A. B. R. 204, 156 Fed. 875 (D. C. Ala.).

Page 225. **Form of Joining Creditor's Pleading.**—See instance, *State Bank v. Haswell*, 23 A. B. R. 330, 174 Fed. 290 (C. C. A. Iowa): "The requisite number of creditors joined with the original petitioner, as authorized by that section, in an amendment which was filed. This amendment, after averring that the new parties had provable claims against the debtor, stated that they adopted all the averments of the original petition, which remained unchanged by the amendment, the same as though they had originally signed and joined in said 'petition.'"

§ 331½. Demurrer.

The respondent may file a demurrer to the petition. He may demur to one cause of action and answer to another. If he demur and answer to the same cause, the demurrer will be considered waived.

In re Cooper Bros., 20 A. B. R. 392, 159 Fed. 956 (D. C. Pa.).

But if they be filed to separate causes, but overlap, they may both stand, under the aid of Equity Rule 37.

In re Cooper Bros., 20 A. B. R. 392, 159 Fed. 956 (D. C. Pa.).

§ 332. No Demurrer to Answer.

Page 226, notes 10 and 11. See, in addition, *Vitzthum v. Large*, 20 A. B. R. 666, 162 Fed. 685 (D. C. Iowa), quoted at § 1759½.

§ 333¼. Bad Faith of Petitioning Creditors No Ground for Dismissal of Petition.

Bad faith on the part of the petitioning creditors in instituting the proceedings affords no ground for dismissing the petition. The motives of the parties are immaterial. Their rights are absolute.

Not contra, *Lowenstein v. McShane Mfg. Co.*, 12 A. B. R. 601, 130 Fed. 1007 (D. C. Md.). Compare, § 203½.

§ 333½. Nor Is Collusion between Them and the Bankrupt Good Ground.

Nor is the fact that a receiver has been appointed by the bankruptcy court, through collusion between the petitioning creditors and the bankrupt, and in the bankrupt's interest, a ground for dismissing the bankruptcy petition itself.

Coal and Iron Co. v. Steel Co., 20 A. B. R. 151, 160 Fed. 212 (D. C. Ala.).

§ 334¼. Requiring Bankrupt to Attach List of Debts and Assets, Where Insolvency Denied.

Whether the alleged bankrupt who denies insolvency may be required to attach to his answer a list of debts and assets has not been decided in any reported case; but seems to have been the practice, in one case at least.

Young & Holland Co. v. Brande Bros., 20 A. B. R. 612, 162 Fed. 663 (C. C. A. R. I.).

There seems, however, to be no valid objection to the practice, as a means of affording discovery to the petitioning creditors, it being a proper exercise of the discretion of the court, in regulating the pleadings before it, to make the requirement.

Page 228, note 16. See ante, § 179.

§ 346. Receiver May Be Appointed to Make Seizure.

Page 234, note 13. See, in addition, *Faulk v. Steiner*, 21 A. B. R. 623, 165 Fed. 861 (C. C. A. Ala.), quoted post, § 381.

§ 347. On Dismissal, Property to Be Returned without Deduction for Care.

In case the petition is dismissed it has been held in some cases that the receiver must return the property to the defendant intact and that no costs nor expenses can be charged against the defendant for the custody and care; whilst, in other cases, it has been held that not only the expenses of such care and preservation may be charged against the property but even that the expense of selling the perishable property may

be so charged, such being the case notwithstanding the fact that the dismissal was on account of lack of jurisdiction, the lack of jurisdiction not appearing on the face of the petition.

In re De Lancey Stables Co., 22 A. B. R. 406, 170 Fed. 860 (D. C. Pa.).

§ 348. **Respondent Allowed Expenses, Counsel Fees and Damages on Dismissal.**

Page 235, note 15. Hill Co. v. Supply & Equipment Co., 24 A. B. R. 84 (App. Ct. of Ill.).

§ 353. **Only Damages for "Seizure" Not for Instituting Bankruptcy Proceedings.**

Page 237. In re Moehs & Rechnitzer, 22 A. B. R. 286, 174 Fed. 165 (D. C. N. Y.): "The liability on the petitioning creditors bond is for damages caused by the appointment of the receiver. There is no liability for filing a petition in bankruptcy except for the usual costs, unless the petitioners acted without probable cause and maliciously, and in that case the remedy is a suit in the nature of a suit for malicious prosecution."

§ 354. **"Malicious Prosecution" for Wrongful Seizure.**

Page 237, note 26. Obiter, In re Moehs & Rechnitzer, 22 A. B. R. 286, 174 Fed. 165 (D. C. N. Y.).

§ 355. **Property Claimed Adversely Not to Be Seized.**

Property claimed adversely and in the actual possession of the adverse claimant must not be summarily ordered seized.

Page 237, note 27. See post, § 1652, et seq.; § 1796, et seq. Also see post, § 391. And see erroneous decision contra, In re Haupt Bros., 18 A. B. R. 585, 239 Fed. 153 (D. C. N. Y.); also erroneous decision contra, but obiter, In re Berkowitz; 22 A. B. R. 227, 173 Fed. 1012 (D. C. N. J.).

Stipulation between receiver and adverse claimant as to sale of property in adverse claimant's possession. See Ommen, trustee, v. Talcott, 23 A. B. R. 572, 175 Fed. 261 (D. C. N. Y.).

The warrant of seizure must not be taken as giving any greater authority to seize property in the hands of adverse holders than would have existed without such warrant.

Page 239. And such property may not be summarily ordered seized, even though such adverse claimant in possession is being proceeded against as one of the members of the partnership sought to be adjudicated bankrupt, if, in fact, such person is not a partner.

Page 239, note 28. In re Nixon, 6 A. B. R. 693, 110 Fed. 633 (D. C. Mont.).

Though property adversely held may not be summarily ordered seized, yet, if, under a general warrant of seizure, not specifically directed to such property, the receiver or marshal does actually seize

the property, the real owner probably may not regain possession simply on proof of a taking from an adverse colorable possession, but must, on the merits, prove actual right of property or right of possession.

§ 356. Property in Actual Possession of Bankrupt, Though Claimed by Another, Seizable.

Page 239. Property summarily taken by the receiver or marshal from the possession of an adverse claimant must not be sold without the claimant's consent.

§ 358. Compensation and Expenses of Marshal or Receiver on "Seizure."

Page 240, note 35. Recent legislation having put the marshal upon a salary basis, such compensation, probably, if allowed at all, would go to the United States.

Page 240, note 36. **Amendment of 1910.**—The Amendment of 1910 to § 72, which was inserted by the senate, includes the receiver and marshal among those who "shall not in any form or guise receive, nor the court allow" them "any further or other compensation than that prescribed by the act;" so that, apparently, in cases where property is returned to the bankrupt on the dismissal of the petition any allowance to the receiver or marshal is cut off, except commissions on monies disbursed, in accordance with § 48, and the marshal's fees for service of papers and process, etc., in accordance with § 52. However, § 48 is to be construed in the light of its object, which has reference only to allowances out of the assets administered—not to compensation of receivers and marshals taxed as part of the costs against unsuccessful petitioning creditors and others, where the assets are not administered but returned intact to the respondent without adjudication of bankruptcy; therefore, in cases where assets are returned to the respondent on dismissal of the petition without adjudication and without administration, the compensation to be fixed as part of the costs against the unsuccessful petitioner or petitioners, would, it would seem, remain in the discretion of the Court.

§ 359. Jurisdiction to Enjoin after Filing of Petition and before Adjudication.

Page 240, note 37. Perhaps, *New River Coal Land v. Ruffner*, 20 A. B. R. 100, 165 Fed. 881 (C. C. A. W. Va.), quoted at § 1901. But in this case it is not certain whether adjudication had already occurred or not.

§ 363. Notice of Hearing for Injunction.

Page 243, note 43. Compare, inferentially, similar rule as to the appointment of receivers to make seizures, ante, § 346; post, § 381.

§ 365. Likewise Adverse Claimants in Possession.

Page 243, note 46. See, also similar proposition *after* adjudication, post, § 1905.

§ 366. Also Court Officers in Possession.

Page 244, note 50. Perhaps, *New River Coal Land Co. v. Ruffner*, 20 A. B. R. 100, 165 Fed. 881 (C. C. A. W. Va.).

Page 244. Impliedly, *Coal Land Co. v. Ruffner Bros.*, 21 A. B. R. 474, 165 Fed. 881 (C. C. A. W. Va.): "In the act forbidding courts of the United States to stay proceedings in a state court, the courts of bankruptcy are specifically excepted and the bankruptcy law of 1898 expressly confers upon these courts the power to issue injunctions to stay proceedings within this exception."

§ 373. Writ of Ne Exeat Also Available.

Page 246, note 58. Impliedly, *In re Appel*, 20 A. B. R. 890, 163 Fed. 1002 (C. C. A. Mass.); *In re Berkowitz*, 22 A. B. R. 231, 173 Fed. 1012 (D. C. N. J.).

Page 246, note 58. Irregularities cured by nunc pro tunc order. *In re Berkowitz*, 22 A. B. R. 231, 173 Fed. 1012 (D. C. N. J.).

Ne exeat may be issued where the specific bankruptcy provisions of § 9 (b) for the detention of the bankrupt are inadequate, or the remedy under such provisions has already expired.

Thus, a year after the adjudication. *In re Appel*, 20 A. B. R. 890, 163 Fed. 1002 (C. C. A. Mass.).

Page 247. And the bond given under ne exeat republica providing that the bankrupt shall not depart from the jurisdiction except upon leave of the bankruptcy court, is not satisfied by mere attendance when wanted, but requires leave to be obtained before any departure.

In re Appel, 20 A. B. R. 890, 163 Fed. 1002 (C. C. A. Mass.): "Was the learned judge of the District Court right in ruling that the bond given for the bankrupt's release was in effect a bail bond, binding him only to abide the decrees and orders of the District Court when rendered, and in other respects leaving him free to absent himself from the court's jurisdiction? The trustee contended in accordance with the wording of the bond, that it was conditioned upon his remaining constantly within the jurisdiction. An examination of the practice of the English Court in chancery, as set out in the decided cases and in accepted text books, leads us to the conclusion that the bond should receive its grammatical construction, and that it binds the bankrupt not to go into parts beyond the jurisdiction without leave of the court of bankruptcy, *Musgrave v. Medex*, 1 Mer. 49; *Utten v. Utten*, 1 Mer. 51; 2 Dan. Ch. Pr. (6th Am. Ed.), p. 1712. This rule has peculiar application to the case of a bankrupt who is required by the general scheme of the Bankruptcy Act to be constantly on hand in order that he may assist the trustee in his administration of the estate. We hold the decree of the District Court erroneous, and reverse it, because it sets out that the bankrupt's absence from Massachusetts was not a breach of the bond."

§ 377. Receivers.

Page 248, note 65. **Receiver's Attorneys.**—Neither the bankrupt's attorney nor the petitioning creditor's attorney should be selected counsel by the receiver; it has been held, *In re Strobel*, 20 A. B. R. 21, 160 Fed. 916 (C. C. A. N. Y.): "Such selection affords a ready op-

portunity for chicanery, fraud and perjury." Also In re Hill Co., 20 A. B. R. 73, 159 Fed. 73 (C. C. A. Ill.): "The record discloses the further fact that the attorneys for whom the claim is made were actively engaged, throughout the protracted contest in bankruptcy, as attorneys for the petitioning creditors, and were not independent counsel employed by the receiver, within the spirit of the order referred to. It is the general rule that receivers are to select counsel not identified with the interests of one or the other party to the litigation, and for departure from the wholesome rule special circumstances and authorization are needful."

Page 248, note 65. **Bond to Pay Expenses, Where No Assets Shown.**—Where the applicants for the appointment of the receiver show no assets, they may be required to give bond to pay the expenses of the receivership if sufficient assets applicable to that purpose be not discovered. In re McKane, 18 A. B. R. 594, 158 Fed. 647 (D. C. N. Y.).

§ 381. Notice of Application.

Page 251. *Faulk v. Steiner*, 21 A. B. R. 623, 165 Fed. 861 (C. C. A. Ala.): "When the involuntary petition was filed, the petition to appoint a receiver was also filed, and the receiver was appointed immediately, without notice to the alleged bankrupt. No fact is alleged or shown by the record to authorize the appointment without notice. The Bankruptcy Act does not expressly provide that notice shall be given before the appointment shall be made, but it is a general rule that, from the institution of a suit until final judgment, every step that immediately affects the rights of a defendant should be preceded by notice, and with few and well-defined exceptions, no court is justified in appointing a receiver and seizing the property of a defendant without giving him notice and an opportunity to be heard. It is necessary to fairness and justice in all legal procedure that judicial action should be taken in open court on issue between the parties, or after an opportunity for such issue; and a regard for this rule 'will not only insure the rights of litigants, but will also protect from the unjust criticism so often made, and, what is of more importance, will secure the courts themselves against hasty and ill-considered action.' * * * The 23rd Gen. Ord. in bankruptcy provides that: 'In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.' The referee, in the appointment, disregarded the order. * * * It has been doubted if a referee is ever justified in appointing a receiver without notice before adjudication. *Ross-Meeham Foundry Co. v. Southern Car Foundry Co.*, 10 A. B. R. 624, 124 Fed. 403. No principle is more essential to the administration of justice, whether, by a referee or a judge, than that no man should be deprived of his property without notice and opportunity to make his defense. A mistaken notion seems to have grown up in reference to bankruptcy proceedings that they are in some way an exception to this principle. * * * If it be conceded that a case may occur where a referee could lawfully appoint a receiver without notice—a question that it is not necessary now to decide—he is certainly not authorized to disregard the rule of equity procedure as to notice which controls a chancellor when appointing receivers. Under the well-established rule a chancellor will not appoint a receiver without notice except in a case of imperious necessity, when the rights of the petitioner can be secured and protected in no other way. It sometimes becomes necessary for the court to act

without notice to the defendant, when he has absconded, or is beyond the jurisdiction of the court, or cannot be found, or when there is imminent danger of irreparable injury, or when, by giving notice, the very purpose of the appointment may be rendered nugatory."

Page 251. The appointment of a receiver without notice, however, is held not to be the depriving of the bankrupt of his property without due process of law.

Page 251, note 72. But compare, inferentially, *Faulk v. Steiner*, 21 A. B. R. 623, 165 Fed. 861 (C. C. A. Ala.), quoted supra.

§ 383. Bankrupt Quasi Trustee for Creditors.

Page 252. Pending the appointment of a receiver or trustee, the bankrupt himself is quasi trustee of the estate, at any rate after adjudication.

Compare post, § 1807. But compare, "Bankrupt Selling Goods in Usual Course of Business after Filing of Petition," § 1093, note.

§ 384. But One Ground, "Absolute Necessity for Preservation of Estate."

Page 252, note 75. Obiter, *Skubinsky v. Bodek*, 22 A. B. R. 689, 172 Fed. 332 (C. C. A. Pa.), quoted post, § 1544.

Page 252. *Faulk & Co. v. Steiner*, 21 A. B. R. 623, 165 Fed. 861 (C. C. A. Ala.): "We are also required to consider the question whether there is anything in the record, as matter of law, to justify the appointment of a receiver. Aside from the Bankruptcy Act, the appointment of a receiver is an extraordinary remedy, and is granted with great caution and only in cases of necessity. The court acts with extreme caution, and requires a clear case of right and pressing necessity to induce it to make an appointment. Is the rule less strict as to the appointment of receivers in bankruptcy? The Bankruptcy Act was framed with the purpose of securing to the creditors a distribution of the bankrupt's estate at a minimum cost. The policy of the act is one of economy, and to promote this policy, Congress sought to provide against the improvident and unnecessary appointment of receivers. The authority to make the appointment is conferred and limited by the act. There is but one ground stated for the appointment. The act authorizes the appointment of receivers 'upon the application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified.' * * * The petition to appoint the receiver should allege that the appointment is absolutely necessary for the preservation of the estate, and the facts should be stated either in the sworn petition, or in accompanying affidavits showing the necessity. The record falls far short of this rule, both as to averment and proof. Neither the petition, the affidavit accompanying it, the order of appointment, nor other parts of the record show that the appointment was absolutely necessary for the preservation of the estate. In a replication filed in a subsequent proceeding, it is alleged that *Faulk & Co.* agreed with *Steiner* and others that the involuntary petition should be filed and a receiver appointed. This feature of the case will be referred to later. It is sufficient at this point to say that the order appointing the receiver does not purport to have been made by consent, and the record

nowhere shows such agreement to have been made. We think it appears from the record that the appointment was improvident, and in opposition not only to the form but to the substance of the law. We are of opinion that the District Court erred in refusing to discharge the receiver."

In *re Oakland Lumber Co.*, 23 A. B. R. 181, 174 Fed. 634 (C. C. A. N. Y.): "The power to take from a man his property, without giving him an opportunity to be heard, is both arbitrary and drastic and should not be exercised except in the clearest cases. Congress recognized the necessity for caution by limiting the appointment of receivers to cases where it is 'absolutely necessary' for the preservation of the estate. In other words, the reason for such an interference with the rights of property must be clear, positive and certain. Of course cases frequently arise where this remedy may be necessary—cases where there is reason to believe that the property may be stolen or secreted or turned over to favored creditors. But fraud cannot be presumed, neither can danger to the property be predicated, of acts which are honest and lawful. It cannot be presumed that an assignee under a State law intends to plunder the fund he is appointed to administer. Unless something be shown to the contrary the presumption is persuasive that during the interval between the filing of the petition and the appointment of a trustee, the property will be entirely safe in the hands of the assignee, especially if he be enjoined from disposing of it *pendente lite*. We are informed that it has grown into a well-established custom for the attorney for the petitioning creditors, when he files his petition, to apply at the same time for the appointment of a receiver, and that the application is usually granted. If such a practice exists we see nothing in the law to warrant it. It seems to us that the rule which obtains in all other jurisdictions where receivers are appointed is equally applicable to courts of bankruptcy, and that in no case should a remedy so far reaching in its effects be resorted to except upon clear and convincing proof. Cases have not infrequently come within the observation of the court where, after a receiver was appointed, the petitioning creditors were unable to establish their own status or to prove an act of bankruptcy, and the petition was dismissed, leaving the court with a receiver on its hands, with no proceeding *in esse* and no funds with which to pay him and the expenses incurred by him. Again, the appointment of a receiver creates an additional official to be paid from the estate. Nothing contributed so much to bring about the repeal of the Act of 1867 as the large expense of administration, the small estates being entirely absorbed in fees. The more economical the administration of the present act the longer will it continue as an important adjunct to trade and commerce. All these reasons combine in requiring that the power to appoint receivers should be exercised not as a matter of course, but cautiously, circumspectly, and always upon proof that the appointment is 'absolutely necessary.'"

Page 253. The expense of a receivership should be avoided if at all possible.

In *re Oakland Lumber Co.*, 23 A. B. R. 181, 174 Fed. 634 (C. C. A. N. Y.), quoted *supra*, § 384.

Resort to injunction should rather be had, wherever such remedy will be adequate.

Impliedly, In *re Oakland Lumber Co.*, 23 A. B. R. 181, 174 Fed. 634 (C. C. A. N. Y.), quoted *supra*. But compare *In re Huddleston*, 21 A. B. R. 669, 167 Fed. 428 (D. C. Ga.).

An assignment for creditors or a receivership is not a good ground in and of itself before adjudication; for the assignment or receivership is not nullified until adjudication and the custody of the State court, without its own consent, may not be disturbed until then.

Page 253. In re Spalding, quoted in In re Oakland Lumber Co., 23 A. B. R. 181: "The question here presented was, upon facts substantially identical, decided by this court in In re Spalding, in May, 1905. As the opinion was delivered orally and has not been reported, we quote it at length: 'The fundamental error in the argument for the receiver and of the learned court below seems to be that both regard it as proper that a receiver should be appointed, practically as a matter of course, in every case where a petition in bankruptcy is filed. That is not the law and it is not good sense. The court has jurisdiction under the statute to appoint receivers only when it shall find it absolutely necessary for the preservation of estates. The petition upon which this receivership was granted not only fails to show that it was absolutely necessary, but shows affirmatively that it was absolutely unnecessary, as it shows the property to have been in the custody of a receiver appointed by the Supreme Court of the State of New York, and there is nothing in the record to show that the State court receiver is not an entirely proper and competent person to preserve the assets. What could the Federal receiver do under such circumstances? He has not title to any property. He is a mere custodian. He could not take the assets from the State court receiver. The bankruptcy court could not make any such order and the assets could only be taken from the State court receiver by an application in the State court itself. Furthermore, this appointment of receivers, as of course, is a great injustice to the bankrupt in the event that the petition is not followed by adjudication. And it is wasteful and an unnecessary expense to the estate in the event that there is an adjudication. The papers on this application are wholly inadequate. The order is reversed with instructions to vacate the receivership.'"

Page 253. Consent of the bankrupt to the appointment of the receiver will not obviate the requirement that such receivership must be "absolutely necessary for the preservation of the estate."

Faulk v. Steiner, 21 A. B. R. 623, 165 Fed. 861 (C. C. A. Ala.): "The Bankruptcy Act makes no provision for the appointment of a receiver in bankruptcy by the consent of the alleged bankrupt. The appointment, by the terms of the act, is only authorized when it is absolutely necessary for the preservation of the estate. * * * The creditors, therefore, are the parties chiefly interested in avoiding the expenses of an unnecessary receivership. It was not intended, we think, that the bankrupt, by his consent, could remove the limitation of the statute, and authorize the appointment of a receiver where it was not necessary for the preservation of the estate. Provisions of the act for the protection of the bankrupt cannot be waived by him if such provisions also serve to protect the bankrupt's creditors. In re Sarsar (D. C.), 9 Am. B. R. 576, 120 Fed. 40. In Whelpley v. Erie Ry. Co., 6 Blatchf. 271, Fed. Cas. No. 17,504, it was claimed that a party was estopped by consenting to the appointment of a receiver. Nelson, Circuit Justice, held: 'I do not assent to this view. The company waived the notice which is required by the rules and practice of this court before an injunction can be issued; but the order for the injunction, and for the appointment of a receiver, depended upon the judg-

ment of the judge who granted them. Indeed, I am not prepared to admit that an order for an injunction, or a receiver, can be made in an improper case, even with the consent of both parties, more especially where the rights of third persons may be concerned.' The agreement of the alleged bankrupt that a receiver should be appointed—if such agreement has been made—should not, under the circumstances, be permitted to affect the rights of opposing creditors."

But, compare, *loose statement*, *In re Huddleston*, 21 A. B. R. 669, 167 Fed. 428 (D. C. Ga.): "After adjudication of voluntary bankruptcy, an application by creditors, in which the bankrupt unites, to appoint a receiver or custodian to preserve the assets of the estate, otherwise wholly unprotected, will usually be granted, especially in the absence of any charge of fraud or collusion, and where the creditors and other persons interested make no objection whatever. When a receiver is designated by the court, the subsequent election by the creditors of the same person as trustee is evidence of the fitness and competency of such person."

§ 384½. Who Eligible?

Page 253. The same rule should apply, in general, to the selection of a receiver, as to that of a trustee. (See post, § 887, et seq.) Thus, it has been held that where the appointment of a receiver has been brought about by the active interference and procurement of the bankrupt, the appointment will be set aside, no matter how high be the character or capacity of the person thus appointed; and this rule states sound doctrine and is a safe rule for guidance in the delicate and responsible matter of such appointments.

Coal and Iron Co. v. Steel Co., 20 A. B. R. 151, 160 Fed. 212 (D. C. Ala.): "There can be no question that in such cases as this, where it is shown that the appointment of a receiver or trustee in bankruptcy is brought about by active interference and procurement of the bankrupt, the appointment of the same will be set aside on proper petition and showing to the court, it matters not how high the character or capacity of the receiver or trustee may be who is so attempted to be procured by the bankrupt. As is said by Lochren, District Judge, in the case of *In re Hansen* (D. C.), 19 Am. B. R. 237, 156 Fed. 717: 'It is well settled by all the authorities that the trustee represents the creditors, and not the bankrupt, in the administration of the estate; and that it is improper that the bankrupt shall actively interfere with the matter of his selection and appointment; and that if he does interfere, and the person aided by him is appointed by votes procured by such interference, the appointment should for that reason be disapproved. * * *' What is said here as to the application of this principle to trustees must of course apply with much more force to receivers, for whom the court alone is responsible. Many cases to the same effect might be cited, and I have found none contrary to the principle announced in the *Hansen* case, *supra*. The rule is based on sound reason, and is a salutary one. It often becomes the duty of the receiver directly to antagonize the bankrupt by efforts to discover secreted assets. Surely, then, there should be no color of basis for any suspicion of partiality or sense of obligation on the part of the receiver toward the bankrupt."

However, in some instances, it may be almost imperative to appoint a partisan of the bankrupt as receiver; as, for example, in cases of assign-

ments or receiverships before bankruptcy; for, in such cases, the assignment or receivership not being void until adjudication, the assignee or receiver of the State court must be left in charge until adjudication. Frequently it is of advantage to appoint such assignee or receiver, as receiver in bankruptcy, that he may be under the direct control of the bankruptcy court.

See post, § 889. Also see instance where prior receiver in State court was elected trustee in bankruptcy and yet trouble arose. *Loveless v. Southern Grocery Co.*, 20 A. B. R. 180, 159 Fed. 415 (C. C. A. La.).

§ 385. Powers and Functions of Receivers, in General.

Page 253, note 77. See, in addition, *In re Harris*, 19 A. B. R. 635, 156 Fed. 875 (D. C. Ala.); *In re Rubel*, 21 A. B. R. 566, 166 Fed. 131 (D. C. Wis.).

Bankruptcy Court Authorizing Receiver to Stipulate with Adverse Claimant for Sale of Property.—The bankruptcy court may authorize the receiver to make a stipulation for sale by an adverse claimant of property in the latter's possession. *Ommen, Trustee, v. Talcott*, 23 A. B. R. 572, 175 Fed. 261 (D. C. N. Y.).

Page 254. Their duties are preservative rather than administrative.

Skubinsky v. Bodek, 22 A. B. R. 689, 172 Fed. 332 (C. C. A. Pa.): "Until after an adjudication the function of a receivership is not administrative of the estate in bankruptcy, but is solely preservative. And this is equally true whether receivers in bankruptcy are or are not authorized by the court to conduct the business of alleged bankrupts for limited periods * * * the granting of such authority and action thereunder prior to an adjudication of bankruptcy can in no legitimate sense be deemed 'process of administration of the estate under the act.'"

Thus, receivers have no power to voluntarily surrender property in their custody.

Inferentially, *Whitney v. Wenman*, 14 A. B. R. 45, 198 U. S. 552, quoted at § 1801; *In re Rose Shoe Mfg. Co.*, 21 A. B. R. 725, 168 Fed. 39 (C. C. A. N. Y.). See post, § 1801.

Page 254, note 78. Inferentially, *In re Harris*, 19 A. B. R. 635, 156 Fed. 875 (D. C. Ala.). But compare obiter, as to curing sale, after trustee elected, by order of confirmation, *In re Fulton*, 18 A. B. R. 591, 153 Fed. 664 (D. C. N. Y.).

Page 254. *In re Harris*, 19 A. B. R. 635, 156 Fed. 875 (D. C. Ala.): "But I further stated in that case that this was confined only to such cases in which it was clear to the court that the property was, in fact, perishable in part or in its entirety, or would greatly deteriorate if held without a sale, and that only that portion which was of such nature could be ordered sold. Now, under these circumstances the receiver is not a general receiver, as designated by the courts in chancery under the common law, but he is a statutory receiver, clothed with the limited powers of the statute under which his receivership was created, and he cannot by the very terms of the statute go beyond the respective powers conferred upon him by the statute itself."

Page 254, note 79. **Receiver Subject to Subpœna, as Any Other Witness.**—Compare, to this general effect, *Graphophone Co. v. Leeds & Catlin*, 23 A. B. R. 337, 174 Fed. 158 (U. S. C. C.).

§ 386. Receivers May Sell Perishable Assets.

Page 254, note 80. As to meaning of "perishability," see post, § 1944.

Page 254. Receivers may be ordered by the referee to sell perishable assets.

In re Kelly Dry Goods Co., 4 A. B. R. 528, 102 Fed. 747 (D. C. Wis.); In re Garner Co., 18 A. B. R. 728, 153 Fed. 914 (D. C. Ala.).

But the court will first satisfy itself that the assets are really perishable.

In re Harris, 19 A. B. R. 635, 156 Fed. 875 (D. C. Ala.).

§ 386½. Whether May Sell Otherwise.

Page 255. It is clear the receiver may sell assets when ordered to conduct the business or when the assets are perishable, as appears from the preceding and succeeding paragraphs. But whether he may sell under other circumstances is doubtful, at any rate before adjudication.

But contra, In re Becker, 3 A. B. R. 412, 98 Fed. 407 (D. C. Pa.), quoted at § 385. Compare, In re Kelly Dry Goods Co., 4 A. B. R. 528, 102 Fed. 747 (D. C. Wis.). Compare, In re Kolin, 13 A. B. R. 533, 134 Fed. 557 (C. C. A. Ill.). Also, see § 1943.

Certainly he may not do so without the consent of the bankrupt. And even the bankrupt's consent may not be sufficient; for other creditors have the right to intervene and become parties. Furthermore, it is a requirement under the present act that there shall be ten days notice by mail given to all creditors of all proposed sales (§ 58), to which the only possible exceptions are those of perishable property, under the Supreme Court's General Order 18, and sales while conducting the business. In case of non-perishable property, especially real estate, an order of court not based upon such notice would be irregular, though possibly the defect could be cured by subsequent proceedings for confirmation of the sale, upon notice to creditors, after adjudication and election of the trustee. Nevertheless, such attempted sales before adjudication are generally found to carry in their train complicated questions that render them exceedingly unsatisfactory in actual practice. And, in practice, it is usually found that, after all, the comparatively little delay occurring before the election of a trustee does not seriously impair the nonperishable assets, although litigants frequently are unduly anxious on that account.

At any rate a sale by a receiver without order of the court conveys no title.

In re Fulton, 18 A. B. R. 591, 153 Fed. 664 (D. C. N. Y.): "Further, although the point has not been urged, it does not seem that the receiver should have attempted to make a sale of the lease in question. Matters relating to rent or the possession of the property should be attended to by the receiver, and the

appointment of a trustee should be facilitated in every way, in order that the title to the chattel real may devolve upon the trustee as soon as possible. It might be argued that a sale could be had by order of the court before the election of a trustee, and confirmatory deeds given thereafter. The title of the trustee relates back to the adjudication in bankruptcy, and he could be directed to execute a conveyance in order to carry out the terms of a sale. But nevertheless it is apparently certain that a sale of a chattel real by a receiver without the express direction of the court conveys no title. The defect in the sale cannot be cured by a motion to confirm the sale and to quiet adverse claims to the property sold."

A sale by a receiver after adjudication but before the appointment of a trustee has been attacked on the ground that the trustee was the only one who could convey title, since, on his qualification, his title reverts to the date of adjudication; but this position has been held untenable, on the ground that it is the court in either event that makes the sale.

In re Maloney, 21 A. B. R. 502 (Sup. Ct. D. of C.), quoted at § 1950.

§ 387. May Continue Business, but Only for "Limited Period."

Page 255, note 82. Instance, In re Restein, 20 A. B. R. 832, 162 Fed. 986 (D. C. Pa.); obiter, Skubinsky v. Bodek, 22 A. B. R. 689, 172 Fed. 332 (C. C. A. Pa.).

Page 255. Compare, to this general effect, In re Lisk, 21 A. B. R. 674, 167 Fed. 411 (D. C. N. Y.): "To allow the receivers to conduct the business of the bankrupt for a prolonged period to the exclusion of rights of creditors demanding the right given them by the Bankruptcy Act to elect a trustee and administer the estate, is unwarranted."

Page 255. Yet an order for the conducting of the business may not be collaterally attacked.

In re Isaacson, 23 A. B. R. 98, 175 Fed. 292 (C. C. A. N. Y.).

And it rests in the discretion of the court.

In re Isaacson, 23 A. B. R. 98, 175 Fed. 292 (C. C. A. N. Y.).

Amendment of 1910.—One of the abuses to which the administration of insolvent estates is peculiarly susceptible is that of the prolonged conducting of business by the officers of the court. This evil the framers of the Bankruptcy Act attempted to avoid, by requiring that such conducting of the business should be only for a "limited period." However, this limitation did not fully effect its object, and the abuse of long continued receiverships in the conducting of business continued, with the result that the administration of bankrupt estates in some sections of the country came to be almost wholly carried on by receivers appointed by the court, rather than by trustees elected by creditors, at great additional expense to the estate, creditors at the same time being debarred from investigation into the affairs of their debtor. Frequently, also, such prolonged con-

tinuing of business under receiverships was connived at by the bankrupt, especially in cases of corporations, for the purpose of delaying and tiring out creditors and reorganizing the corporate affairs at their expense. One of the objects of the Amendment of 1910, limiting the compensation of receivers for the conducting of the business was precisely to prevent this abuse of prolonged court custody and to hasten the turning over of insolvent estates to the trustees elected by creditors, for administration.

See Senate Judiciary Report No. 691, of the 61st Congress, 2nd Session, quoted at § 2116.

§ 388. Expense of Continuing Business.

Page 255, note 83. See, in addition, *In re Clark Coal & Coke Co.*, 23 A. B. R. 273, 173 Fed. 658 (D. C. Pa.), quoted at § 1996.

Page 255, note 84. See, in addition, *In re Clark Coal & Coke Co.*, 23 A. B. R. 273, 173 Fed. 658 (D. C. Pa.), quoted at § 1996.

It has been held, in one case, that where a receiver persisted in carrying on the business of the bankrupt, that of a restaurant keeper, for nearly a year at a weekly loss of \$100, without keeping proper account books, with an officer of the bankrupt in control of the moneys and without a proper bank account or separation of his private funds from the funds of the receivership, his account would be surcharged with a part of the loss.

In re Consumers Coffee Co., 20 A. B. R. 835, 151 Fed. 933 (D. C. Pa.).

But, in general, a receiver in bankruptcy should not be surcharged for losses on sales during his continuance of the business.

In re Isaacson, 23 A. B. R. 98, 175 Fed. 292 (C. C. A. N. Y.).

§ 388½. Additional Compensation for Continuing Business.

The receiver may be allowed additional compensation for conducting the business of the bankrupt.

Bankr. Act, § 2 (5): "Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estate, and allow such officer additional compensation for such services, as provided in section forty-eight of this act."

Amendment of 1910.—But by the Amendment of 1910 this compensation is limited to commissions on moneys disbursed by him or realized from property turned over in kind by him—at any rate, so far as any allowance out of the assets is concerned.

Bankr. Act as amended 1910, § 2 (5), § 48 (e), § 72; see post, § 2118, et seq.

However, such limitation of compensation has reference to allowance out of the estate, so that, in the event of dismissal of the petition with-

out adjudication, it is possible that other compensation than that by way of commissions or moneys disbursed may be charged against the petitioning creditors by way of costs, the obvious intent of Congress in limiting the compensation being to protect helpless insolvent estates from depletion through extravagant allowances therefrom.

§ 389. Power to Borrow Money, and Issue Receiver's Certificates.

When authorized by order of court, receivers may borrow money and issue receiver's certificates.

Impliedly, *In re Alaska Fishing, etc., Co.*, 21 A. B. R. 685, 162 Fed. 498 (D. C. Wash.). *Obiter*, compare, *In re Clark Coal & Coke Co.*, 23 A. B. R. 273, 173 Fed. 658 (D. C. Pa.). Also compare, *In re Clark Coal & Coke Co.*, 22 A. B. R. 843, 57 Pittsb. Law J. 205.

Priorities between Holders of Receiver's Certificates and Others Who Have Sold Supplies, etc., to Receiver.—*In re Restein*, 20 A. B. R. 832, 162 Fed. 986 (D. C. Pa.). Compare, *In re Erie Lumber Co.*, 17 A. B. R. 687 (D. C. Ga.).

Also between Holders of Receiver's Certificates and Lienholders.—*In re Alaska Fishing, etc., Co.*, 21 A. B. R. 685, 162 Fed. 498 (D. C. Wash.). Compare post, § 1996.

Page 256. *In re Restein*, 20 A. B. R. 832, 162 Fed. 986 (D. C. Pa.): "All the authorities sustain the proposition that the court in bankruptcy has power to authorize a receiver to borrow money and issue certificates therefor and conduct the business for the purpose of preserving the assets of the bankrupt's estate. In this case the order was made because it was urged upon the court that it was necessary to do so to realize on the prospective asset, which all parties concerned agreed could be made out of the contracts which the bankrupt had with the United States government, so that the certificates were properly issued."

§ 390½. Compensation for Making Seizure.

The receivers are entitled to compensation for making seizure.

See Bankr. Act as amended in 1910, § 48 (d); quoted post, § 2132½.

Amendment of 1910.—Such compensation, where adjudication follows, is to be confined to commissions upon moneys disbursed or realized from property turned over to the trustee, in accordance with the rates prescribed in § 48 (d), with this additional proviso, that where the receiver is a "mere custodian" he receives a lesser rate of commissions. [See post, § 2132 (b).] What constitutes being a "mere custodian" is not clear, although the apparent wording of the proviso to the amendment, § 48 (d), would seem to indicate that the receiver or marshal is to be considered a "mere custodian" whenever he "does not carry on the business of the bankrupt." However, the question as to when the receiver is or is not a "mere custodian" is open. Doubtless there may be instances arising where a receiver or mar-

shal who does not "carry on the business of the bankrupt," may yet be more than a "mere custodian." The proviso limiting compensation of the custodian was meant to cover cases where the services performed were merely those of a "keeper."

See Report of Hearings before the Sub-Committee of the Senate Judiciary Committee on House Bill 20575 to Amend the Bankruptcy Act, Sixty-First Congress, Second Session.

§ 391. May Not Seize Property Held Adversely.

Page 256, note 86. See similar proposition, ante, § 355; also, compare post, § 1652, et seq., and § 1796, et seq. Contra, *In re Haupt Bros.*, 18 A. B. R. 585, 153 Fed. 239 (D. C. N. Y.); contra, *In re Garner & Co.*, 18 A. B. R. 733, 153 Fed. 914 (D. C. Ala.), wherein the court even ordered the property sold! Contra, but obiter, *In re Berkowitz*, 22 A. B. R. 227, 173 Fed. 1012 (D. C. N. J.).

Stipulation between receiver and adverse claimant as to sale of property in adverse claimant's possession. See *Ommen, trustee, v. Talcott*, 23 A. B. R. 572, 175 Fed. 261 (D. C. N. Y.).

Page 256, note 88. **When Contempt for Disobedience of General Order to Turn Over Books, etc., Made in Order of Appointment of Receiver.**—It has been held that a mere general order for the bankrupt to turn over all books, assets, etc., to the receiver, contained in the order of appointment of the receiver, is not sufficient to predicate contempt for disobedience, where the agent representing the receiver on the demand had no written credentials other than the order itself. *Skubinsky v. Bodek*, 22 A. B. R. 699, 172 Fed. 332 (C. C. A. Pa.).

§ 395. Receiver Going into Other District than That of Appointment.

And it has been held that receivers may not go out of the jurisdiction of their appointment and institute actions, nor do any other official act.

Page 257, note 92. *In re Schrom*, 3 A. B. R. 352, 97 Fed. 760 (D. C. Iowa). Compare post, § 1705, et seq.

Page 258. *In re Benedict*, 15 A. B. R. 232, 140 Fed. 55 (D. C. Wis., citing *Booth v. Clark*, 17 How. 327, and *Hale v. Allinson*, 188 U. S. 56): "In *Great Western Mineral & Manufacturing Co. v. Harris*, 198 U. S. 561, Mr. Justice Day, delivering the opinion, fully sustains the authority and reasoning of this early case, and commits the court again to the doctrine that the receiver in whom the title to assets has not been vested, but who relies upon his authority as an officer of the court, has no authority to do any official act outside the jurisdiction of the court appointing him."

Page 258. *In re Dunseath & Son Co.*, 22 A. B. R. 75, 168 Fed. 973 (D. C. Pa.): "The weight of authority is that the receiver appointed by the District Court of one district cannot maintain an action in the District Court of another district to recover the assets in the hands of strangers. The extra-territorial power of a receiver was carefully considered in the case of *Clark v. Booth*, 17 How. 327, * * *, and it was there decided that the receiver possessed no such power. This case was referred to in the case of *Hale v. Allinson*, 188 U. S. 56, * * *, where Mr. Justice Peckham, in commenting on the case of *Clark v.*

Booth, said: 'We do not think anything has been said or decided in this court which destroys or limits the controlling authority of that case.'"

But it has also been held that they may, when authorized by the court appointing them, go into other districts and there institute actions. (See post, § 1705, et seq.) But even so, they may only do so when specially authorized by the court appointing them.

In re National Mercantile Agency, 12 A. B. R. 189 (D. C. Pa.): "As is well known a receiver has such power only as the court that appoints him chooses to give and unless he is authorized to leave the court of original jurisdiction and sue elsewhere, he is not competent to bring such a suit."

And authority so to do before adjudication was refused a receiver in one case.

In re Schrom, 3 A. B. R. 352, 97 Fed. 760 (D. C. Iowa).

§ 397. Effect of Dismissal of Petition on Receivership.

Page 259, note 97. **Court Vacating Receivership.**—In re Church Construction Co., 19 A. B. R. 549, 157 Fed. 298 (D. C. N. Y.).

§ 398. Costs and Expenses of Receiver Taxable against Petitioning Creditors.

Where a receiver has been appointed, the costs and expenses of the receivership are taxable against the petitioning creditors.

To same effect, obiter, In re Church Construction Co., 19 A. B. R. 549, 157 Fed. 298 (D. C. N. Y.). Compare, In re Hill Co., 20 A. B. R. 73, 159 Fed. 73 (C. C. A. Ill.), quoted at § 398½.

Amendment of 1910.—Since the Amendment of 1910, limiting the compensation of the receiver to commissions upon actual amounts disbursed by him or upon moneys realized from property turned over in specie to the trustee, the question arises as to what compensation may be allowed a receiver where no disbursements are made by him and where no adjudication takes place, and consequently no trustee is appointed. Doubtless, the proper construction of § 48 would be that that section is only applicable to cases where administration of assets is had, the obvious intent of the amendment being to avoid the abuse of extravagant allowances out of helpless insolvent estates, which was the immediate cause of the passing of this amendment.

The administration of insolvent estates differs from other forms of litigation. In other litigations there are two adversary parties, sitting on opposite sides of the trial table, each watching the other's every movement. But insolvency administration is peculiar in this, that there is ordinarily a large number of parties interested, sometime scores and hundreds of them, scattered far apart and in distant parts of the country, each one of whom is interested in the estate, to be sure, but each one of

whom has but a comparatively small share therein. "What is everybody's business is nobody's care," so it has come to be true that there is nothing more helpless than an insolvent estate: it is the easy prey of the rapacity of unscrupulous attorneys, of misinformation on the part of the court, and of over-estimation of the worth of services rendered on the part of officers in charge of the administration.

The reason of the law fails where there is an alert and adversary party, such as the petitioning creditor, against whom the allowance of compensation is to be fixed. Where there are no assets for administration, obviously there can be no allowance, for lack of a subject out of which to grant allowance.

In the case supposed, however, the receiver would only be a "mere custodian," in any event, since the assets would not be administered nor the business conducted, and he would, therefore, even if § 48 were applicable and the assets be wholly converted into money, be restricted to the very meagre compensation of 2 per cent on the first \$1,000 and one-half of one per cent on amounts above that sum, to which the "mere custodian" is limited by the Amendment of 1910.

§ 398¼. Whether Receivership Expenses Payable Out of Assets on Dismissal of Petition.

It has been held that the expenses and compensation of the receiver may be paid out of the assets on dismissal of the petition, and that this is so, notwithstanding the dismissal was on the ground that the debtor was a corporation of a class not subject to bankruptcy.

In re T. E. Hill Co., 20 A. B. R. 73, 159 Fed. 73 (C. C. A. Ill.): "On behalf of this assignee it is contended that he is entitled to the corporate assets 'without any deduction for the expenses of the receivership'—in effect, that it was not within the power of the court, after dismissal of the petition for adjudication of bankruptcy, to award payment for expenses or compensation of the receiver out of the funds in the custody of the court. The only reviewable question under his petition rests on this broad proposition, and it cannot be upheld, as we believe, when the jurisdiction of the District Court over the subject-matter is ascertained and recognized. Upon the filing of the petition for an adjudication of bankruptcy against the corporation and service of process, jurisdiction over parties and subject-matter was established (First National Bank of Denver v. Klug, 180 U. S. 202, 204, 8 Am. B. R. 12, and cases cited), and was complete for the hearing and determination of all the issues involved, whatever the ultimate conclusions of the court upon such issues. In re First National Bank of Belle Fourche, 18 Am. B. R. 265, 152 Fed. 64, 68, * * *, Columbia Ironworks v. National Lead Co., 11 Am. B. R. 340, 127 Fed. 99, 101. So, under § 2 (3) of the Bankruptcy Act, * * *, the power and duty of the court, in such case, is unquestionable, to appoint a receiver, when found necessary for preserving the estate in controversy, 'to take charge of the property * * * after the filing of a petition and until it is dismissed, or the trustee is qualified.' This preservation of res and statu quo is an elementary requirement in bankruptcy, when ground appears for the exercise of such

power, and until the issues are decided the jurisdiction is exclusive. The receiver, upon appointment and acceptance, becomes the officer and hand of the court in performance of his duties, neither subject to the wishes or directions of the parties, nor dependent upon the result of the controversy for payment of expenses or services; and he is clearly entitled to protection by the court, in the exercise of such jurisdiction, for all expenses rightly incurred and services rendered under its orders, either in allowances out of the funds committed to his charge, or through provision otherwise made by the court to that end. The rule thus settled in reference to receivers in equity (High on Receivers, § 796, and Smith on Receiverships, § 350), applies with special force for protection of these statutory receivers. While it is the undoubted purpose of the statute to limit the functions of the receiver in bankruptcy (Boonville Nat. Bank *v.* Blakey, 6 Am. B. R. 1, 107 Fed. 891, 894), and his performance must be confined to the statutory requirements and directions of the court thereunder, the authority vested in the court is ample, as we believe, to provide for payment of needful expenses and compensation (within the prescribed limits) out of the property thus taken custodia legis. Assuming that the court may ultimately charge such expenses, in whole or in part, against the petitioning creditors, on dismissal of the proceedings, and further assuming for the argument, that they should be so charged in the case at bar, as contended, it is not the place of the receiver to move for relief of one or the other party, nor are his rights dependent upon the equities of the parties therein. So, the authorities cited in support of the contention that the receivership expenses were rightfully chargeable to the petitioning creditors (In re Lacov, 15 Am. B. R. 290, 142 Fed. 960, * * * and cases reviewed; Link Belt Mach. Co. *v.* Hughes, 195 Ill. 413, 417, * * * 59 L. R. A. 673, and citations) are inapplicable upon the present inquiry. We are of opinion, therefore, that allowance out of the assets for expenses of the receivership was authorized, as within the statutory purposes of the appointment; and no other question of law is raised by the petition to review such allowance."

In re De Lancey Stables Co., 22 A. B. R. 406, 170 Fed. 860 (D. C. Pa.): "It was not the case where upon the face of a petition it is clear that the bankrupt belongs to an excepted class; for example, a transportation company or a railroad company. In such a proceeding any action attempted by the court would be wholly void, for no jurisdiction ever attaches; the petition is *coram non iudice*. But, where there is an apparent right to file the petition, jurisdiction undoubtedly exists—that is, the right to hear, inquire, and determine—although the inquiry may result in a finding that the averments of the petition are not true, and that for this reason the proceeding can go no further. Therefore, as jurisdiction against the stables company existed—*prima facie* a trading or mercantile company—it follows that the court had a right to preserve the property, and as means to that end to appoint a receiver, and also to turn the goods and chattels into cash. This last step was necessary, for the cost of keeping and feeding the horses would soon have exhausted their value. Having, therefore, exercised the undoubted power of caring for the property and of transforming it into money, the expenses of so doing are properly chargeable against the fund; and, as there is no attack upon the reasonableness of the credits asked for in the receiver's account, these credits will be allowed."

Receiver's Attorney Fees—When Not Allowed as Part of Such Costs.—See In re T. E. Hill Co., 20 A. B. R. 73, 159 Fed. 73 (C. C. A. Ill.), quoted post, § 2054. Compare ante, §§ 347, 397; post, § 418. Compare, *Olive v. Armour & Co.*, 21 A. B. R. 901, 167 Fed. 517 (C. C. A. Ga.).

Motion That Funds in Receiver's Hands Be Paid Over to Trustee.—In re Vogt, 20 A. B. R. 243, 163 Fed. 551 (D. C. N. Y.).

Compensation of Receivers.—See post, § 2118, for the subject of compensation of the receiver.

§ 398½. Compensation of Receiver on Dismissal by Settlement with All Creditors.

Amendment of 1910.—Of course, where settlement is made with all creditors but not by way of compensation before adjudication, the compensation of the receiver may likewise be fixed by agreement, the prohibition of § 72 of the act manifestly referring only to allowances out of assets administered under the bankruptcy law.

§ 399. Creditors' Independent Plenary Actions Pending Adjudication.

Page 260, note 98. But compare, *Cruchet v. Red Rover Mining Co.*, 18 A. B. R. 814, 155 Fed. 486 (U. S. C. C. Mass.): "The bill did not allege the pendency of the bankruptcy proceedings in Colorado, nor was that fact brought to the attention of the court in any way. If it had been, the court would have refused to take jurisdiction of the bill, since it would be manifestly destructive of the fundamental purpose of the Bankrupt Act and lead to endless confusion, for the Circuit Courts to entertain creditors bills like the present one after the commencement of proceedings in bankruptcy against the insolvent. Nor are we aware that any Circuit Court has ever entertained such a bill and appointed a receiver where it had notice that bankruptcy proceedings had already been commenced against the defendant."

Until adjudication, creditors are entitled to make use of all usual and ordinary remedies in State or Federal courts to recover property.

Reading Trust Co. v. Boyer, 15 Pa. Dist. Rep. 45.

§ 401. Independent Plenary Suits by Creditors Not Maintainable in United States District Courts.

Page 262, note 102. Also compare, inferentially, contra, *In re Haupt Bros.*, 18 A. B. R. 585, 153 Fed. 239 (D. C. N. Y.).

§ 403. Trial, in General, by Court.

Page 263. Hearings in general are to be before the court as to whether the debtor belongs to a class exempt from bankruptcy.

Carpenter v. Cudd, 23 A. B. R. 463, 174 Fed. 603 (C. C. A. S. C.), quoted at § 408.

Adjournments of bankruptcy hearings and trials, may be had, in accordance with the ordinary rules, bearing in mind, always, however, that celerity of procedure is intended by the Bankruptcy Act. (See ante, § 23.)

Amendment of 1910—Adjournment of Petition, in Composition Cases.—In the case of a composition before adjudication, under the Amendment of 1910, it is expressly provided that the hearing upon the petition for adjudication shall be delayed until it shall be determined whether the composition shall be confirmed.

Bankr. Act, § 12a: “ * * * and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed.” See also, post, § 2358, et seq.

§ 404. But Court May Submit Issue of Fact to Jury.

Page 263, note 2. *Carpenter v. Cudd*, 23 A. B. R. 463, 174 Fed. 603 (C. C. A. S. C.).

§ 405. Jury's Verdict, in General, Advisory.

Page 264, note 4. *Carpenter v. Cudd*, 23 A. B. R. 463, 174 Fed. 603 (C. C. A. S. C.), quoted at § 408.

§ 406. Except That on Issues of Insolvency and Commission of Act, Right Absolute.

Page 264, note 5. *Carpenter v. Cudd*, 23 A. B. R. 463, 174 Fed. 603 (C. C. A. S. C.), quoted at § 408. Impliedly, *Buffalo Mill Co. v. Lewisburg Dairy Co.*, 20 A. B. R. 279, 159 Fed. 319 (D. C. Pa.), quoted at § 408; *In re Ward*, 20 A. B. R. 482, 161 Fed. 755 (D. C. N. J.), quoted at § 408; impliedly, *Schloss v. Strelow*, 19 A. B. R. 359, 156 Fed. 662 (C. C. A. Pa.).

Page 264. **Disobedience of Interlocutory Order Requiring Alleged Bankrupt, Who Denies Insolvency, to Attach List of Debts and Assets Not Ground for Refusing Him Right of Trial.**—Where the court has made an interlocutory order upon an alleged bankrupt who is denying that he is insolvent, requiring him to file a list of debts and assets by way of amendment of his answer, the bankrupt's disobedience of the order will not deprive him of the right to appear at the trial and oppose the petition. *Young & Holland v. Brande Bros.*, 20 A. B. R. 612, 162 Fed. 663 (C. C. A. R. I.).

§ 408. Jury Confined, Where Demandable, to Two Issues.

Page 265. *Carpenter v. Cudd*, 23 A. B. R. 463, 174 Fed. 603 (C. C. A. S. C.): “Under these provisions it is clear that it is the province of the judge to hear and determine without the intervention of a jury all issues in cases of contested bankruptcy, unless the alleged bankrupt shall make seasonable application for a jury trial, in which case he is entitled as of right to a jury trial in respect to his insolvency, and any act of bankruptcy alleged to have been committed by him. Any other issue of fact involved in the question of bankruptcy, such, for instance, as that in this case, may in the discretion of the court be also submitted to the jury; but the finding of the jury upon such an issue, as in cases submitted to a jury by the chancellor in a court of chancery, is merely advisory, and not binding upon the court.”

Thus, where the answer admits insolvency and the act of bankruptcy charged, but alleges that the debtor is not amenable to involuntary

proceedings because chiefly engaged in farming, there is no issue warranting a jury trial.

Stephens v. Merchants Bank, 18 A. B. R. 560, 154 Fed. 341 (C. C. A. Ill.).

Nevertheless, other issues may, from the nature of things, be involved in the question of insolvency and thus have to be left to the jury; as, for example, whether the debtor is a member of a partnership or whether the alleged partnership includes a certain respondent.

Buffalo Mill Co. v. Lewisburg Dairy Co., 20 A. B. R. 279, 159 Fed. 319 (D. C. Pa.): "But if the respondent was a partner, it is admittedly decisive of the question of his solvency, and as he is entitled to go to the jury upon everything which affects or enters into that, the question of partnership must not be kept open for their consideration."

Compare, where the question of membership of one of the respondents in a partnership was held to be involved in the question of insolvency, *In re Neasmith*, 17 A. B. R. 131, 147 Fed. 160 (C. C. A. Mich.). Also, *Schloss v. Strellow*, 19 A. B. R. 359, 156 Fed. 662 (C. C. A. Pa.). Compare, inferentially merely, *Lennox v. Allen Lane Co.*, 21 A. B. R. 648, 167 Fed. 114 (C. C. A. Mass.).

Or may be involved in the question of the commission of the act of bankruptcy charged; as, for example, whether the debtor were insane at the time the alleged act was committed and therefore whether it was possible for him to have committed it.

In re Ward, 20 A. B. R. 482, 161 Fed. 755 (D. C. N. J.): "It will be observed from what has been said that in such a case as the present one the defense that the alleged bankrupt did not commit the act of bankruptcy charged against him involves the question of his insanity. * * * Evil intent is an essential element of the act charged. Section 19 of the act gives to an alleged bankrupt the right of a trial by jury of the question of his insolvency and of the question concerning his commission of an act of bankruptcy. * * * The question of the alleged bankrupt's sanity will therefore be submitted to the jury as an essential part of the defense that he did not commit the act of bankruptcy charged."

On the other hand, the bankrupt is not entitled to a trial of the mere question of intention to commit a preference, after having, in the pleadings, substantially admitted the insolvency and the act of bankruptcy charged.

In re Harris, 19 A. B. R. 204, 156 Fed. 875 (D. C. Ala.).

And the issue of insolvency involves of course, the existence, validity and amount of debts; and the court may not predetermine such facts.

Schloss v. Strellow, 19 A. B. R. 359, 156 Fed. 662 (C. C. A. Pa.): "On February 28, 1907, there was a jury trial as to both insolvency and the act of bankruptcy; but the assignment of errors concerns only the issue as to insolvency, and the single point presented by the several specifications is whether, for the trial of that issue, the orders of September 29, 1906, and of January 30, 1907, had conclusively determined the validity and amount of the

claims and of the petitioners, original and intervening. The case was tried and decided upon the theory that they had, and in this we think there was error. The precise question, as defined by the Bankruptcy Act * * *, was whether the property of Schloss would, 'at a fair valuation, be sufficient in amount to pay his debts,' and for the solution of that question it was quite as needful to ascertain the amount of his debts as the value of his property. These elements were both inherent in 'the question of his insolvency.' There was no separate issue as to his indebtedness. That was matter of evidential fact, and the plaintiff in error was entitled to a finding of the jury upon it, notwithstanding its supposed predetermination by the court."

§ 410. To Be Conducted According to Common Law.

Page 266, note 9. See, in addition, *Acme Food Co. v. Meier*, 18 A. B. R. 550, 153 Fed. 74 (C. C. A. Mich.).

Page 266, note 10. **Estoppel as to Residence by Pleadings Filed in Another Case.**—*Long v. Lockman*, 14 A. B. R. 172, 135 Fed. 197 (D. C. Colo.).

Page 266. But equitable defenses are not on that account to be excluded.

Acme Food Co. v. Meier, 18 A. B. R. 550, 153 Fed. 74 (C. C. A. Mich.): "Neither is there any sound reason for saying that the effect of calling for a jury to try the issues in respect to the alleged acts of bankruptcy operates to circumscribe the powers of the court to those technically belonging to a court of law. It is true that error upon such a trial by jury can be reviewed only by a writ of error. But that is because the act confers as a privilege the right of jury trial and such a trial can only be reviewed according to the course of the common law. *Elliott v. Toeppner*, 187 U. S. 327, 9 Am. B. R. 50. But in the case under consideration the only defense against the charge of an act of bankruptcy by making a deed which at common law was *mala fide*, is that the deed was made in good faith and intended as a mere security. Against the charge that these same conveyances were intended as illegal preferences the only defense is, that, in fact, they were mere securities and that defendant was solvent when they were made if his equity of redemption be valued as part of his property. In such a case to give the defendant the right of trial by jury and then deny the right to show the actual character of the conveyances would be to give and deny the right of jury trial by the same provision of law."

§ 411. Demand for Jury.

But the jury must be demanded.

In re Ward, 20 A. B. R. 482, 161 Fed. 755 (D. C. N. J.).

And if the bankrupt does not demand the jury before or on the answer day, and demands it in writing, filed with the District Clerk, he will be deemed to have waived a jury trial.

§ 414. Dismissal for Want of Jurisdiction.

Page 268, note 1. Compare ante, § 30; post, § 441½.

Page 268, note 2. Compare, *In re Tully*, 19 A. B. R. 604, 156 Fed. 634 (D. C. N. Y.), where the court vacated the order of adjudication because of lack of

sufficient residence at the time of the adjudication; but immediately readjudicated the debtor bankrupt as having meantime acquired sufficient residence, without requiring even the formalities of reverification or refiling, clearly an erroneous ruling. See post, §§ 431, 441½; also ante, § 30.

§ 416½. Dismissal on Composition.

Amendment of 1910.—It is contemplated by § 12 of the Bankruptcy Act as amended in 1910, that the petition for adjudication shall be dismissed upon distribution of the consideration after confirmation of a composition. This dismissal, however, is not to be made until the composition has been distributed (see post, § 2371½); and during the meantime the case is to be considered as still pending.

[1867] In re Mickel, 19 N. B. Reg. 374, quoted post, § 2371½.

§ 418. Costs on Dismissal for Want of Jurisdiction.

Page 269, note 9. Compare, ante, §§ 347, 397, 398½. But compare, *Olive v. Armour Co.*, 21 A. B. R. 901, 167 Fed. 514 (C. C. A. Ga.); also compare, *In re DeLancey Stables*, 22 A. B. R. 406, 170 Fed. 860 (D. C. Pa.).

However, it has been held that where a bond for the seizure of property has been given in such case, damages and attorney's fees may be recovered, the giving of the bond creating a new right under the special provisions of the Bankruptcy Act.

Hill Co. v. Supply & Equipment Co., 24 A. B. R. 84 (App. Ct. of Ill.).

Moreover, it has been held that the court has not "lack of jurisdiction" when it decides that a debtor is not of a class subject to bankruptcy, for, all the time, the court had complete jurisdiction to determine precisely that question.

Hill Co. v. Supply & Equipment Co., 24 A. B. R. 84 (App. Ct. of Ill.), quoted ante, § 30. See, also, discussions of § 30, ante.

§ 418½. Costs on Dismissal in Compositions before Adjudication.

Amendment of 1910.—The Amendment of 1910, permitting compositions with creditors before adjudication of bankruptcy, contemplates the dismissal of the bankruptcy petition on distribution being made to creditors on confirmation of the composition. In such cases the compensation of the receiver or marshal is regulated by § 48, being limited to commissions not exceeding one half of one per cent upon the amount distributed to creditors, and an additional one half of one per cent thereon in the event that the business has been conducted.

§ 418¾. On Dismissal by Settlement Other than "Composition."

Amendment of 1910.—The compensation of the receiver or marshal on dismissal of an involuntary petition by consent of parties, as,

for example, in cases of settlement with all creditors other than by way of a statutory "composition," is not within the contemplation of § 48, nor within the prohibitions of § 72, as amended in 1910, such sections having reference only to allowances out of the assets in process of administration, or where compositions under § 12 are involved; and having no relation to cases where all parties, the debtor and all creditors, agree upon the compensation.

§ 419. On Dismissal, Ten Days Notice to Creditors to Be Given.

Amendment of 1910.—Owing to the particular difficulty in giving notices to creditors before the filing of schedules, some of the courts, before the Amendment of 1910, had come to rule that §§ 58 (a) (8) and 59 (g) were unenforceable, since no method was provided whereby the names and the addresses of the creditors could be ascertained. This defect has been cured by the Amendment of 1910, by which it is provided in § 59 (g), that courts shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all the creditors with their addresses and shall cause notice to be sent to all creditors of the pendency of such application and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest to be heard. As to the length of time of such notice and the manner of giving it, § 58 (a) already furnishes the guide, such section providing that there should be ten days notice by mail, etc., "of (8) the proposed dismissal of the proceedings."

§ 422. No Dismissal if Any Petitioning Creditor Objects.

Page 271. *In re Perry & Whitney Co.*, 22 A. B. R. 772, 172 Fed. 745 (D. C. Mass.): "It sufficiently appears from the record that this case is one in which only a comparatively inconsiderable minority of the creditors desire the administration of the estate in bankruptcy, and that by far the greater proportion of them in number and amount regard the common law assignment as more for their interest. * * * If there are three bona fide creditors whose claims amount in all to \$500, Congress has given them the right to insist on bankruptcy, however great the majority of creditors who disagree with them."

Page 271, note 15. **No Dismissal of Petition for Adjudication Simply Because of Collusive Receivership.**—*Birmingham Coal & Iron Co. v. Steel Co.*, 20 A. B. R. 157, 160 Fed. 212 (D. C. Ala.).

Nunc Pro Tunc Correction of Order of Dismissal.—*Bernard v. Abel*, 19 A. B. R. 383, 156 Fed. 649 (C. C. A. Wash.).

Motion to Dismiss Petition.—*Bernard v. Abel*, 19 A. B. R. 383, 156 Fed. 649 (C. C. A. Wash.).

Notice of Motion to Dismiss.—*Bernard v. Abel*, 19 A. B. R. 383, 156 Fed. 649 (C. C. A. Wash.).

Power to Amend Court Records.—*Bernard v. Abel*, 19 A. B. R. 383, 156 Fed. 649 (C. C. A. Wash.): "The principal question involved is whether the court had authority to vacate the judgment of dismissal, and to make a judgment

nunc pro tunc at the time and under the circumstances stated. Courts have the power to amend their judgments, upon proper showing, within a reasonable time, when no such change of circumstances has occurred as would make an amendment unjust to third persons or to the parties themselves. It happens sometimes, for instance, that applications to amend verdicts are granted even after error has been brought. Such amendments have often been allowed upon the judge's notes of the evidence at the trial, or upon other evidence clearly establishing the justice of the proposed amendments. This principle is distinctly stated in *Matheson's Adm'r v. Grant's Adm'r*, 2 How. 263, 11 L. Ed. 261. 'It is a familiar doctrine,' said the Supreme Court in *Insurance Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 395, 'that courts always have jurisdiction over their records to make them conform to what was actually done at the time; and, whatever may have been the rule announced in some of the old cases, the modern doctrine is that some orders and amendments may be made at a subsequent term, and directed to be entered, and become of record, as of a former term.' This power is one to make the record speak the truth."

§ 427. Premature Adjudication on Bankrupt's Consent.

Page 275, note 7. See, in addition, *In re Western Investment Co.*, 21 A. B. R. 367, 170 Fed. 677 (D. C. Okla.).

Page 275. And, of course, this is true, additionally, where such creditors had actual knowledge of the pendency of the proceedings before the adjudication.

In re Marion Contract & Construction Co., 22 A. B. R. 81, 166 Fed. 618 (D. C. Ky.): "They by no means attempt to say that they could not have intervened before the adjudication, and have been made parties under clause 'b' of § 18 of the act * * * and have resisted the adjudication before it was made. That clause of the section clearly gives any creditor the right equally with the alleged bankrupt to do this. It reads as follows: 'The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow.' The court finds the fact to be that before the adjudication W. H. Netherland and the Continental National Bank of Louisville, Ky., each had full knowledge of the pendency of the petition in this case which sought to have the company adjudicated a bankrupt, and that they acquired this knowledge in ample time to have pleaded to the petition under the clause of the act just referred to, but that each of them failed to do so. Having this knowledge and this right under the act, they became quasi parties to the proceeding at least sufficiently to make it the duty of each then, or within five days thereafter, to intervene or be foreclosed of the right to do so. Too much importance cannot be attached to the fact that they had this previous knowledge; for that, coupled with their rights under clause 'b,' supra, gave them, respectively, their day in court, but, instead of availing themselves of it, they made default. Like others in default in judicial proceedings, they cannot now be heard, unless upon a strong showing which will move the discretion of the court in the direction of granting what they ask."

Page 275, note 9. **Date of Adjudication.**—The date of adjudication is the date of the entry of the decree that the defendant is a bankrupt; or, if such decree is appealed from, then the date when such decree is finally confirmed. *Bankr. Act*, § 1 a (2); *In re Lee*, 22 A. B. R. 820, 171 Fed. 266 (D. C. Pa.).

§ 429. Jurisdiction to Vacate Adjudication.

Page 276, note 10. Impliedly, *In re Hudson River Electric Co.*, 21 A. B. R. 915, 173 Fed. 934 (D. C. N. Y.).

§ 431. May Vacate "After Term."

Page 276, note 12. See, in addition, *In re Tucker*, 19 A. B. R. 378, 153 Fed. 91 (C. C. A. Mass.); *In re Lemmon & Gale Co.*, 7 A. B. R. 291, 112 Fed. 296 (C. C. A. Tenn.); *In re Henschel*, 8 A. B. R. 201, 114 Fed. 968 (D. C. N. Y.); (1867) *Sandusky v. National Bank*, 23 Wall. 289. Also, see post, § 858, note.

Page 277. This has been held as to a referee's order fixing in advance the trustee's extra compensation for conducting the business.

In re Russell Card Co., 23 A. B. R. 300, 174 Fed. 202 (D. C. N. J.): "The doctrine of laches, which is insisted on by counsel for the trustee, is not applicable to a motion to vacate an order made without jurisdiction, especially where no rights have become vested under the order sought to be vacated."

The doctrine that "there are no 'terms of court' in bankruptcy" does not seem to be applicable to a decree of the Circuit Court of Appeals; and such a decree rendered on an appeal, even if the matter were not appealable, cannot be vacated after term, and is not a nullity.

Loeser v. Bank & Trust Co., 20 A. B. R. 845, 163 Fed. 212 (C. C. A. Ohio), quoted on other points at § 2888½.

The Circuit Court of Appeals may correct errors of the courts of bankruptcy, but it is not itself a court of bankruptcy, and the doctrine of "No terms in courts of bankruptcy" is not applicable to it.

§ 432. Who May Move to Vacate—Court Sua Sponte.

Page 277, note 15. Impliedly, *In re New England Breeders' Club*, 21 A. B. R. 349, 165 Fed. 517 (D. C. N. H.), quoted ante, § 30.

Page 277. *In re New York Tunnel Co.*, 21 A. B. R. 531, 166 Fed. 284 (C. C. A. N. Y.): "Although we think these objections are good [that the parties are tort claimants and therefore not holders of provable claims] still if the appellants and petitioners have called our attention to a jurisdictional defect which makes the adjudication a nullity, we feel bound to consider it. * * * But they are strangers to the bankruptcy proceedings, having no right to prove their claims, to defend or to appeal. The most they can do is to call the attention of the court as amici curiæ to a want of jurisdiction of the subject-matter appearing on the face of the record."

§ 434. And Only Such as Have Present Interest.

Thus, as to creditors, only creditors owning provable claims may move to vacate adjudication.

§ 435. Thus, Creditors Proper Parties.

Page 278. Obiter, *In re New England Breeders' Club*, 22 A. B. R. 128, 169 Fed. 586 (C. C. A. N. H.): "The trustee urged before us that the Hub Company had shown no interest in the vacation of the adjudication, but we

hold that its interest as a creditor, without more, was sufficient for that purpose." Quoted further at § 436.

Page 278, note 18. Instance, *In re Altonwood Park Co.*, 20 A. B. R. 31, 160 Fed. 448 (C. C. A. N. Y.); instance, *In re Hudson River Electric Co.*, 21 A. B. R. 915, 173 Fed. 934 (D. C. N. Y.).

Receivers, Assignees, etc., as Proper Parties.—It has been held, obiter, that receivers appointed outside of bankruptcy are proper parties. *In re Hudson River Electric Co.*, 21 A. B. R. 915, 173 Fed. 934 (D. C. N. Y.). But in this case the record showed the adjudication to be a nullity, in which event anyone is competent to draw the court's attention to the lack of jurisdiction; moreover, a creditor also was making the motion.

§ 435½. Whether Tort Claimants Proper Parties.

It would seem, on principle that tort claimants, although not holding provable debts, might nevertheless be parties in interest.

But compare, *In re New York Tunnel Co.*, 21 A. B. R. 531, 166 Fed. 284 (C. C. A. N. Y.): "It must be admitted that tort claimants who see the property of a person against whom they make claim, seized and administered in bankruptcy to their own exclusion for the benefit of contract creditors, have an interest which should be protected and are in bad case if the law afford no remedy. We are, however, clear that they can have no relief in this case in the proceedings they have adopted." Quoted further at §§ 30, 432.

§ 436. Laches Bars Right.

Page 279, note 19. Instance, held not laches, *In re Altonwood Park Co.*, 20 A. B. R. 31, 160 Fed. 448 (C. C. A. N. Y.).

Page 279. *In re New England Breeders' Club*, 22 A. B. R. 125, 169 Fed. 586 (C. C. A. N. H., reversing S. C., 21 A. B. R. 349, 165 Fed. 517): "The trustee's contention in effect is as follows: He does not dispute the correctness of the master's report concerning the nature of the bankrupt's business, but he contends that the District Court erred in holding its want of jurisdiction to be absolute, and in disregarding the questions of laches, damage to creditors, and the like, which were raised by his petition to dismiss. He does not contend that the District Court was altogether without jurisdiction to vacate the bankruptcy proceedings, but he does contend that the District Court was not obliged to vacate the proceedings as matter of law and without considering the circumstances and consequences. The Hub Company, on the other hand, contends that the finding of the master has shown that the District Court was altogether without jurisdiction to adjudicate the club a bankrupt, and that the court was therefore absolutely required to vacate the proceedings as soon as the nature of the bankrupt's business was established. The action of the learned judge in the District Court was plainly based upon his agreement with the Hub Company's contention as stated above, and not upon consideration of the issues which the trustee sought to raise. The adjudication was vacated solely because of a supposed legal necessity arising from an absolute want of jurisdiction, and not because the petitioning creditors and the trustee failed to make out the allegations of the trustee's petition. Upon this distinction rests the decision of the case at bar. To determine what allegations and facts are necessary to support the jurisdiction of a court, and what go

only to establish a plaintiff's right to recover, is sometimes matter of difficulty. It is well settled, for example, that the allegations of diversity of citizenship is necessary to uphold the jurisdiction of the Federal courts in those cases where jurisdiction depends upon diversity of citizenship; and even in the ultimate court of appeal the omission of this allegation may be noticed by the court, and, unless remedied, it will cause a vacation of the entire proceeding. But where the plaintiff's allegation of diverse citizenship is sufficient, the defendant, under ordinary circumstances, loses in time his right to dispute the allegation. *Hartog v. Memory*, 116 U. S. 588. In the case at bar there was no fraud upon the court. In *Denver Bank v. Klug*, 186 U. S. 202, 10 Am. B. R. 786, the petition in involuntary bankruptcy contained a sufficient allegation of the nature of the respondent's business. This allegation was traversed, and the jury found that the respondent was 'engaged chiefly in farming' within the meaning of the Bankruptcy Act. The District Court dismissed the petition, and the petitioning creditors took an appeal directly to the Supreme Court as in a case where the jurisdiction of the District Court was in issue. The Supreme Court dismissed the appeal, saying that: "The District Court had and exercised jurisdiction. The conclusion was, it is true, that Klug could not be adjudged a bankrupt, but the court had jurisdiction to so determine, and its jurisdiction over the subject-matter was not and could not be questioned."

§ 436½. Whether Proving of Claim Estops.

It has been held, also, that proving his claim in the bankruptcy proceedings is such an acquiescence as will bar the creditor from the right to move for a vacating of the adjudication for want of jurisdiction.

In re N. Y. Tunnel Co., 21 A. B. R. 531, 166 Fed. 284 (C. C. A. N. Y.).

§ 437. But Record of Adjudication Imports Jurisdiction and Need Not Recite All Jurisdictional Facts.

Page 279, note 21. Compare, analogously, *Loeser v. Bank & Trust Co.*, 20 A. B. R. 845, 163 Fed. 212 (C. C. A. Ohio), quoted at § 2888½. See "Jurisdiction to Adjudge Bankrupt," ante, § 30.

Page 280. Thus, default adjudication of a corporation will not be vacated merely because the petition fails to show that it was a corporation of a class subject to bankruptcy, at any rate where the petition does not show that it was *not* of such class.

But compare, *In re Altonwood Park Co.*, 20 A. B. R. 31, 160 Fed. 448 (C. C. A. N. Y.); compare also, *In re New York Tunnel Co.*, 21 A. B. R. 531, 166 Fed. 284 (C. C. A. N. Y.), quoted at §§ 30, 441½; compare also, *In re Hudson River Electric Co.*, 21 A. B. R. 915, 173 Fed. 934 (D. C. N. Y.).

Page 281. Much less will an adjudication be vacated where such allegations are merely defective and not wholly lacking.

In re Marion Contract & Construction Co., 22 A. B. R. 81, 166 Fed. 618 (D. C. Ky.).

And where the allegations are sufficient and the lack of jurisdiction

is only provable by evidence dehors the record, it is clear that laches may bar the right to move for a vacating of the adjudication.

In re New England Breeders' Club, 22 A. B. R. 125, 169 Fed. 586 (C. C. A. N. H.).

And where the lack of jurisdiction does not affirmatively appear on the face of the record but is dependent solely upon questions of fact which have been decided in favor of jurisdiction by the court below, the appellate court will not remand the cause with instructions to dismiss the entire proceeding.

Brady v. Bernard & Kettinger, 22 A. B. R. 342, 170 Fed. 576 (C. C. A. Ky.).

§ 439. Who May Oppose Vacating.

Any party in interest may oppose the vacating of the adjudication, even the trustee.

Obiter, In re Penn. Consol. Coal Co., 20 A. B. R. 872, 163 Fed. 579 (D. C. Pa.); impliedly, In re New York Tunnel Co., 21 A. B. R. 531, 166 Fed. 284 (C. C. A. N. Y.); In re New England Breeders' Club, 22 A. B. R. 125, 169 Fed. 586 (C. C. A. N. H.).

§ 441¼. Lack of Jurisdiction Sufficient Ground.

Lack of jurisdiction is, of course, sufficient ground for vacating the adjudication.

In re Hudson River Electric Co., 21 A. B. R. 915, 173 Fed. 934 (D. C. N. Y.); also, see §§ 441½, 437.

But the doctrine of estoppel and res adjudicata would likely prevent the adjudication, in most instances of involuntary bankruptcy. Thus, adjudications on voluntary petitions may be set aside for lack of sufficient residence, domicile, etc.

In re Tully, 19 A. B. R. 604, 156 Fed. 634 (D. C. N. Y.), where the court, however, immediately re-adjudicated the bankrupt without requiring the bankrupt to reverify or refile his petition; see also, ante, §§ 30, 414.

§ 441½. When Is Adjudication a "Nullity."

When is a decree of adjudication of bankruptcy a nullity?

Page 282. In re New York Tunnel Co., 21 A. B. R. 531, 166 Fed. 284 (C. C. A. N. Y.): "If a petition for adjudication were made by only two creditors, the law requiring three, there would be a jurisdictional defect on the face of the record, making any adjudication void. On the other hand, if the aggregate amount of claims were stated to be \$500 as required by law, and because of setoffs or other reasons was in point of fact less, an adjudication would be an error to be corrected. So if the petition were against a railroad company there would be on the face of the record such a jurisdictional defect as would make an adjudication void. Whereas, if the corporation might or might not be considered within the act, an adjudication, even if erroneous,

would have to be corrected by appeal. At the time the adjudication was made in this case, building companies had been held in two districts of this circuit to be within the act. We have since decided they are not subjects of adjudication. It is, moreover, argued in this case that a tunnel company differs from a building company and is within the act. Lack of jurisdiction cannot be said to have appeared on the face of the record and therefore the adjudication made by the District Court, even if erroneous, is not a nullity."

Compare, *Loeser v. Bank & Trust Co.*, 20 A. B. R. 845, 163 Fed. 212 (C. C. Ohio), quoted at § 2888½; compare, also ante, §§ 30, 414.

And mandamus will not lie to compel the District Court to disregard an adjudication as a nullity even though the corporation in fact be of a class not subject to bankruptcy, where the record does not affirmatively show that the corporation does belong to an exempted class, but rather either shows it was alleged to have belonged to a class subject thereto.

In *re Riggs* (In *re* New York Tunnel Co.), 214 U. S. 9, 22 A. B. R. 720. See also, post, § 450.

Or omits all allegations in respect thereto.

§ 441¾. Premature Adjudication on Bankrupt's Consent.

That an adjudication was prematurely had upon the bankrupt's consent would be sufficient ground for vacating the adjudication at the motion of any party in interest not estopped nor guilty of laches; but if such motion were not made before the rightful answer day, it would be too late.

See ante, § 427; also, see In *re* Marion Contract and Construction Co., 22 A. B. R. 81, 166 Fed. 618 (D. C. Ky.), quoted ante, § 427.

§ 444. Adjudication as Res Adjudicata.

See post, §§ 450, 1632, 1776, 1777, 1777½.

Page 283, note 33. But compare *Manson v. Williams*, 18 A. B. R. 674, 153 Fed. 525 (C. C. A. Me.); obiter, In *re* Harper, 23 A. B. R. 918, 175 Fed. 412 (D. C. N. Y.), quoted at § 447.

Page 283. In *re* Hecox, 21 A. B. R. 314, 164 Fed. 823 (C. C. A. Colo.): "The radical error in the ruling of the District Court and the vice in the position assumed by counsel for the receiver before this court consist in undertaking collaterally to controvert the ground of adjudication in bankruptcy. That adjudication determined that the bankrupt was insolvent, and while insolvent, within four months of the filing of the petition in involuntary bankruptcy, and because of its insolvency, a receiver had been put in charge of its property by order of the State court. * * * Until avoided in a direct proceeding therefor, that adjudication was binding and conclusive on the bankrupt and creditors, as much so as a judgment, inter partes, on due hearing in a court of competent jurisdiction."

Page 287, note 34. In *re* Harper, 23 A. B. R. 918, 175 Fed. 412 (D. C. N. Y.), quoted at § 447.

§ 445. But Better Rule, Adjudication Not Binding Except on Mere Status of Debtor as Bankrupt, unless Parties Actually Contest.

Page 288, note 35. And compare *Manson v. Williams*, 18 A. B. R. 674, 153 Fed. 525 (C. C. A. Me.). But that the adjudication conclusively establishes insolvency, see *Whitwell, trustee, v. Wright*, 23 A. B. R. 747, 136 App. Div. N. Y. 246, but this case is not to be commended for its reasoning. To same effect, *In re Harper*, 23 A. B. R. 918, 175 Fed. 412 (D. C. N. Y.), quoted at § 447.

Page 290. Thus, it has been held, though in an obiter, that an adjudication on the ground of a fraudulent transfer will not be binding upon the alleged fraudulent transferee in a subsequent suit to recover the property.

Obiter, *In re Larkin*, 21 A. B. R. 711, 168 Fed. 100 (D. C. N. Y.).

Indeed, it has been held that an order of involuntary adjudication against a partnership is not conclusive, either as to the existence of the partnership or the title to its assets, upon the trustee of one of the alleged partners, such trustee not being entitled to oppose the adjudication.

Page 290. Obiter (*res adjudicata* waived), *Manson v. Williams*, 22 A. B. R. 22, 213 U. S. 413, affirming 18 A. B. R. 674, 153 Fed. 525: "The appellee says that the question is concluded by the adjudication putting the company into bankruptcy, that being an adjudication against the two brothers. On the other hand, the record shows that the trustees of Henry, although they had filed a denial and answer, were not heard on that question. The principle of law is plain. The adjudication put the two brothers into bankruptcy for the purpose of administering whatever property there might be, as against all the world. But it did not establish the facts upon which it was founded, no matter how necessary the connection, except as against parties entitled to be heard. *Tilt v. Kelsey*, 207 U. S. 43, 52. * * * If the trustees of Henry were not entitled to be heard, it is because they had no concern with whether the alleged firm was wound up in bankruptcy or not, but only with the facts upon which creditors sought to wind it up—that is to say, the existence of the partnership and the title to the partnership assets—and these facts would remain open to dispute. As the trustees of Henry were not heard, it would come with bad grace from one who might have urged the foregoing consideration, to argue here that they are bound to admit anything except that Henry and his brother are in bankruptcy as partners. Furthermore, we gather from the opinion of the district judge that all parties requested him to examine the evidence, and that the defense of *res judicata* really was waived. But, as the partnership might have been a partnership in profits only, leaving the title to the capital in Henry alone, the adjudication, even if it established that there had been a partnership, could not conclude anything as to the title to the assets, the matter with which we now are concerned."

§ 446½. Adjudication in General Terms Where Several Distinct Acts Alleged.

Page 291. An adjudication in general terms, where several distinct acts are alleged, is not *res adjudicata* as to any one act.

In *re Leston*, 19 A. B. R. 506, 157 Fed. 78 (C. C. A. Okla.): "But there were five other distinct acts of bankruptcy charged in the creditors' petition, and the record does not show upon which the adjudication proceeded; therefore the matter is at large. *Russeil v. Place*, 94 U. S. 606, 24 L. Ed. 214; *Ætna Life Ins. Co. v. Board of Com'rs*, 117 Fed. 82, 54 C. C. A. 468. The adjudication in bankruptcy was in general terms, and it might well have been authorized by proof of any one or more of the other acts charged. The controversy here is not that in the original proceeding. The adjudication in bankruptcy stands admitted and uncontested, and, for aught the record shows, it may have proceeded upon a ground wholly disconnected from the acquisition of the homestead."

§ 447. Adjudication Not Binding as to Petitioning Creditors' Claims When Presented for Allowance.

Page 294. In *re Harper*, 23 A. B. R. 918, 175 Fed. 412 (D. C. N. Y.): "The allegation in the involuntary petition, the Peninsular Company being one of the petitioning creditors, that such company was a creditor of said Harper, the alleged bankrupt, to the amount stated, and the failure to answer the petition and to controvert the allegation, did not make it *res adjudicata* as to the creditors or as to the trustee. The Peninsular Company must still file its proof of claim and procure its allowance. Any creditor, or the trustee, may contest it. *Matter of the Continental Corporation*, 14 Am. B. R. 538, 542, 543; In *re Cleveland Ins. Co.* (C. C.), 22 Fed. 204; *Aspden v. Nixon*, 4 How. (U. S.), 467, 498. I agree with the dissenting opinion of Sanborn, C. J., in *Ayres v. Cone et al.* (C. C. A.), 14 Am. B. R. 739, 138 Fed. 778. Quite probably a creditor, who appears in the proceeding and contests the adjudication on the ground a petitioning creditor is not a creditor of the alleged bankrupt, would be concluded by the adjudication. Not so of those who do not appear or contest. That is not the time or place for presenting and contesting claims as such. There is no privity between the creditors, or between the alleged bankrupt and his creditors, which will bind them on the question referred to."

§ 449. Laches Bars.

Page 296, note 42. Inferentially, compare, In *re Altonwood Park Co.*, 20 A. B. R. 31, 160 Fed. 448 (C. C. A. N. Y.).

§ 450. Collateral Attack on Adjudication.

Page 296, note 43. See, in addition, In *re Dempster*, 22 A. B. R. 751, 172 Fed. 353 (C. C. A. Mo.), although not correctly stating the rule as to ancillary jurisdiction. But compare, on the facts, apparently, *Whitwell*, trustee, *v. Wright*, 23 A. B. R. 747, 136 N. Y. Sup. Ct., App. Div. 246.

Page 296. In *re Hecox*, 21 A. B. R. 314, 164 Fed. 823 (C. C. A. Colo.): "The radical error in the ruling of the District Court and the vice in the position assumed by counsel for the receiver, before this court consist in undertaking collaterally to controvert the ground of adjudication in bankruptcy. That adjudication determined that the bankrupt was insolvent, and, while insolvent, within four months of the filing of the petition in involuntary bankruptcy and because of its insolvency, a receiver had been put in charge of its property, by order of the State court. * * * Until avoided in a direct proceed-

ing therefor, that adjudication was binding and conclusive on the bankrupt and creditors, as much so as a judgment, *inter partes*, on due hearing in a court of competent jurisdiction."

Page 297. Nor upon trial for the crime of "concealment of assets."

Gilbertson v. United States, 22 A. B. R. 32, 168 Fed. 672 (C. C. A. Wis.): "Hence the reference to and adjudication by the referee in the case at bar, however erroneous and avoidable on review, are neither void, nor subject to collateral attack, for contradiction or impeachment of the record. This doctrine is fundamental in reference to adjudications of courts of general jurisdiction—see *Van Fleet on Collateral Attack*, §§ 16, 17, 526; 1 *Freeman on Judgments*, c. 3; 23 *Cyc.* 1055—and is alike applicable, as we believe, to the adjudication of the District Court in bankruptcy, having unlimited and exclusive jurisdiction in the matters thereof."

Nor upon the trial of a trustee's action to set aside a preferential or fraudulent transfer.

Huttig Mfg. Co. v. Edwards, 20 A. B. R. 349, 160 Fed. 619 (C. C. A. Iowa): "The manufacturing company attacks the validity of the adjudication that D. Winter was a bankrupt, upon the ground that one of the three petitioners in the involuntary proceedings was not a creditor; but since the attack was made in a proceeding by the trustee to annul a preference, it is a collateral, not a direct one. An adjudication of bankruptcy is entitled to the same verity and is no more to be impeached collaterally than other judgments or decrees of competent jurisdiction. It cannot be assailed by the defendant in a suit by the trustee to recover or avoid a preference upon the ground that one of the petitioners was not in fact a creditor of the bankrupt. When the record shows jurisdiction the adjudication of bankruptcy is subject to impeachment only by a direct proceeding in a competent court."

Page 297, note 46. See post, § 1777½.

Page 297. And *mandamus* is improper as a method of obtaining an indirect review of an erroneous adjudication of a corporation which in reality belongs to a class not subject to bankruptcy.

In *re Riggs*, 22 A. B. R. 720, 214 U. S. 9. Compare, analogously, § 472.

In the case of *In re Riggs*, it is to be observed that the record in the case did not show affirmatively that the corporation did not belong to a class subject thereto, but, on the contrary, that the pleadings affirmatively declared it to be of a class subject thereto, and the court below was therefore presumed to have had sufficient evidence to sustain its findings. Had the record of the adjudication shown on its face, affirmatively, lack of jurisdiction, it would have been void.

§ 451. Contractual Relations Not Affected unless Merged in Provable Debts.

Page 298, note 48. See post, § 2678. Compare, collaterally, *In re Sims*, 23 A. B. R. 899, 176 Fed. 645 (D. C. N. Y.), quoted at § 2678½.

An assignment of wages to be earned in the future under a contract of employment existing at the time of the bankruptcy is not void as to

the trustee, for the contract of employment, being a contract for personal services, would not be an asset of the estate as to future earnings thereunder even if not previously assigned.

Compare, to this effect, *In re Driggs*, 22 A. B. R. 621, 171 Fed. 897 (D. C. N. Y.).

Page 300, note 49. Also, see post, § 1150.

Employer, as Also Assignee, Adverse Claimants as to Assigned Wages, Not to Be Proceeded against Summarily.—See post, §§ 1678, 1683.

Page 300. *Citizens Loan Ass'n v. Boston & Maine R. R.*, 19 A. B. R. 650, 196 Mass. 528: "The single question presented by this appeal is whether an assignment of wages to be earned in an existing employment, given before bankruptcy, without fraud, and upon sufficient consideration, to secure a valid subsisting debt, and duly recorded, can be enforced, after the discharge in bankruptcy of the assignor, as to wages earned in the course of the original employment, by the creditor, who has not proved his debt in bankruptcy. A debt is not extinguished by a discharge in bankruptcy. The remedy upon the debt, and the legal, but not the moral, obligation to pay, is at an end. The obligation itself is not cancelled. * * * An assignment of future earnings, which may accrue under an existing employment, is a valid contract and creates rights, which may be enforced both at law and in equity, whichever may in a particular case be the appropriate forum. * * * These cases proceed upon the theory that the worker under contract for service, though indefinite as to time and compensation and terminable at will, has an actual and real interest in wages to be earned in the future by virtue of his contract. He may recover for an unjustifiable interference with such an employment, as for an injury to any other vested property right. * * * It is plain that one may sell wool to be grown upon his own sheep or a crop to be produced upon his own land, but not that to be grown or produced upon the sheep or land of another. No more can one assign wages, where there is no contract for service. * * * But profitable employment is a reality. Wages to be earned by virtue of an existing employment are no more shadowy or unsubstantial than the fleece of next spring or the crop of the following autumn. Money to accrue from such service is not a bare expectancy or mere possibility, but a substance capable of grasp and delivery. It constitutes a present, existing, right of property, which may be sold or assigned as any other property. Although not in the manual possession of the assignor, it is in his potential possession. The transfer of this potential possession, creates the assignee a lienor upon the property right. The holder of such an assignment stands upon a firmer plane than the mortgagee of future acquired property, who has only the right by contract to act betimes in the future for his protection. * * * The assignee of wages to be earned under an existing contract gets a present right, perfect in itself, requiring no future action on his part. * * * It may be taken for granted that the right to future wages to be earned under such a contract does not pass to the trustee in bankruptcy. * * * It is possible that an agreement to execute an assignment, falling short of the creation of a lien, is, when the wages have been actually earned, enforceable in equity, even after a subsequent bankruptcy, or insolvency. We do not decide this, however. * * * At lowest the assignment in question became 'a specific equitable lien on the fund' or was 'an independent collateral agreement given by way of guaranty or other security' for the main debt, and there is no reason

why such an agreement should not outlive the remedy upon the debt, to secure which it was given. In either event it was not dissolved by the bankruptcy."

Page 300. However, statutes providing for an effective levy upon salary to the extent of a certain per cent in favor of certain classes of creditors have been held not to give such a lien upon the entire contract of employment as to appropriate to the judgment salary earned after adjudication, notwithstanding the statutes provide that the levy shall continue until the entire judgment be satisfied.

See § 1035; also § 2678½. See post, § 2678½; *In re Sims*, 23 A. B. R. 899, 176 Fed. 645 (D. C. N. Y.), quoted at § 2678½.

§ 451½. Adjudication of Corporation Not a "Dissolution" of it.

The adjudication of a corporation is not a "dissolution" of it.

Nat'l Surety Co. v. Medlock, 19 A. B. R. 654, 2 Ga. App. 665: "A corporation by being adjudicated bankrupt, is not thereby civilly dead. It is not thereby dissolved. *Holland v. Heyman*, 60 Ga. 181. To use the sententious language of Judge Bleckley in the case just cited: "Your money," not "your life," is the demand made by the Bankruptcy Act."

§ 453. When Begins and When Ceases to Be a "Bankrupt."

Page 302, note 1. *In re Larkin*, 21 A. B. R. 711, 168 Fed. 100 (D. C. N. Y.). See post, § 473.

Page 302, note 2. See post, §§ 473, 2497.

Page 302, note 3. See post, § 473.

§ 460. Fourth and Fifth Statutory Duties—Execution of Papers.

Page 303, note 12. See post, §§ 969, 1009, 1115, 1835.

§ 461. Eighth Statutory Duty—Schedules.

Page 303, note 13. *Obiter*, *In re Goodman*, 23 A. B. R. 504, 174 Fed. 644 (C. A. Ala.).

Amendment of 1910—Compositions before Adjudication.—By the Amendment of 1910, permitting compositions before adjudication of bankruptcy, it is made the duty of the bankrupt, in such cases, to file schedules, precisely as in cases of adjudication.

Bankr. Act, § 12a: " * * * in compositions before adjudication, the bankrupt shall file the required schedules, etc." Also, see §§ 482½, 593½, 2358, et seq.

§ 462. Ninth Statutory Duty—Submission to Examination.

Page 303, note 14. **Habeas Corpus ad Testificandum.**—See post, §§ 1568½, 1570.

§ 463. Protection of Bankrupt from Arrest.

Page 304, note 15. Compare, as to practice, Gen. Order No. 30. And compare, *Ex rel Mansfield v. Flynn*, 23 A. B. R. 294, 179 Fed. 316 (D. C. N. Y.), quoted at § 470.

Page 304, note 15. **Arrest Permissible on Process in State Insolvency Proceedings Where Debtor Not Adjudged Bankrupt, unless State Insolvency Law Superseded by Bankruptcy Act.**—In *re Crawford*, 18 A. B. R. 618, 154 Fed. 769 (C. C. A. Pa., affirming *Johnson v. Crawford*, 18 A. B. R. 608, 154 Fed. 761); *Johnson v. Crawford*, 18 A. B. R. 608, 154 Fed. 761 (C. C. Pa., affirmed sub nom. In *re Crawford*, supra).

Page 304, note 17. Compare, *Peters v. U. S. ex rel. Kelley*, 24 A. B. R. 206, 177 Fed. 885.

§ 464. Protected if Debt Dischargeable—Otherwise Not.

Page 304, note 17. Judgments for libel, *Thompson v. Judy*, 22 A. B. R. 151, 169 Fed. 553 (C. C. A. Ky.).

§ 466. Duty of Court to Protect.

Page 305, note 19. Contra, and that no bond may be required, *Ex rel Kelley v. Peters*, 22 A. B. R. 177, 166 Fed. 613 (D. C. Ill.), reversed on other grounds, *Peters v. U. S. ex rel. Kelley*, 24 A. B. R. 206, 117 Fed. 885 (C. C. A. Ills., reversing *U. S. ex rel. Kelley v. Peters*, 22 A. B. R. 177, 166 Fed. 613), wherein the appellate court held a judgment against a school teacher for assault not to be dischargeable and the teacher not to be within the protection of the act.

§ 469. Whether Arrest for Contempt of Other Courts within Protection.

It is a question whether the bankrupt is exempt from arrest for contempt of other courts.

Not protected from arrest for contempt of state court's order, instance, *In re Hall*, 22 A. B. R. 49, 170 Fed. 721 (D. C. N. Y.).

§ 470. Protected While Attending Bankruptcy Court or Performing Statutory Duties, Whether Debt Dischargeable or Not.

Page 306. *Ex rel Mansfield v. Flynn*, 23 A. B. R. 294, 179 Fed. 316 (D. C. N. Y.): "The order was valid regardless of the dischargeability of the debt under § 9 a (2), since the relator was arrested while in attendance on the court and while engaged in the performance of a duty imposed by the act."

§ 472. Habeas Corpus and Injunction Available to Effect Protection.

Page 306, note 27. Gen. Order No. 30: "IMPRISONED DEBTOR.—If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon habeas corpus, by the jailor or any officer in whose custody he may be, before the referee, for the

purpose of testifying in any matter relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of habeas corpus to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order."

See, in addition, *Ex rel Mansfield v. Flynn*, 23 A. B. R. 294, 179 Fed. 316 (D. C. N. Y.); instance, *Ex rel Kelley v. Peters*, 22 A. B. R. 177, 166 Fed. 613 (D. C. Ill., reversed, on ground debt not dischargeable, sub nom. *Peters v. U. S. ex rel. Kelley*, 24 A. B. R. 206, 177 Fed. 885 (C. C. A.)). But compare, contra, *In re Lewensohn*, 3 A. B. R. 594, 99 Fed. 73 (D. C. N. Y.).

Habeas corpus may not be used as an indirect method of review.

Peters v. U. S. ex rel. Kelley, 24 A. B. R. 206, 177 Fed. 885 (C. C. A. Ill., reversing *U. S. ex rel. Kelley v. Peters*, 22 A. B. R. 177, 166 Fed. 613): "And so he was; for a writ of habeas corpus cannot lawfully be used as a means of bringing the original parties into court to relitigate their original controversy—it cannot even be used lawfully to review and revise alleged errors of law or fact in the original litigation. 'No court may properly release a prisoner under conviction and sentence of another court, unless for want of jurisdiction of the cause or person, or for some other matter rendering its proceedings void. Where a court had jurisdiction, mere errors which have been permitted in the course of the proceedings cannot be corrected upon a writ of habeas corpus, which may not in this manner usurp the functions of a writ of error.' *Kaizo v. Henry*, 211 U. S. 146."

Compare, analogously, § 450.

§ 472½. Bond by Bankrupt Not Requisite.

Where a bankrupt makes application, under Gen. Ord. No. 30 for his release from arrest, the court, neither under § 2 (15) nor under § 9 (b), is authorized to require the bankrupt to give bail.

Ex rel Kelley v. Peters, 22 A. B. R. 177, 166 Fed. 613 (D. C. Ill., reversed, on ground debt not dischargeable, sub nom. *Peters v. U. S. ex rel. Kelley*, 24 A. B. R. 206, 177 Fed. 885 (C. C. A.)).

§ 473. "Bankrupt" for Purpose of Protection, as Long as Any Proceedings Pending.

Page 306, note 30. See ante, § 453.

Page 306, note 31. Compare, collaterally, §§ 453, 2497.

§ 477. Duty of Bankrupt to File Schedules of Assets, Liabilities and Exemption Claim.

Page 309, note 2. See, in addition, *In re Schulman & Goldstein*, 20 A. B. R. 707, 164 Fed. 440 (D. C. N. Y.).

Page 309. It is the bankrupt's duty to file them without being ordered to do so.

Obiter, *In re Philip Brady*, 21 A. B. R. 364, 169 Fed. 152 (D. C. Ky.): "And besides, the Bankruptcy Act expressly requires him to file his schedules without being ruled in the premises."

§ 477½. Individual Schedules Where Firm Alone Bankrupt.

Page 309. It has been held that there is no requirement that the individual schedules of each member of the partnership should be filed where the firm alone is adjudicated bankrupt.

Compare, §§ 65, 2231; also, *In re Blanchard & Howard*, 20 A. B. R. 422, 161 Fed. 797 (D. C. N. C.); to same effect, *In re Bertenshaw*, 19 A. B. R. 577, 157 Fed. 363 (C. C. A.).

But the contrary is the true rule; and non-bankrupt members must file schedules as well as the bankrupt partnership and its bankrupt members.

In re Ceballos & Co., 20 A. B. R. 459, 161 Fed. 445 (D. C. N. J.): "'Defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such copartner shall be required to furnish to the marshal, as messenger, a schedule of his debts and an inventory of his property, in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.' General Order 8 * * *, under the Act of 1898 * * *: 'Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.' Under the Act of 1867 a partnership was not regarded as a legal entity in the sense in which the courts regard it under the Act of 1898. Although General Order 18 referred to the procedure in a case where one or more members of a copartnership refused to join a petitioning partner in a petition to have 'the firm declared bankrupt,' the only way of obtaining an adjudication against a 'firm' under the Act of 1867 was by having all the copartners so adjudged. This is clearly shown by the provisions of that act. Section 11 provided that in a voluntary case the petitioner should annex to his petition a verified schedule of his debts and an inventory of his property; § 42 provided that in an involuntary case the bankrupt should file such schedule and inventory; and § 36 provided that where two or more persons being partners in trade should be adjudged bankrupt 'all the joint stock and property of the copartnership, and also all the separate estate of each of

the partners,' should be taken, excepting the parts by that act exempted from seizure. General Order 18 provided a method for enforcing the act in partnership cases, where a petition was filed by less than all the partners. It required each non-joining partner, where the 'firm'—that is, all the partners—were adjudged bankrupt, to furnish a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.' I think General Order 8 has the same effect."

In *re Junck & Balthazard*, 22 A. B. R. 298, 169 Fed. 481 (D. C. Wis.): "He must file his schedules of individual property and individual debts as provided by General Order No. 8. This is not an arbitrary regulation, but is inherent in the very nature of the case. Neither is it new. General Order No. 18, under the Act of 1967, was substantially the same. If Balthazard has a surplus of assets after the discharge of his individual liabilities, such surplus must be devoted to the payment of the firm liabilities if the firm assets are insufficient for that purpose. In other words, such surplus must be considered an asset of the firm, and no settlement can be complete without the information sought to be derived from the individual schedules contemplated by General Order No. 8. The objecting partner may prevent his own adjudication, but he cannot escape an accounting which is necessary to facilitate the jurisdiction of the court over the partnership case."

§ 482¼. Contempt for Failure to File.

Page 309. It may be contempt for the bankrupt to fail to file his schedules.

In *re Schulman & Goldstein*, 20 A. B. R. 707, 164 Fed. 440 (D. C. N. Y.); In *re Fetterman*, 19 A. B. R. 785 (D. C. N. Y.).

§ 482½. Compositions before Adjudication—Amendment of 1910.

Page 309. The Amendment of 1910, permitting compositions before adjudication of bankruptcy, provides that in such cases the bankrupt shall file schedules as a basis upon which action may be taken by creditors.

Bankr. Act, § 12a: "A bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and the list of his creditors required to be filed by bankrupts. In compositions before adjudication the bankrupt shall file the required schedules, etc."

§ 483. Importance of Schedules in Bankruptcy.

The schedules are supposed to be the statement of the bankrupt to his creditors, and he runs great risk of forfeiting his opportunity to get released from his debts if he makes omissions in them.

Whether Schedules Are "Pleadings."—See *Johnson v. United States*, 20 A. B. R. 724, 163 Fed. 30 (C. C. A. Mass.), quoted at § 2323.

Page 310, note 9. Instance, In *re Kranich*, 23 A. B. R. 550, 174 Fed. 908 (D. C. Pa.).

§ 489. Names and Addresses of Creditors to Be Given.

The names and addresses of all creditors must be given as accurately as possible.

See post, subject of "Debts Not Duly Scheduled," not discharged, § 2761, et seq.

§ 493. Omitted Creditors Added by Amendment.

Page 313, note 18. Impliedly, *In re McKee*, 21 A. B. R. 306, 165 Fed. 351 (D. C. N. Y.).

Page 313, note 19. But compare post, § 2780.

Page 313. And such amendment in its effect reverts to the date of the filing of the petition; subject, probably to whatever exception from the operation of the discharge the creditor's claim might possess by reason of lack of "due scheduling," "due" scheduling doubtless implying scheduling in time for the creditor to participate in all the essential steps of the proceedings and to avail himself of all substantial remedies, such as opposition to discharge, etc.

See post, § 2780.

§ 494. But Not after Expiration of Year for Filing Claims.

Page 313, note 20. Also compare germane subject of the effect of lack of "Due Scheduling," post, § 2761, et seq. Impliedly, *In re Walker*, 21 A. B. R. 132, 164 Fed. 689 (C. C. A. Calif.). Also, see post, "Schedules Not to Be Used in Criminal Proceedings against Bankrupt," § 2323.

But it has been held that omitted creditors may not be added by amendment, after the expiration of the year from the date of the adjudication within which the creditor could file his claim.

Page 313. Nor where the bankrupt has delayed asking for leave to make such amendment until within a few days of the end of the year.

In re Kittler, 23 A. B. R. 585, 176 Fed. 655 (D. C. Pa.).

Page 313. However, on principle, creditors, whenever discovered, might be added; such right being properly distinguishable from the *effect* of lack of "due scheduling" on the discharge, as to which latter matter, see post, "Debts Excepted from the Operation of Discharge" through lack of "Due Scheduling," § 2761, et seq.

When Amendment Too Late for "Due Proof" and Ineffective to Bar Discharge.—Compare post, § 2780.

Use of Schedules in Criminal Prosecution.—See post, §§ 1556, 2323.

§ 495. Administration of Estate Distinguished from Proceedings for Adjudication.

Page 316a, note 1. Receivership before adjudication, not part of "Administration of Estate," *Skubinsky v. Bodek*, 22 A. B. R. 689, 172 Fed. 332 (C. C. A. Pa.), quoted at §§ 385, 1544.

§ 498. Appointment and Term of Office.

Page 319, note 3. **General Subject of Jurisdiction to Appoint Referees.**—*Birch v. Steele*, 21 A. B. R. 539, 165 Fed. 577 (C. C. A. Ala.); *In re Steele*, 20 A. B. R. 446, 161 Fed. 886 (D. C. Ala.), quoted ante, § 29; *In re Steele*, 19 A. B. R. 671, 156 Fed. 863 (D. C. Ala.). Compare, ante, § 29.

§ 518½. No "Certificate of Conformity" under Present Act.

It is no part of a referee's duty to make "certificates of conformity," as was the registrar's duty under the former act, and such certificates are unauthorized, except where specifications of opposition to discharge have been referred to him as special master.

In re Randall, 20 A. B. R. 305, 159 Fed. 298 (D. C. Pa.).

§ 520. Reference.

Reference is accomplished by the making and entry of an order by the judge, or in the name of the judge by the District Clerk, referring the case to the referee; and the sending of the papers with a certificate of the order of reference, to the referee.

Deputy Clerk May Make Reference.—The deputy of the district clerk may sign the order of reference. *Gilbertson v. United States*, 22 A. B. R. 32, 168 Fed. 672 (C. C. A. Wis.): "The only objection raised upon its introduction was to the order of reference—that it was signed by a deputy, and not by the clerk personally; and such objection impresses us to be without merit, in any view of the effect to be given the adjudication. The appointment of a deputy clerk is expressly authorized by § 558, Rev. St. * * * in general terms, and the powers of a deputy, as recognized at common law, are thereby implied. The appointee in such case is empowered to perform all ministerial acts of the clerk, as his principal (*Throop on Public Officers*, § 583; 7 Cyc. 248), and thus to make the order of reference, as the statute directs to be made of course, when the petition is filed in the absence of the District Judge. The clerk is given no discretion nor authority to pass upon the sufficiency of the petition, and performance of the statutory duty is thus made ministerial, not judicial."

§ 521. Reference after Adjudication, General or Special; before Adjudication, Special.

Page 324. Such special reference, of course, is superseded by the general reference.

In re Ruos (No. 2), 21 A. B. R. 257, 164 Fed. 749 (D. C. Pa.).

§ 521½. References in Compositions before Adjudication.

By the Amendment of 1910, permitting compositions before adjudication in bankruptcy, provision is made for the calling of a meeting of creditors before adjudication, at which the judge or referee is to preside.

Bankr. Act, § 12a, as amended in 1910: " * * * In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the

court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall preside." Also, see §§ 593¼, 2358, et seq.

§ 522. Reference to Another Referee.

Page 324, note 34. See, in addition, *In re Western Investment Co.*, 21 A. B. R. 367, 170 Fed. 677 (D. C. Okla.).

§ 522½. Appointing "Special Master" to Perform a Duty of Referee, Improper.

It is improper and an abuse of power to appoint either the referee or another person as "special master" to perform duties rightly devolving upon the referee by virtue of his office. It is the clearly expressed intent of the act to entrust the administration of bankrupt estates, where the judge himself does not retain the administration, to the certain judicial officer termed the "referee," whose duties are clearly defined and whose compensation has been carefully limited by congress, in the interests of economy. In many districts the practice prevails of referring, either to such referees or to others, as "special masters," various matters which the act clearly includes among the duties of the referee. In this way additional expense is unnecessarily saddled upon bankrupt estates, and the statutory provision violated which prohibits "any other or further compensation" "in any form or guise" than that "expressly authorized and prescribed by the act."

In re Sweeney, 21 A. B. R. 866, 168 Fed. 612 (C. C. A. Tenn.): "The issues presented by the intervention were properly referred by the court to the referee for the purpose of hearing the evidence and making a report. The referee afterwards filed a report as special master. This was doubtless an inadvertence. There is no authority for converting the referee into a special master. * * * For the most part the duties of a referee are those of a special master, and we know of no authority for the appointment of a special master to do the proper business of the referee. Nor do we know of any power to allow a referee the compensation of a special master. The fees and compensation of that officer were enlarged by the amendment of the act passed February 5, 1903. By § 72 added by that amendatory act it is provided, etc."

See ante, § 24; post, § 2011. Apparent instances, *In re Hoyt & Mitchell*, 11 A. B. R. 784, 127 Fed. 968; *Laffoon v. Ives*, 20 A. B. R. 174, 159 Fed. 861 (C. C. A. Wash.); *In re Hunttenberg*, 18 A. B. R. 697, 153 Fed. 768 (D. C. N. Y.); *In re Wilcox Co.*, 19 A. B. R. 91, 156 Fed. 685 (D. C. N. Y.); *In re Allert*, 23 A. B. R. 101, 173 Fed. 691 (D. C. N. Y.); *In re Photo Engraving Co.*, 19 A. B. R. 94, 155 Fed. 684 (D. C. N. Y.); *In re Strobel*, 19 A. B. R. 109, 160 Fed. 916 (D. C. N. Y.).

§ 523. The Referee, upon Reference, Becomes "The Court."

Page 325. *Gilbertson v. United States*, 22 A. B. R. 32, 168 Fed. 672 (C. C. A. Wis.): "The office of referee, created by the act as an arm of the bankruptcy court, is invested with certain judicial powers (§ 38), 'subject always to a review by the judge,' and his proceedings, after the court acquires jurisdiction, are those of the court."

Page 327. *Knapp & Spencer v. Drew*, 20 A. B. R. 355, 160 Fed. 413 (C. C. A. Neb.): "The claim that the referee had no power to entertain the proceeding in question, make an investigation, and report his result to the court for its action is without merit. By § 38 of the Bankruptcy Act of 1898 the referee is empowered to 'perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts.' By general order No. 12 prescribed by the Supreme Court pursuant to the power conferred by the Bankruptcy Act upon it, after a case has been referred to a referee, 'all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.' These provisions with the provision for review by the judge on certificate from the referee as contemplated by § 39 (6) and general order No. 27, not only conferred jurisdiction upon the referee to entertain the proceeding now under consideration, but afforded ample provision for review of his decision by the judge of the District Court from whose action alone an appeal to this court can be prosecuted."

Page 327. However, wherever the act uses the term judge it excludes the referee in bankruptcy: the referee may be the "court" but he is never the "judge."

In re *Bloodworth Stenbridge Co.*, 24 A. B. R. 156, 178 Fed. 372 (D. C. Ga.): "Now, wherever in the Bankruptcy Act the term 'judge' is used, it means the judge of the District Court, and not the referee in bankruptcy."

§ 524. May Adjudge Bankrupt on Default, or Dismiss Petition.

But they have no jurisdiction to dismiss the proceedings in bankruptcy after adjudication.

In re *Elby*, 19 A. B. R. 734, 157 Fed. 935 (D. C. Iowa).

It is only the judge who may do so, and not even then until first the adjudication be itself vacated.

§ 526. After Adjudication and General Reference All Proceedings to Be before Referee.

After adjudication and reference (unless the reference is restricted) all the proceedings are conducted before the referee, even to the appointment of receivers to take charge of the property until the election of the trustee, precisely the same as if they were before the judge himself.

And a previous special reference is superseded. In re *Ruos* (No. 2), 21 A. B. R. 257, 164 Fed. 749 (D. C. Pa.).

§ 527. Referee May Issue Injunctions.

Page 329, note 48. See, in addition, In re *Mustin*, 21 A. B. R. 147, 163 Fed. 506 (D. C. Ala.); In re *Lawrence*, 20 A. B. R. 698, 163 Fed. 131 (D. C. Ala.).

§ 530. May Appoint Receiver, Even before Adjudication.

But not without notice upon the bankrupt, except where to give notice is impossible or would defeat the object of the appointment.

See ante, §§ 346, 381.

§ 530¼. May Order Trustee to Intervene in Pending Action.

The referee has power to authorize the trustee to intervene in an action which was pending at the time the bankruptcy petition was filed.

Conti v. Sunseri, 18 A. B. R. 891 (Pa. Com. Pleas Court).

§ 530½. May Order Preservation of Lien for Benefit of Estate.

And he may order the preservation of liens, otherwise annulled, for the benefit of the estate.

Conti v. Sunseri, 18 A. B. R. 891 (Pa. Com. Pleas Court).

§ 531. May Marshal Liens.

Page 330, note 52. See post, § 1888; also *Mound Mines Co. v. Hawthorne*, 23 A. B. R. 242, 173 Fed. 882 (C. C. A. Colo.), quoted at § 1796.

§ 532. May Order Sale of Assets.

Page 331, note 53. Instance, *In re Littlefield*, 19 A. B. R. 18, 155 Fed. 838 (C. C. A. N. Y.).

§ 533. And May Sell Free from Liens.

Page 331, note 55. See, in addition, *In re Miners Brew. Co.*, 20 A. B. R. 717, 162 Fed. 327 (D. C. Pa.); *In re Littlefield*, 19 A. B. R. 18, 155 Fed. 838 (C. C. A. N. Y.).

§ 535. May Tax Costs.

Page 331, note 57. Under what circumstances he may tax attorneys' fees as part of the costs, see post, §§ 861½, 1996, 2004.

§ 540. Also by Agent of Bankrupt or Person Not Claiming Adversely.

Page 332, note 62. See post, §§ 1474, 1823, et seq.

§ 543. Also Property Taken Out of Bankrupt's Possession after Filing of Bankruptcy Petition.

The referee has power to order the surrender of property taken out of the bankrupt's possession after the filing of the bankruptcy petition, or wrongfully paid out by the bankrupt after the filing.

Knapp & Spencer v. Drew, 20 A. B. R. 355, 160 Fed. 413 (C. C. A. Neb.), quoted at §§ 523, 1800.

And to order the seizure of the property by the marshal upon warrant of seizure.

§ 544. No Jurisdiction to Order Surrender of Property Held Adversely.

Page 332, note 67. See, in addition, *In re Walsh Bros.*, 21 A. B. R. 14, 163 Fed. 352 (D. C. Iowa), quoted post, at § 1652; *In re Peacock*, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.), quoted at § 548.

§ 545. No Jurisdiction to Entertain Plenary Actions.

Page 333, note 68. Compare post, § 1695; *In re Walsh Bros.*, 21 A. B. R. 14, 163 Fed. 352 (D. C. Iowa), quoted at § 1652; *In re Overholzer*, 23 A. B. R. 10 (Ref. N. Dak.). Compare, apparently contra, *In re O'Brien*, 21 A. B. R. 11 (Ref. Mass.). Compare, *In re Peacock*, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.), quoted at § 548.

§ 545½. Nor to Render Judgment in Personam.

And the referee has no jurisdiction to render judgment in personam.

See § 548. Also, see *Knapp & Spencer v. Drew*, 20 A. B. R. 355, 160 Fed. 413 (C. C. A. Neb.).

He proceeds solely by "orders."

§ 546. May Not Vacate Adjudication.

Page 333, note 69. *In re Elby*, 19 A. B. R. 734, 157 Fed. 935 (D. C. Iowa).

The referee has not power to dismiss the proceedings after adjudication.

In re Elby, 19 A. B. R. 734, 157 Fed. 935 (D. C. Iowa).

§ 548. Proceedings before Referee Summary.

Page 334. *In re Peacock*, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.): "To confer upon the referee the jurisdiction to pass upon and decide controversies regarding the title to property between the trustee and third parties, frequently and, as in this case, involving questions and issues of fact, would be to deprive the parties of trial by jury as secured by the Constitution. The mere fact that a person has been adjudged a bankrupt does not deprive other persons owning or claiming purely legal rights to property claimed by the trustee of having such rights adjudicated in the courts and by procedure guaranteed to them by the Constitution."

§ 548½. Process.

The Supreme Court's General Order No. 3 provides that "All process, summons and subpoenas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the

clerk and seal of the court, may, upon application, be furnished to the referees."

See post, § 1537. Compare, *Cohen v. American Surety Co.*, 22 A. B. R. 909, 132 App. Div. (N. Y.) 917.

§ 549½. Notice and "Orders to Show Cause."

There are two methods of bringing parties before the court of the referee for determination of their rights, notices by mail to creditors (considered post, at § 564, et seq.), and orders to show cause upon parties claiming interest in property or upon whom summary orders to surrender assets or perform some other acts are demanded. (See post, §§ 1838, 1890, 1980.) There is, of course, no need of a notice of the granting of the "order to show cause"—it is itself a notice.

In re Philip Brady, 21 A. B. R. 364, 169 Fed. 152 (D. C. Ky.).

Compare, collaterally, *Morehouse v. Pacific Hardware, etc., Co.*, 24 A. B. R. 178, 177 Fed. 337 (C. C. A. Nev.): "An order to show cause is but the means prescribed by law for bringing the defendant into court to answer the plaintiff's demands. It is in the nature of process."

§ 550. Hearings Governed by United States Equity Rules, Where Act or Rules Silent.

Page 335, note 74. Compare Gen. Ord. No. 37.

§ 551. Competency of Witnesses Governed by United States Statutes, Not by State Statutes.

Page 335, note 75. Compare, however, before amendment of 1903, In re Josephson, 9 A. B. R. 345, 121 Fed. 142 (D. C. Ga., on review sub nom. *Myers v. Josephson*, 10 A. B. R. 687). Compare, post, § 1567. Compare, contra, In re Horne, 22 A. B. R. 269 (Ref. Miss.), where the bankrupt was held disqualified to object to the claim of a decedent's administrator under a State statute forbidding a party so testifying even where claim "assigned." Bankruptcy transfers title by operation of law, not by "assignment," however, even if State statute applicable. Quoted at § 1567.

§ 552. Referee to Rule on Evidence and Admit or Exclude.

Page 335, note 76. See also, post, § 1554.

Page 335. In re Ruos, 20 A. B. R. 281, 164 Fed. 749 (D. C. Pa.): "Where a question arises concerning the competency of a witness or the admissibility of evidence, the referee should decide the point himself in the first instance, instead of turning the matter over to the court. It will be time enough to certify the question when he is asked to do so in a proper manner. Very often his ruling will be acquiesced in, and the delay of referring the dispute to the court will be thus avoided."

Page 335, note 77. Compare, post, §§ 2554, 2855. *National Bank v. Abbott*, 21 A. B. R. 436, 165 Fed. 852 (C. C. A. Mo.).

It has, however, been held, apparently contra, that the referee must take down all the evidence, simply noting the objections thereto.

Page 336. *Mo.-Am. Elec. Co. v. Hamilton & Brown Co.*, 21 A. B. R. 270, 165 Fed. 283 (C. C. A. Mo.): "A proceeding in bankruptcy is a proceeding in equity, and it is the duty of examiners, masters, referees, and the court, when taking evidence in controversies therein in the absence of a jury, to take, record, and, in case of an appeal, to return to the reviewing court, all the evidence offered by either party, that which they hold to be incompetent or immaterial as well as that which they deem competent and relevant, to the end that, if the appellate court is of the opinion that evidence rejected should have been received, it may consider it, render a final decree, and thus conclude the litigation without remanding the suit to procure the rejected evidence. From this rule evidence plainly privileged, the testimony of privileged witnesses, and evidence which clearly and affirmatively appears to be so incompetent, irrelevant, and immaterial that it would be an abuse of the process or power of the court to compel its production or permit its introduction, are excepted."

Page 337. And in any event the referee may exclude evidence where it is so clearly and plainly incompetent, irrelevant and immaterial that it would have been an abuse of the process or power of the court to have compelled its production.

In *re Clark*, 21 A. B. R. 776 (Ref. Calif.); *obiter*, *Mo.-Am. Elec. Co. v. Hamilton & Brown Co.*, 21 A. B. R. 270, 165 Fed. 283 (C. C. A. Mo.), quoted *supra*.

§ 552½. Ground of Objection to Be Stated.

The general rule is that the ground of objection must be stated, else the objection, though duly excepted to, will not be available on review.

Equity Rule II, 150 Fed. XXVII. Also, compare post, § 2844.

However, where there can be but one possible ground for the objection and such ground is sufficiently obvious, it may be noticed on review.

Analogously, *Johnson v. United States*, 20 A. B. R. 724, 158 Fed. 69 (C. C. A. Mass.).

§ 553. Referee to Hear Evidence.

The referee is to decide each controversy on the evidence introduced on the hearing thereof. Thus, he is not to consider a previous examination of the bankrupt or of a witness, as being in evidence, unless the same is introduced into evidence or stipulated in.

See post, § 1555½.

§ 553¼. Necessity of Pleadings.

No pleadings are requisite to bring on a "general examination" of the bankrupt or of witnesses [see post, § 1525, et seq.]; but in contested

matters before the referee, pleadings are requisite; as, for instance, on objection to, or re-examination of, a claim [see post, § 830, et seq.], petition and answer are requisite, and leave to plead out of time will be granted only for due cause [see post, § 841].

§ 553½. Re-Opening of Case for Further Testimony.

After a party has had an opportunity to call and examine his witnesses and the matter is closed, he should not be permitted to re-open the case for the introduction of evidence which he subsequently concludes would have been an advantage to him.

In *re Booss*, 18 A. B. R. 658, 154 Fed. 494 (D. C. Pa.): "We approve the conclusions of the referee in this case. While we think every facility and opportunity should be afforded parties interested in bankrupt estates to present their evidence in support of contentions in which they may be interested, there is a limit beyond which it would be impracticable and imprudent to go. After a party has had an opportunity to call and examine his witnesses and the matter is closed, unless there is some especial reason for it, the referee should not be expected to again open the case. A party cannot be permitted to re-open a case whenever he finds that he has not produced some evidence which he subsequently concludes would have been an advantage to him. Like all other litigation, there must be an orderly manner of proceeding as well before a referee as before a jury."

Unless for special reasons.

Compare, *Geo. Carroll & Bros. Co. v. Young*, 9 A. B. R. 643.

§ 553¾. State Regulations of Right to Maintain Suit, Not Binding.

State laws requiring certain partnerships, etc., to file certificates of members, etc., and other local regulations upon the right of a party to maintain a suit, are not binding upon the bankruptcy court.

In *re Farmers' Supply Co.*, 22 A. B. R. 460, 170 Fed. 502 (D. C. Ohio).

§ 554. Untrustworthy, Though Uncontradicted, Testimony May Be Rejected.

Page 338, note 82. To same effect, see post, § 2650.

Page 338, note 83. In *re Friedman*, 21 A. B. R. 213, 164 Fed. 131 (D. C. Wis.), quoted at § 852; similarly, In *re Mayer*, 19 A. B. R. 480, 156 Fed. 432 (D. C. Pa.), quoted at § 554½; also, compare to same effect, § 2650.

Page 338. *Ohio Valley Bank v. Mack*, 20 A. B. R. 919, 163 Fed. 155 (D. C. Ohio): "The bankrupt though doing a large business kept no books and it was his practice to destroy all notes and other evidence of indebtedness as soon as the debts were paid or settled. The petitioning (claiming) creditors are members of the family. The answer given to a majority of the questions put to the bankrupt while under examination was 'I don't remember,' and the testimony of the other members of the family who were witnesses was not much more satisfactory."

§ 554½. Failure to Call Accessible Witnesses.

Likewise uncontradicted, but uncorroborated testimony of an adverse claimant to property in the trustee's possession may be insufficient, if witnesses are not called who might have substantiated the claim.

In *re* Mayer, 19 A. B. R. 480, 156 Fed. 432 (D. C. Pa.): "It would be dangerous to accept such testimony as is now before the court without corroboration, save in exceptional cases. The bankrupt, who must have known as much about the matter as his brother, was not called as a witness; there is not a scrap of written evidence to support the claim, directly or indirectly; it is not even proved that the property in dispute ever belonged to the partnership, although the merchants, who are said to have sold it to the firm, were easily accessible; and, in a word, the whole statement rests absolutely upon the claimant's uncorroborated account, to which it would be almost impossible for the trustee to reply. I do not decide that in no case can a claim be made out by the unsupported testimony of the creditor, but simply that, under the circumstances of the present case, I do not find such testimony to be sufficient. I therefore hold, that the evidence offered by Max Mayer does not establish his claim to be the owner of the goods in dispute, and that he has not overcome the *prima facies* of the bankrupt's ownership, due to possession of the property at the time the petition was filed."

§ 555. But Mere Circumstances of Suspicion Insufficient for Rejection.

Thus, the mere facts that the only testimony as to the validity of an assignment of book accounts comes from the bankrupt and the assignee and that they are relatives, are not sufficient to warrant rejection.

In *re* McCauley, 18 A. B. R. 459, 158 Fed. 322 (D. C. Mich.): "It must be conceded that an agreement resting for its support upon the testimony of the two parties to it, is suggestive of bias and open to suspicion, especially where the amount at stake is large and there is no written evidence of the fact in controversy. But when it is not opposed by any evidence—except the considerations suggested by the interest of the petitioner and his relationship to the bankrupt which the referee rejected as factors in his judgment—and undisputed facts tend to corroborate it, the referee's denial of the petition must be referred to the competency of the evidence accepting its truthfulness."

§ 556. Dealings between Near Relatives to Be Scrutinized with Care.

Page 338, note 86. Instances, *Ohio Valley Bank v. Mack*, 20 A. B. R. 919, 163 Fed. 155 (D. C. Ohio); In *re* Sanger, 22 A. B. R. 145, 169 Fed. 722 (D. C. W. Va.). See post, § 800.

§ 558⅞. Conspiracy to Defraud Creditors.

A mere tacit understanding between parties to work to a common unlawful purpose is all that is necessary to constitute a conspiracy to de-

fraud; and it may be proved by circumstantial evidence even in the face of uncontradicted testimony.

In re Friedman, 21 A. B. R. 213, 164 Fed. 131 (D. C. Wis.).

§ 558¼. **Omission of Items from Books, Destruction of Papers, etc., as Badges of Fraud.**

The omission of items from books of account, the destruction or mutilation of books, checks, stubs or papers may be badges of fraud.

In re Friedman, 21 A. B. R. 213, 164 Fed. 131 (D. C. Wis.), quoted at § 856½.

§ 558½. **Unusual Manner of Doing Business, a Badge of Fraud.**

The conducting of business in an unusual manner, is a badge of fraud; as, for instance, selling job lots to peddlers, failing to enter the sales in the books, etc.

In re Friedman, 21 A. B. R. 213, 164 Fed. 131 (D. C. Wis.), quoted at § 856¾.

§ 558¾. **Evasive or Self-Contradictory Testimony.**

Of course, evasive or self-contradictory testimony of the witness affects his credibility, and may indicate fraud.

In re Friedman, 21 A. B. R. 213, 164 Fed. 131 (D. C. Wis.): "The inference of fraud is strengthened by systematic evasion and contradictory statements of these parties on the witness stand."

Block, trustee, v. Rice, trustee, 21 A. B. R. 691, 167 Fed. 693 (D. C. Pa.): "This, together with Rice's shifty, evasive, and unreliable manner as a witness, is sufficient to warrant the jury in finding, as they did, that Rice had appropriated the \$750 trust fund to his own use."

Thus, repetitions of "I don't know" or "I don't remember" as to matters undoubtedly within the witness' knowledge or memory may indicate falsehood and fraud.

Ohio Valley Bank v. Mack, 20 A. B. R. 919, 163 Fed. 155 (D. C. Ohio), quoted at § 554. Also, see post, §§ 1851, 2331.

§ 559. **Agent's Amission Not Binding unless within Scope.**

Page 339, note 87. **Res Judicata and Collateral Attack.**—As to questions of res judicata and collateral attack arising before referees, compare post, § 1771, et seq.

§ 561. **Orders of Referees.**

Page 340, note 89. And also, § 2850.

Page 240. Even notice to parties (other than the ten days' statutory notices to creditors) is ordinarily given by service upon them of an "order to show cause."

See ante, § 549½.

§ 562. Order to Recite Notice, Appearance and Hearing, etc.

Page 340, note 90. **Mere Calendar Entries of Papers Filed Not Sufficient.**—Compare, *Scofield v. United States ex rel Bond*, 23 A. B. R. 259, 174 Fed. 1 (C. C. A. Ohio). Also, compare *In re (James) Dunlap Carpet Co.*, 22 A. B. R. 788, 171 Fed. 532 (D. C. Pa.).

Page 340. *Faulk v. Steiner*, 21 A. B. R. 623, 165 Fed. 861 (C. C. A. Ala.): "The twenty-third General Order in Bankruptcy provides that: 'In all orders made by a referee it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented, at the hearing; or that the order was made after hearing adverse interest.' The referee, in the appointment [of a receiver] disregarded this order. This rule is prescribed by the Supreme Court by authority of § 30 of the Act, and it is the duty of referees to make their orders conform to it."

Compare as to what, if any, recitals are to be made [in District Court, at any rate] *In re Fischer*, 23 A. B. R. 427, 175 Fed. 531 (C. C. A. N. Y.): "The practice in bankruptcy is similar to that in equity. The 86th Equity Rule provides that there shall be no recitals in decrees or orders. Although in modern practice this is not always strictly adhered to when some useful purpose would be subserved by departing from it, it cannot be held error in the bankruptcy court when such rule is followed."

§ 563. Referee May Vacate or Modify Orders or Findings.

Page 340, note 91. Compare, *Bernard v. Abel*, 19 A. B. R. 383, 156 Fed. 649 (C. C. A. Wash.), quoted at § 422, note.

Referee May Not Impeach Own Orders.—Compare post, § 1773.

Pages 340-341. It is a question whether the referee has jurisdiction to vacate or modify his orders after the case has been carried up for review.

In re Greek Mfg. Co., 21 A. B. R. 111, 164 Fed. 211 (D. C. Pa.): "It follows, also, that an order once entered is not subject to be reviewed or altered by the referee himself. To permit this would be to enlarge General Order 27 so as to include what the Supreme Court did not see fit to insert—namely, 'the referee' as well as 'the judge'—and I need not say that such enlargement is beyond the power of a District Court. The practice (which has, to some extent, grown up in this district) of filing exceptions to a referee's order, which are thereupon argued and determined at such time as may be fixed, is merely a method of having the referee review his own ruling, and finds no warrant either in the general order or in the rule of the District Court. The general order requires that the petition for review shall '(set) out the error complained of,' and by this means the same result is reached as by filing exceptions. Occasionally, such practice may conveniently afford the referee the opportunity of correcting an inadvertence or a plain mistake, but even when this is true the correction may ordinarily be made by the judge with as much convenience and as little loss of time. In the great majority of cases, the filing of exceptions is followed by a rehearing that does not change the referee's opinion, and a review by the court is therefore delayed without any corresponding advantage. But in any event the practice appears to be irregular and should be discontinued."

Page 341, note 93. See further, on this subject, § 553½.

Page 341, note 94. But compare ante, § 553½.

Trustee Not to Execute Order of Referee for Payment of Money until Opportunity for Appeal or Review Given.—In re Nichols, 22 A. B. R. 216, 166 Fed. 603 (D. C. N. Y.).

Litigants to Be Notified of Referee's Decision.—In re Nichols, 22 A. B. R. 216, 166 Fed. 603 (D. C. N. Y.).

Page 341. But the referee may not review his own order on exceptions thereto.

In re Marks, 22 A. B. R. 568, 171 Fed. 281 (D. C. Pa.). Also, In re Greek Mfg. Co., 21 A. B. R. 111, 164 Fed. 211 (D. C. Pa.), quoted supra.

§ 564. Notices to Creditors, Valuable Feature of Act.

Before the passage of the Bankruptcy Law, one of the greatest abuses in the ordinary administration of insolvent estates was the rushing through of improper sales of assets and of improper distributions of the proceeds.

Page 342. Compare, In re Beutels Sons Co., 7 A. B. R. 768 (Ref. Ohio). Also, see post, § 1944.

§ 565. Ten Days' Notice by Mail to Creditors.

Page 343. Notices should also be given of petitions to redeem from liens.

In re Grainger, 20 A. B. R. 166, 173, 160 Fed. 69 (C. C. A. Calif.). See post, § 1869.

§ 565¼. Thirty Days' Notice of Bankrupt's Discharge Petition.

Amendment of 1910.—By the Amendment of 1910 the length of notice of the hearing of the bankrupt's application for a discharge has been extended from ten days to thirty days.

Bankr. Act as amended 1910, § 58 (a): “* * * (9) there shall be thirty days' notice of all applications for the discharge of bankrupts.”

The object of such extension, is, obviously, to afford opportunity for creditors to hold their meeting called for the purpose of determining whether they shall oppose the bankrupt's discharge.

See report No. 691 of Senate Judiciary Committee of the 61st Congress, 2nd Session, quoted at § 2431½.

§ 565½. Notices of Composition Meeting before Adjudication.

By the Amendment of 1910, authorizing compositions before adjudication of bankruptcy (see post, § 2358½, et seq.) it is provided that the bankrupt, in such cases, shall file the required schedules and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt and preservation or conduct of the

estate. The notice of such meeting is already provided for in Bankruptcy Act, § 58 (a) (3), wherein ten days' notice is required of "all meetings of creditors." The notice of the petition for confirmation of composition made before adjudication is likewise already provided for in § 58 (a) (2).

§ 565¾. Notices of Applications for Compensation of Receiver, Trustee, etc.

By the Amendment of 1910 to § 48, ten days' notice must be given creditors of all applications of receivers and marshals for allowance of compensation and of all applications of trustees, receivers and marshals for allowance of additional compensation for conducting the business, such notices to specify the amounts asked.

Bankr. Act, as amended 1910, § 48 (d) and (e): "Provided, further, that before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this act." See post, § 2119 (b).

§ 567. Notice to All Scheduled and to All Filing Claims.

Page 344. Even those not scheduled nor filing claims must be notified where they have already participated in the bankruptcy proceedings under claim of being creditors and no final determination has been had that they are not creditors; and an election held without notice to them may be set aside.

In re Evening Standard Pub. Co., 21 A. B. R. 156, 164 Fed. 517 (D. C. N. Y.): "The assumption of the referee and attorneys for the trustee and others, in not notifying Tyner of the first meeting, was that, as he was not scheduled by the bankrupt corporation as a creditor, he was not entitled to notice; but they had notice that he claimed to be a creditor, and that the court had decided that, until his claim was presented in the regular way and offered for allowance and disallowed, he was to be treated as a creditor or alleged creditor. He was entitled to notice of the first meeting of creditors, and entitled to attend and file his claim. If his claim was not then objected to by a creditor and valid on its face, he was entitled to have it allowed, and then to take part in the selection of a trustee. If objected to by creditors, and such objections were verified, then it was the duty of the referee either to adjourn the meeting and try out the merits of the claim, or, if that would unduly postpone the election of a trustee, to proceed on the votes of those whose claims were allowed. Tyner had the right at the first meeting as an alleged creditor to file verified objections to the claims of other alleged creditors." Quoted further at §§ 575, 579½.

§ 571. Creditors' Meetings Valuable Feature of Modern Bankruptcy Law.

Page 347, note 5. Impliedly, In re Evening Standard Publishing Co., 21 A. B. R. 156, 164 Fed. 517 (D. C. N. Y.), quoted at §§ 567, 870½; In re Kaufman, 24 A. B. R. 117, 176 Fed. 93 (D. C. Ky.).

Page 347. By the Amendment of 1910, meetings of creditors are provided for in cases of composition before adjudications of bankruptcy [see § 593 (a)]; and also for the authorization of the trustee to enter opposition to the bankrupt's discharge [see § 593 (b)].

§ 572. How Creditors Pass upon Matters at Meetings.

The authorization of the trustee to oppose the bankrupt's discharge at the expense of the estate, provided for by the Amendment of 1910, is to be conferred by such a vote.

§ 575. Creditors Not to Vote Whose Claims Not Allowed.

Page 348. *Obiter*, In re Evening Standard Publishing Co., 21 A. B. R. 156, 164 Fed. 517 (D. C. N. Y.): "Claims should not be voted where duly verified legal objections are filed thereto." Quoted further at §§ 567, 579½.

§ 576. Thus, Secured and Priority Creditors.

Page 349, note 15. Compare, impliedly, In re Milne, Turnbull & Co., 20 A. B. R. 248, 159 Fed. 280 (D. C. N. Y.).

But where a claimant, entitled to priority, inadvertently participates in the election of the trustee, precisely as if his claim were not entitled to priority, it will not be held that he is estopped or has waived his priority.

In re Ashland Steel Co., 21 A. B. R. 834, 168 Fed. 679 (C. C. A. Ky.). See also, post, § 2139.

§ 577. Preliminary Estimate of Values for Voting Purposes.

Page 349, note 16. In re Milne, Turnbull & Co., 20 A. B. R. 248, 159 Fed. 280 (D. C. N. Y.).

Allowing to Vote for Deficit Instead of Requiring Surrender of Security as Preference—When Not Prejudicial Error.—In re Milne, Turnbull & Co., 20 A. B. R. 248, 159 Fed. 280 (D. C. N. Y.).

§ 579½. Objections So Numerous That Determination of Validity Would Unduly Delay Appointment of Trustee.

Where so many claims are objected to, in apparent good faith, that the determination of their validity would unduly delay the appointment of a trustee, it has been held that the referee may appoint, or may permit an election by those creditors whose claims have been allowed.

In re Syracuse Paper & Pulp Co., 21 A. B. R. 174, 164 Fed. 275 (D. C. N. Y.), quoted at §§ 817, 828, 831, 838.

In re Evening Standard Pub. Co., 21 A. B. R. 156, 164 Fed. 517 (D. C. N. Y.): "Whether the referee will or will not postpone the election of a trustee, where claims are objected to, is a matter of sound discretion. If such a number of claims are duly objected to that an election by a majority in number and

amount cannot be had, then, if circumstances demand, he may and should himself appoint. All this is settled by the weight of well-considered authorities. Claims should not be voted where duly verified legal objections are filed thereto. Of course, the referee may proceed to take proof, and, if the objecting party cannot produce sufficient evidence to sustain them, he will allow the claim. If the objecting party shows legal cause for delay for the purpose of producing evidence not at hand, the referee may in some cases allow the claim for voting purposes; but a better practice is to proceed to an election on the allowed claims, if the condition of the estate demands prompt action. If so many verified objections, apparently valid, are filed that an election by creditors is impossible, let the referee appoint."

§ 580. For Other Participation than Voting, Claim Need Not Be Allowed.

Page 350, note 20. See post, § 1532; *In re Kuffler*, 18 A. B. R. 587, 153 Fed. 667 (D. C. N. Y.); *In re Jehu*, 2 A. B. R. 498, 94 Fed. 638 (D. C. Iowa), quoted at § 1532.

Page 350, note 22. See post, § 1532; *In re Kuffler*, 18 A. B. R. 587, 153 Fed. 667 (D. C. N. Y.); *In re Jehu*, 2 A. B. R. 498, 94 Fed. 638 (D. C. Iowa), quoted at § 1532.

§ 590. May Be Adjourned.

Meetings of creditors may be adjourned from time to time.

Obiter, *In re Eagles and Crisp*, 3 A. B. R. 733, 99 Fed. 696 (D. C. N. C.); *obiter*, *In re Syracuse Paper & Pulp Co.*, 21 A. B. R. 174, 164 Fed. 275 (D. C. N. Y.). Compare, § 863.

Nevertheless, adjournment may be granted to enable creditors to amend proofs of debt to state the consideration more properly.

Obiter, *In re Morris*, 18 A. B. R. 826, 159 Fed. 591 (D. C. Pa.), quoted at § 863.

§ 593. First Meeting—Referee or Judge to Preside, Allow Claims, Examine Bankrupt.

Generally, then, with the bankrupt's assistance, the court, by which usually is meant the referee since the judge seldom, if ever, takes advantage of the statutory permission to preside, proceeds to the allowance and disallowance of claims, and then the creditors take up the voting for the trustee.

Page 354, note 37. Compare, general duty to elect trustee at the first meeting, *In re Syracuse Paper & Pulp Co.*, 21 A. B. R. 174, 164 Fed. 275 (D. C. N. Y.).

§ 593¼. Meeting to Consider Composition before Adjudication.

Amendment of 1910.—By the Amendment of 1910, permitting compositions before adjudication, it is provided that in such cases the

bankrupt shall file the required schedules before adjudication, and that thereupon the court shall call a meeting of creditors for the allowance of claims, the examination of the bankrupt, and for the consideration of the conduct of the estate, at which meeting the judge or referee shall preside.

Bankr. Act, § 12 (a) as amended in 1910: "A bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and the list of his creditors required to be filed by bankrupts. In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed."

§ 593½. Meeting to Consider Opposition to Discharge.

Amendment of 1910.—The Amendment of 1910, making the trustee a competent party to oppose the discharge of the bankrupt, only permits him to oppose the discharge when authorized so to do at a meeting of creditors called for such purpose.

Bankr. Act, § 14 (b): "The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such times as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense.....

"Provided, That a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose."

Such meetings of creditors is to be called on the ordinary ten days' notice by mail, and it takes action in the ordinary manner.

See ante, § 565¼.

§ 595. "Proof" and "Allowance" Different Terms.

The court apparently has no authority to allow any claims except such as have been "duly proved."

Post, § 813; also compare, *In re (James) Dunlap Carpet Co.*, 22 A. B. R. 788, 171 Fed. 532 (D. C. Pa.).

§ 595½. Agreeing to Treat Informal Papers as "Proofs of Claim."

Attempt is sometimes made to have informal papers not containing sufficient allegations "by which to amend," treated as claims, this effort

most commonly arising in cases of claims that have not been properly filed within the year.

Instance, *In re Kessler & Co.*, 23 A. B. R. 901, 176 Fed. 647 (D. C. N. Y.): "I do not think it is necessary to make any decision upon the first point, although I can see many evils which would arise from permitting oral testimony to show that some of the papers, which came into the hands of the trustee, he agreed to treat as proofs of claim. When the Congress says that the proof of claim must be in writing, it must mean that there are certain essential elements without which it is no 'claim' at all. I should think that one of those elements must be some indication in the writing that the 'claim' is a demand against the bankrupt estate. No case goes so far as to remove that essential. However, I make no decision upon that question, because it is not necessary. The most that the petitioner can claim is that, because of the conversation between the trustee, then receiver, and Mr. McCurdy, the trustee consented that the petitioner's statement and letter, which he had received with the other papers from the assignee, should stand in the place of a proof of claim. If any paper is to be treated as a proof of claim which the parties agree on, I am certainly of opinion that the oral testimony on which the parties rely must be clear and explicit. The trustee has no recollection of the conversation, but assuming that Mr. McCurdy's recollection is accurate, it by no means goes far enough to show that the trustee consented to accept the papers in lieu of a formal proof of claim. He was asked whether he had received them from the assignee, and he said that he had and that they were all right. At the time when this conversation took place no trustee had been appointed and no adjudication had taken place. No proof of claim could have been filed. It is inconceivable to my mind that either party to the conversation could have intended that the papers referred to should stand in lieu of a proof of claim. The receiver did not know that he would be elected trustee; he did not know that there would be an adjudication. It would have been rash and improper for him to have agreed on behalf of the future trustee and in the event of a future adjudication, that any existing papers should have stood in place of a proof of claim. I do not even mean to decide that such an agreement would have bound the estate, though the receiver was subsequently made trustee, but I do mean to decide that it would be most unreasonable to construe the language used as intended by the parties to constitute so certain an agreement as must exist, if this paper is by estoppel to be construed as a proof of claim. Therefore, the proof falls short, in my opinion, of an agreement that the papers should stand as a proof of claim."

§ 597. "Claim" to Be Set Forth and Alleged to Be "Justly Owing."

Page 357, note 6. Impliedly, *In re Kessler*, 23 A. B. R. 901, 176 Fed. 647 (D. C. N. Y.), quoted at § 595½.

§ 598. Due Date and Interest.

Page 357, note 9. Whether interest to be given on allowed claims where trustee in bankruptcy ordered to pay over to trustees in liquidation, *In re John Osborne's Sons & Co.*, 24 A. B. R. 65, 177 Fed. 184 (C. C. A. N. Y.).

Where the debt is secured the creditor is entitled to compute interest to the date of realizing on the security.

Obiter, Coder v. Arts, 18 A. B. R. 513, 152 Fed. 943 (C. C. A. Iowa); *Coder v. Arts*, 22 A. B. R. 1, 213 U. S. 223, quoted at §§ 758½, 1997½; *In re Stevens*, 23 A. B. R. 239, 173 Fed. 842 (D. C. Ore.), quoted at § 758½.

And it has been held, in determining the amount of the deficit to be "allowed" for sharing in dividends, that the security may be marshaled first against the interest, as thus computed, to the date of realizing thereon, and that the remainder is the allowable deficit, not to exceed, however, what would have been the amount of the debt, principal and interest, as it stood at the date of the filing of the bankruptcy petition.

In re Kessler & Co., 22 A. B. R. 607, 171 Fed. 751 (D. C. N. Y.), quoted at § 758½.

However, a contrary rule prevails in England, established by a long line of authorities.

Ex parte Wardell, 1 Cooke's Bankr. Law, p. 181; *Ex parte Hersey*, 1 Cooke's Bankr. Law, p. 181; *Ex parte Badger*, 4 Vesey 165; *Ex parte Ramsbottom*, 2 Mont. & Ayrton, 80; *In re Penfield*, 4 J. DeG. & Sm. 282; *In re Savin*, 7 Chan. 760; *In re Talbott*, 39 Chanc. Div. 567; *Quartermaine's Case* L. R. 1 Chanc. 639; *In re Bonacino*, 1 Manson 59.

§ 602. If Instrument in Writing Given, Original to Be Attached.

A judgment or transcript of the record of a judgment is not a "written instrument" and need not be filed.

But compare, impliedly, contra, *McCabe v. Patton*, 23 A. B. R. 335, 174 Fed. 217 (C. C. A. Pa.).

§ 603. Consideration to Be Stated.

Page 359, note 16. See, in addition, *In re Coventry Evans Furniture Co.*, 22 A. B. R. 272, 171 Fed. 673 (D. C. N. Y.), quoted later at § 603. Compare, *In re Watertown Paper Co.*, 22 A. B. R. 190, 169 Fed. 252 (C. C. A. N. Y.).

Page 359, note 17. *In re Coventry Evans Furniture Co.*, 22 A. B. R. 272, 171 Fed. 673 (D. C. N. Y.), quoted further on in this paragraph.

Page 359. *In re Morris*, 18 A. B. R. 828, 159 Fed. 591 (D. C. Pa.): "The proofs of debt objected to were clearly defective, most of them being simply stated to be for 'services,' 'mdse., etc.,' 'balance of wages,' 'balance of professional services,' for 'goods sold and delivered,' and the like; none of which meets the law."

Page 360. Claims founded upon promissory notes and other commercial paper importing consideration should state the consideration.

In re Coventry Evans Furniture Co., 22 A. B. R. 272, 171 Fed. 673 (D. C. N. Y.): "The claim filed is a mere statement that the company is indebted to Darling in the sum of \$7,329.90, without any information as to the basis of such indebtedness except that the consideration for such debt is a promissory note of the company to Darling's order for \$7,151.13, giving date. The consideration of the note is not stated. That this proof of claim was a compliance

with § 57a of the Bankruptcy Act * * * is not seriously contended. If the claim was on the note, an instrument in writing, evidence of indebtedness, the section requires that the consideration for the note be stated. If a note is given for property, or money loaned or advanced, or for work, labor, and services, etc., as the case may be, the proof of claim must so state and give facts in regard thereto which will enable the trustee and creditors to investigate and ascertain the consideration and justice of the claim. If the claim is for a debt for work, etc., or money loaned, or property sold, etc., and no note has been given, the proof of claim should state the consideration and give facts which will enable the trustee and creditors to ascertain the adequacy of the consideration and the justice and legality of the claim. Whether the claim be on a promissory note, other instrument in writing, or on an account, or for money loaned, etc., the proof of claim must state 'the consideration' for the debt. A proof of claim which complies with the requirements of § 57 establishes the claim, entitles it to allowance in the first instance, and throws the burden of overthrowing it on the trustee when appointed, and on the creditors of the bankrupt if they would contest. *Whitney v. Dresser*, 200 U. S. 532, 15 Am. B. R. 326, * * * and cases there cited. If it fails to do this, it is not entitled to allowance, and, if allowed, the trustee when appointed may have it disallowed and expunged, unless it is corrected by amendment or established by proof. The proof of claim must set forth 'the consideration,' not a general statement that there was a consideration. The claim is 'proved' and entitled to allowance only when it is properly verified and gives 'the consideration' therefor and contains the other statements required. It is not sufficient to say that the bankrupt is indebted to claimant in a certain sum, and then say that the consideration for the debt is a written promise to pay it reciting 'for value received.' True, this written promise also acknowledges a consideration for the promise, but it does not give the consideration as required by § 57a."

§ 604. Account to Be Itemized.

Page 360, note 19. **Account Stated.**—When an "account rendered" becomes an "account stated," see post, § 694, note.

§ 604½. All Credits to Be Shown.

All credits are to be shown.

Obiter, In re Watertown Paper Co., 22 A. B. R. 190, 169 Fed. 252 (C. C. A. N. Y.).

In one instance, on review, a wife's claim against her husband's estate was disallowed, because an amendment had been had, after expiration of the year, to show undisclosed credits, with the object of taking the claim out of the statute of limitations, the claimant originally having erased the word "except" from the form, as if there were no credits. In re Girvin, 20 A. B. R. 490, 160 Fed. 197 (D. C. N. Y.).

§ 605. Claims Provable in Name of Real Party in Interest.

Claims are, in general, to be made in the name of the party substantially in interest.

Bank loaning money to creditor, which creditor in turn lends to bankrupt, is not, on that account, the real party in interest, even though the creditor is

one of the bank's trustees. *Ohio Valley Bank v. Mack*, 20 A. B. R. 40, 163 Fed. 352 (C. C. A. Ohio). See ante, § 203½.

§ 611. Proof by Person Contingently or Secondarily Liable.

Page 362, note 30. See, in addition, *In re Otto F. Lange Co.*, 22 A. B. R. 414, 170 Fed. 414 (D. C. Iowa).

Page 363, note 34. Thus, an endorser paying a note before the maker's bankruptcy may prove for the full amount. *In re McCord*, 22 A. B. R. 204, 174 Fed. 72 (D. C. N. Y.).

§ 613. Surety, on Payment, Subrogated, Pro Tanto, to Creditor's Dividends.

Page 364, note 36. See, in addition, *In re Lange Co.*, 22 A. B. R. 414, 170 Fed. 114 (D. C. Iowa).

§ 614. Signature and Verification.

It is hardly a sufficient reason, that the creditor himself was merely "absent" from the city, or county, or State, so long as it does not appear that he could not have been reached by proper diligence notwithstanding.

Page 364. *In re Reboulin Fils. & Co.*, 19 A. B. R. 215 (Ref. N. J.): "When General Order XXI provided that a proof of claim made by an agent should state the reason the deposition was not made by the claimant in person, it would seem as if the provision was for some purpose, and that the reason must be a good, and valid, and sufficient reason and 'such a reason as would satisfy the officer taking the proof that it was proper to dispense with the oath of the claimant in person' or with the oath of the treasurer, etc. The reason given by the attorney for making proof of claim in question does not seem to me to be such a reason. The attorney in fact does not appear to have legal knowledge of the facts set out in the proof of claim; in a court or before the referee he would not be a competent witness to prove sufficient to establish the claim; indeed I do not see how he would be able to testify that any money was advanced on the claim in question at all. The power of attorney attached to the proof of claim was executed in France, December first, 1905. There appears to be no reason why the treasurer, or proper officer, should not have verified the proof of claim in this matter, even though he was in France, and it could have been done as well as to execute the power of attorney in France."

§ 615. Several Claims by Same Creditor.

Different claims of the same creditor need not be included in one proof.

Claims against Several Bankrupts on Same Instrument.—May be presented against each estate and receive dividends thereon from each, not to exceed total amount due. *B'd of Comm'rs Kan. v. Hurley*, 22 A. B. R. 209, 169 Fed. 92 (C. C. A. Kans.). Also, see post, § 1519.

§ 617. Proofs of Claim Amendable.

Page 366. In re Morris, 18 A. B. R. 828, 159 Fed. 591 (D. C. Pa.): "The proofs of debt objected to were clearly defective, most of them being simply stated to be for 'services'; 'mdse., etc.,' 'balance of wages,' 'balance of personal services,' 'for goods sold and delivered' and the like; none of which meets the law. * * * They were of course capable of correction in this respect, and the referee cannot be said to have gone out of the way to allow it."

Page 366, note 47. See, in addition, In re Faulkner, 20 A. B. R. 542, 161 Fed. 900 (C. C. A. Kans.), quoted at § 734; In re Schiebler, 21 A. B. R. 309, 163 Fed. 545 (D. C. N. Y.); In re Horne & Co., 23 A. B. R. 590 (Ref. Miss.).

§ 618. Amendment to Be Based on an Original Proof Filed.

Thus, mere oral assurances by a receiver of the receipt of a creditor's letter mentioning a claim, will not be sufficient basis.

See In re Kessler & Co., 23 A. B. R. 901, 176 Fed. 647 (D. C. N. Y.), quoted at § 735.

§ 622. Amendment Permissible after Expiration of Year for "Proving" Claims.

Page 367, note 54. See, in addition, In re Faulkner, 20 A. B. R. 542, 161 Fed. 900 (C. C. A. Kans.), quoted at § 734. See, also, In re Horne & Co., 23 A. B. R. 590 (Ref. Miss.).

§ 623. Withdrawal of Proofs of Claim.

Proofs of claim may be withdrawn.

In re Strickland, 21 A. B. R. 734, 167 Fed. 867 (D. C. Ga.): "The only question before the court is the propriety of the referee's order allowing a creditor to withdraw his debt and intervention before the final determination of the cause. Now, the right to dismiss legal proceedings has long inured to parties in all jurisdictions, State and National. * * * The only limitation upon that right is that the party dismissing shall pay all costs, and that the dismissal shall not violate any substantial right, nor render it unavailable. That is the law in Georgia and obtains almost universally. * * * Can the withdrawal of a proof of debt be said to violate any substantial right of the bankrupt, or place him in a position more prejudicial than that which he occupies before the proof was filed? An examination of the precedents shows that all the recent cases sanction a withdrawal or amendment, under ordinary circumstances, of proceedings in bankruptcy."

The filing of a proof of claim is not necessarily an "election of remedies."

In re Strickland, 21 A. B. R. 734, 167 Fed. 867 (D. C. Ga.).

It has been held that a claim may be withdrawn from the individual estate and filed against firm assets, after the expiration of the year for filing the claim.

In re Horne & Co., 23 A. B. R. 590 (Ref. Miss.). But compare, post, § 737.

§ 626. "Debt."

Page 372, note 2. In re Harper, 23 A. B. R. 918, 175 Fed. 412 (D. C. N. Y.).

§ 627. Includes Demands and Claims Not Technically "Debts."

Thus, "debt" has been held to include damages for false representation, inducing the entering into a contract of sale, whereby loss has occurred.

In re Harper, 23 A. B. R. 918, 175 Fed. 412 (D. C. N. Y.).

§ 629. Whether "Provable" or Not Depends on Status at Date of Filing Bankruptcy Petition.

In re Neff, 19 A. B. R. 23, 157 Fed. 57 (C. C. A. Ohio, affirming 19 A. B. R. 911): "The status of a claim must depend upon its provability at the time the bankrupt petition was filed. At that time it must come within the definition of § 63 of the Bankrupt Act; it cannot be benefited by its status at a later date." Quoted further at § 674.

Board of Commissioners v. Hurley, 22 A. B. R. 209, 169 Fed. 92 (C. C. A. Kans.): "Indeed, the condition at the time of the filing of the petition measures the extent of the estate and the rights of all creditors of the bankrupt and all parties interested in the property, throughout all the provisions of the law." Quoted further at §§ 1519, 1521.

Page 374, note 9. Swarts v. Siegel, 8 A. B. R. 689, 117 Fed. 13 (C. C. A. Mo.); Steinhardt v. Nat'l Bk., 18 A. B. R. 87, 52 Misc. (N. Y.) 465, reversed, on other grounds, Steinhardt v. National Bank, 19 A. B. R. 72, 120 A. D. 255; In re Reading Hosiery Co., 22 A. B. R. 562, 171 Fed. 195 (D. C. Pa.); In re Garlington, 8 A. B. R. 602, 115 Fed. 999 (D. C. Tex.); obiter, Ruhl-Koble-gard Co. v. Gillespie, 22 A. B. R. 643, 61 W. Va. 554.

§ 631. Whether a "Debt," "Claim" or "Demand" Dependent on State Law.

Whether a claim be a "debt," "claim," or "demand" is determined by state law.

In re Brown, 21 A. B. R. 123, 164 Fed. 673 (C. C. A. Calif.); In re Talbot, 7 A. B. R. 29, 110 Fed. 924 (D. C. Mich.).

§ 632. "Provability" and "Allowability" Different Terms.

Steinhardt v. National Bank, 19 A. B. R. 72, 120 App. Div. N. Y. 255: "Proof of the claim is one thing, and its allowance is quite another."

Page 375, note 13. Steinhardt v. National Bank, 19 A. B. R. 72, 120 App. Div. N. Y. 255.

Page 376, note 15. In re Clover Creamery Ass'n (Evans v. Claridge), 23 A. B. R. 884, 176 Fed. 907 (C. C. A. Wis.).

§ 633. "Provability" Not Dependent on "Dischargeability."

That a claim may be a provable claim and be allowed to participate

in dividends and yet not be affected by the bankrupt's discharge, is illustrated by the instance of debts for property willfully and maliciously injured.

Kavanaugh v. McIntyre, 21 A. B. R. 327, 128 App. Div. 722, 112 N. Y. Supp. 897.

§ 635. Claims "Ex Delicto" for Money Not Provable unless in Judgment.

Claims ex delicto for money cannot be proved as such.

In re Dorr, 21 A. B. R. 752 (Ref. Calif.).

Page 377, note 19. Thus, damages for wrongful death not provable. *In re New York Tunnel Co.*, 20 A. B. R. 25, 159 Fed. 688, and 21 A. B. R. 531, 166 Fed. 284 (C. C. A. N. Y.).

Page 377. Even though the plaintiff was under contract of employment with the bankrupt.

In re Crescent Lumber Co., 19 A. B. R. 112, 154 Fed. 724 (D. C. Ala.).

But if reduced to judgment before the filing of the bankruptcy petition, may be proved as a judgment, though not if not reduced to judgment until after the filing of the petition.

Impliedly, *In re Crescent Lumber Co.*, 19 A. B. R. 112, 154 Fed. 724 (D. C. Ala.).

And Bankruptcy Act, § 17 (a) (2), excepting from the operation of discharge "liabilities for obtaining property by false pretenses or false representations, or willful and malicious injuries to the person or property of another," does not enlarge the classes of provable debts so as to include injuries to the person, not yet reduced to judgment.

In re New York Tunnel Co., 20 A. B. R. 25, 159 Fed. 688 (C. C. A. N. Y.): "In 1903, § 17 was amended in various ways. One change was the substitution of the word 'liability' in place of the word 'judgments.' And the provision as it now stands affords some basis for the claim that the exception from the operation of the discharge of particular liabilities for tort implies that such liabilities in general are [not] discharged [and hence are provable debts]. But this implication does not carry far. The amendment was to an exception in the discharge statute which states what debts shall not be discharged rather than what shall be. A negative provision that liabilities for certain torts shall not be discharged, does not of itself, make all other tort liabilities provable debts. It is apparent that Congress by the amendment intended to preclude the possibility of claims for certain torts being discharged whether reduced to judgment or not. Having this object in view it used language not wholly in harmony with the other sections of the act. But we see nothing to indicate an intention to enlarge the classes of provable debts. Certainly no intention is evidenced to bring in claims for torts which were never provable under the earlier bankrupt acts."

It is doubtful whether damages for the infringement of a patent are provable.

Graphophone Co. *v.* Leeds & Catlin, 23 A. B. R. 337, 174 Fed. 158 (U. S. C. C.).

§ 636. But Provable Where Tort Waivable and Claim Presentable as in Contract.

Page 377, note 21. Compare, inferentially, *Maxwell v. Martin*, 22 A. B. R. 93 (N. Y. Sup. Ct. App. Div.).

Page 378, note 22. Instance, conversion of car load of eggs, sold for cash, by getting the carrier to deliver them without payment of the draft attached to the bill of lading. *Clingman v. Miller*, 20 A. B. R. 360, 160 Fed. 326 (C. C. A. Kans.). Instance, conversion of proceeds of sale by agent on commission. *In re Hale*, 20 A. B. R. 633, 161 Fed. 387 (D. C. Conn.).

Page 378. Damages for loss arising on a contract of sale or purchase entered into through fraudulent misrepresentations, have been held to be a provable debt.

In re Harper, 23 A. B. R. 918, 175 Fed. 412 (D. C. N. Y.).

§ 637. Claimant Must Elect.

Page 378, note 24. Compare, as to the effect on dischargeability of the proving of a claim in bankruptcy created by the bankrupt's fraud, § 2750½; also, *Standard Sewing Machine Co. v. Kattell*, 22 A. B. R. 376, 132 App. Div. 539, 107 N. Y. Supp. 32.

§ 638. Not to Waive Tort as to Part and Affirm It as to Balance of Same Transaction.

Page 379, note 25. Also, *In re Kenyon*, 19 A. B. R. 194, 156 Fed. 836 (D. C. Ohio); (1867) *Parmalee v. Adolph*, 28 Oh. St. 10; (1841) *Everett v. Derby*, 5 Law Rep. 227.

Page 379, note 26. Compare, also, analogously, apparently to same general effect, *Maxwell v. Martin*, 22 A. B. R. 93 (N. Y. Sup. Ct. App. Div.); obiter, *In re A. O. Brown*, 23 A. B. R. 423, 175 Fed. 469 (C. C. A. N. Y.). Compare post, § 1882, note 149.

§ 639. After Election, Claimant Foreclosed.

Page 381. *Lynch v. Bronson*, 20 A. B. R. 409, 160 Fed. 139 (D. C. Conn.): "As already suggested, the parties chiefly interested have offered themselves to this court as creditors of the estate. By filing their claims against the bankrupt they have waived their right to dispute the passing of the title in their goods to him, prior to bankruptcy. They have done more than that. They have, by affirmative action, ratified the original purchase, sale and delivery of those goods, as constituting a valid title thereto in the bankrupt."

Compare, *Thomas v. Taggart*, 19 A. B. R. 710, 209 U. S. 385: "In the proof of his claim, Hall sets forth the following statement relative thereto: 'Said deponent hereby stipulates that by filing notice of this claim he does not

waive any right of action that he now has to recover possession of said certificates or the value thereof against either of the bankrupts or any person in whose possession they may be found, or any right of action that he has against either or both of said bankrupts for the conversion of said certificates to their own use, * * * ' In this claim, the essential question is as to the effect of Hall's proof of his claim in bankruptcy as a waiver of his right to recover the shares of stock covered by the receipt. We are of the opinion that, in view of the reservation just made, there was nothing in Hall's conduct amounting to an election to pursue his claim as a creditor in bankruptcy, which now prevents his recovery of the certificates of stock in question. It is true that he voted at the first meeting of the creditors on December 19, 1904, upon an informal ballot for trustee in bankruptcy, and at the formal election of trustees on December 21, 1904, Mr. Hall did not vote, though the referee finds that he participated actively at the meetings held for the election of trustee. We are of the opinion that the reservation of Hall evidenced his intention to hold on to whatever rights he had in his shares of stock, and there is nothing in his conduct which should preclude him, after he had discovered that the shares had been returned to the trustee in bankruptcy from reclaiming them as his own property."

Page 381, note 27. See, in addition, *In re Berry & Co.*, 23 A. B. R. 27, 174 Fed. 409 (C. C. A.). Other instances of election of remedies, see index; also instance, attempting to obtain security after bankruptcy which was rejected before bankruptcy, *In re Reading Hosiery Co.*, 22 A. B. R. 562, 171 Fed. 195 (D. C. Pa.).

But the election must have been knowingly made, else it will not be binding.

Obiter, *In re Berry*, 23 A. B. R. 27, 174 Fed. 409 (C. C. A.).

§ 639½. Claims Ex Contractu Provable, Though Also Presentable in Tort.

Claims ex contractu are provable, though also presentable in tort.

Grant Shoe Co. v. Laird Co., 21 A. B. R. 484, 212 U. S. 445: "Again it has been suggested that a cause of action for a breach of warranty really is for deceit and sounds in tort, claims for torts not being mentioned among the 'Debts which may be proved' in § 63a. *In re Morales*, 5 Am. B. R. 425, 105 Fed. 761. No doubt at common law a false statement as to present facts gave rise to an action of tort, if the statement was made at the risk of the speaker, and led to harm. But ordinarily the risk was not taken by the speaker unless the statement was fraudulent, and it was precisely because it was a warranty, that is, an absolute undertaking by contract that a fact was true, that if a warranty was alleged it was not necessary to lay the scienter. *Schuchardt v. Allen*, 1 Wall. 359; *Norton v. Doherty*, 3 Gray, 372. In other words, a claim on a warranty as such necessarily was a claim arising out of a contract, even if in case of actual fraud there might be an independent claim purely in tort."

§ 640. Contingent Claims Not "Provable."

Page 381, note 28. See, in addition, *Phoenix National Bank v. Waterbury*, 20 A. B. R. 140, 108 N. Y. Supp. 391, quoted at § 690. Instance, *In re Hartman*, 21 A. B. R. 610, 166 Fed. 766 (D. C. Pa.), in which the court held that

where upon the dissolution of a partnership composed of a bankrupt and his father, they execute a written instrument by which the bankrupt agrees to pay his father a certain sum with interest during his lifetime, or his heirs five years after his death, reserving the right to pay any part or all of the amount to his father, or in the event of his death before full payment to pay any part or all, to his heirs any time before the expiration of the five years, and the father agrees to make no disposition of his estate or any part thereof by will or otherwise, the father's claim against the bankrupt is a contingent liability and under § 63a (1) cannot be proved in the bankruptcy proceedings.

Contracts to Buy Stock in Future.—See post, §§ 689, 690.

§ 641. Test of Contingency.

Page 382, note 29. Some claims are called "contingent" that are merely unliquidated, for an instance of which see *In re [James] Dunlap Carpet Co.*, 20 A. B. R. 882, 163 Fed. 541 (D. C. Pa.). Compare, *Leeser v. Alexander*, 24 A. B. R. 72, 176 Fed. 265 (C. C. A. Ohio).

Page 382, note 30. Compare, impliedly to same effect, *Phoenix Nat. Bank v. Waterberry*, 20 A. B. R. 140, 108 N. Y. Supp. 391, quoted at § 690.

Page 382, note 31. Section 57 (n) is not operative to let in contingent claims becoming fixed within the year. *In re Roth & Appel*, 22 A. B. R. 504, 174 Fed. 64 (D. C. N. Y.). See post, § 737¾.

§ 643. Bankrupt Surety, Guarantor or Endorser.

Page 383, note 33. **Claims against Several Bankrupts in Different Bankruptcies on Same Instrument.**—The creditor is entitled to prove against each for the full amount due on the instrument at the date of the filing of the bankruptcy petition and to receive dividends from each estate up to amount of entire debt. *Board of Commissioners v. Hurley*, 22 A. B. R. 209, 169 Fed. 92 (C. C. A. Kans.). See ante, § 615; post, § 1519.

Page 384. It has even been held that where the bankrupt is a guarantor on an oral guaranty, the guaranty is a provable debt and the one to whom the guaranty is made is a "creditor," the fact that the guaranty is not written going merely to the proof.

Huttig Mfg. Co. v. Edwards, 20 A. B. R. 349, 160 Fed. 619 (C. C. A. Iowa): "A surety or endorser for a bankrupt has been held to be a creditor within the meaning of the bankruptcy law; and, upon the same principle a guarantor liable upon a fixed liquidated demand as this was, is a debtor to him who holds it, and his liability is to be counted in determining his financial status. That the guaranty may have been oral and therefore within the statute of frauds of Iowa where the transaction occurred, is immaterial. The Iowa statute relates merely to the evidence or proof of the undertaking and not to its validity."

Creditor Consenting to Bankrupt's Composition Releases Surety.—Although the statute declares that "discharge" shall not release those secondarily liable for a bankrupt's debt, and although the confirmation of a composition is in effect a discharge, yet a creditor who voluntarily consents in writing to accept the bankrupt's offer of composition probably thereby releases the surety, since he has himself directly contributed voluntarily to the principal debtor's release. *In re Benedict*, 18 A. B. R. 604 (Ref. N. Y.), quoted at § 1513½.

A fortiori, it is a provable debt if default and protest have been duly made before bankruptcy.

Obiter, Whitwell, trustee, *v. Wright*, 23 A. B. R. 747 (N. Y. Sup. Ct. App. Div.). But it is difficult to see precisely how the question could properly have arisen in this case, the suit being one brought by the trustee to recover a preference, after adjudication, and the question of the provability of the indorsement being wholly collateral, as well as being conclusively established by the adjudication. Also, see, *Cohen v. Pecharsky*, 23 A. B. R. 754, 121 N. Y. Supp. 602.

§ 644. Bankrupt as Principal—Surety Is Creditor before Default, and from Date of Signing.

Page 384, note 34. *Kobusch v. Hand*, 19 A. B. R. 379, 156 Fed. 660 (C. C. A. Mo.); *In re Farmers' Supply Co.*, 22 A. B. R. 460, 170 Fed. 502 (D. C. Ohio); *Brown v. Streicher*, 24 A. B. R. 267, 177 Fed. 473 (D. C. R. I.).

Indorser Paying Note before Maker's Bankruptcy Entitled to Prove for Full Amount.—In the absence of an express agreement to the contrary, of course, an indorser paying a note before the maker's bankruptcy is entitled to prove the claim for its full amount. *In re McCord*, 22 A. B. R. 204, 174 Fed. 72 (D. C. N. Y.).

§ 645. Surety Paying Principal's Debt after Principal's Bankruptcy.

Page 387, note 35. Inferentially, *In re Lange Co.*, 22 A. B. R. 414, 170 Fed. 114 (D. C. Iowa).

Solvent Partner's Claim against Bankrupt Partner for Liquidation of Firm Affairs.—Where a solvent partner has undertaken the liquidation of the partnership affairs instead of having them administered in the individual bankruptcy of the other partner, his claim (where the bankrupt partner was not indebted to the firm nor to the solvent partner at the date of adjudication), is not a provable debt. *In re Walker*, 23 A. B. R. 805, 176 Fed. 455 (D. C. Ala.), quoted at § 2259. See also, post, § 711, note. Also, see § 2259.

§ 648. Obtaining of Judgment Prerequisite to Liability on Bond.

As to staying discharge and refusal to stay creditors' actions, in order to permit creditors to perfect rights against sureties, see post, §§ 1524, 1914, 2446, 2712.

§ 651. Bond for Annuity, Annuitant Still Living.

Page 393, note 40. **Other Instances of Contingency and Not Contingency.**—Liability of directors and officers for misappropriation of corporate funds, held to be contractual and provable. *In re Brown*, 21 A. B. R. 123, 164 Fed. 673 (C. C. A. Calif.).

Stockholder's liability for corporate debts also provable. *In re Walker*, 21 A. B. R. 132, 164 Fed. 680 (C. C. A. Calif.).

Future taxes and insurance covenanted to be paid as part of rent by tenant, not matured by provision maturing future installments of rent upon default in present installment. *In re Pittsburg Drug Co.*, 20 A. B. R. 227, 164 Fed. 482 (D. C. Pa.).

§ 653. Does Bankruptcy Sever Relation of Landlord and Tenant?

Page 394, note 42. Compare, *In re Inman & Co.*, 22 A. B. R. 524, 171 Fed. 185 (D. C. Ga.), quoted at § 686. Compare, *In re Rubel*, 21 A. B. R. 566, 166 Fed. 131 (D. C. Wis.), quoted at § 656.

Page 396, note 44. See, in addition, *In re Roth & Appel*, 22 A. B. R. 504, 174 Fed. 64 (D. C. N. Y.), quoted post, § 653; *Shapiro v. Thompson*, 24 A. B. R. 91 (Ala.).

Thus, bankruptcy and the bankrupt's subsequent discharge not operating to sever the relation, then the bankrupt remains liable for rent accruing after the adjudication, where the trustee rejects the lease.

Page 397. *In re Roth & Appel*, 22 A. B. R. 504, 174 Fed. 64 (D. C. N. Y.): "It appears to me plain that this situation as between lessor and lessee is not altered by any bankruptcy on the part of the lessee. Bankruptcy does not terminate the lease. This must be so from the very nature of bankruptcy, which does not destroy but conserve property, and the leasehold estate is property which may (and frequently does) become the property of the trustee and inure to the benefit of creditors. It is impossible to conceive of a trustee in bankruptcy selling a lease if bankruptcy destroy the same lease. If the lease survives adjudication and is rejected by the trustee (i. e., not appropriated as belonging to the estate), it is necessarily an existing and continuing contract,—and such contract requires parties thereto. Who are these parties? The landlord is one. The trustee in bankruptcy, not having appropriated the lease, is not the other; therefore that other must be the bankrupt lessee. Such being the case, does the bankrupt's continuing liability on a lease which has survived adjudication and been abandoned by the trustee,—give rise to a provable debt? There are obvious reasons of expediency and equity why such claims should not be provable. A landlord is a species (speaking very loosely) of preferred or secured creditor, in that his rent is presumed to be no more than a fair measure of the value of the use of his land, and that land he can always recover if his rent is not paid. If the trustee pays his rent (as rent) he has appropriated the lease. If no one pays that rent the presumption of law is that the landlord on getting back his land can obtain from other tenants the value of its use. It is therefore inequitable to permit a landlord not only to recover and re-let the demised premises, but to share *pari passu* with other creditors not so favorably situated. In the second place, the admission of landlords' claims arising and continuing to arise after adjudication and after condition of the lease broken, tends to delay the settlement of estates and should not be encouraged unless the law absolutely requires it."

§ 654. Rent Accrued Up to Date of Filing Bankruptcy Petition Provable.

Page 399, note 49. See, in addition, *In re Roth & Appel*, 22 A. B. R. 504, 174 Fed. 64 (D. C. N. Y.), quoted at § 653.

Fraudulent transferee's claim for rent. *In re Hurst*, 23 A. B. R. 554 (Ref. W. Va.).

§ 656. Installments Accruing after Adjudication, for Occupancy Thereafter, Not Provable.

Page 399, note 51. See, in addition, *In re Roth & Appel*, 22 A. B. R. 504, 174 Fed. 64 (D. C. N. Y.), quoted at § 653; *Shapiro v. Thompson*, 24 A. B. R. 91 (Ala.).

Page 400. *In re Rubel*, 21 A. B. R. 566, 166 Fed. 131 (D. C. Wis.): "The text books and the authorities all seem to concur in the proposition that rent upon such a lease [three years leave at annual rental payable monthly, having one year more to run] which has not accrued at the time of adjudication cannot be proven as a claim in bankruptcy. * * * These authorities are not in accord as to the method of reasoning by which the conclusion is reached. Some of them hold that the adjudication destroys the relation of landlord and tenant, and practically annuls the lease. Others hold that the claim, not being provable in bankruptcy, is not affected by the discharge; that the bankrupt remains bound by his covenant, but that the trustee is not bound thereby. It is conceded on all hands that the trustee has a reasonable time after his appointment to determine whether he will adopt the lease as an asset of the estate, and offer the same for sale, or whether he will ignore it entirely. For practical purposes, it makes no difference in the instant case which line of authority is adopted, for either is fatal to a recovery of rent, as such, for the unexpired term."

§ 659. Bankruptcy or Default in Payment Maturing Future Installments.

Page 401, note 55. See, in addition, *In re Pittsburg Drug Co.*, 20 A. B. R. 227, 164 Fed. 482 (D. C. Pa.). But if a lien upon the bankrupt's property is reserved which, under the State law, is good against levying creditors, would it not be good in bankruptcy, the trustee simply taking the leasehold as an asset? Compare, impliedly, *In re Pittsburg Drug Co.*, 20 A. B. R. 227, 164 Fed. 482 (D. C. Pa.).

Page 402. And such remainder of rent might even become entitled to priority under § 64 (b) (5).

In re Pittsburg Drug Co., 20 A. B. R. 227, 164 Fed. 482 (D. C. Pa.).

§ 663. Likewise, Liens for Future Rent Not Released.

Page 404, note 60. *Martin v. Orgain*, 23 A. B. R. 454, 174 Fed. 772 (C. C. A. Tex.), quoted at § 663. Compare, *Shapiro v. Thompson*, 24 A. B. R. 91 (Ala. Sup. Ct.).

Thus, where the landlord, both by a contract in writing, and also by force of State statute, has a lien for future rent, such lien is unimpaired in bankruptcy.

Martin v. Orgain, 23 A. B. R. 454, 174 Fed. 772 (C. C. A. Tex.): "This lien is good and valid in cases like the present for rent due and to become due. * * * Under the agreed statement of facts, the appellant has by contract in writing a lien for the amount of rent due and to become due, and she also has such lien by force of the statutes of the State of Texas."

§ 665. Landlord Forfeiting Lease or Accepting Surrender Waives Claim of Unexpired Term.

Page 404, note 62. Raising rent and making repairs which the tenant is obligated for, is evidence of acceptance of surrender, even where the landlord pretends he is doing so in behalf of the tenant. In *re* Piano Forte Mfg. Co., 20 A. B. R. 899, 163 Fed. 413 (D. C. Pa.).

Page 405, note 63. See, in addition, In *re* Piano Forte Mfg. Co., 20 A. B. R. 899, 163 Fed. 413 (D. C. Pa.).

§ 668. Subject of Claims "Not Owing" Involves That of Contingent Claims.

The subject of the provability* of claims not owing at the time of the filing of the bankruptcy petition somewhat involves the subject of contingent claims.

Impliedly, *Phoenix National Bank v. Waterbury*, 20 A. B. R. 140, 108 N. Y. Supp. 391, quoted post, § 690.

Instances Held to Be "Fixed Liability Absolutely Owing."—Liability of directors for misappropriation of corporate funds. In *re* Brown, 21 A. B. R. 123, 164 Fed. 617 (C. C. A. Calif.).

§ 669. Claims Not Owing at Time of Filing Bankruptcy Petition, Not Provable.

Claims not owing at the time of the filing of the bankruptcy petition are not provable, whether the claims be on judgments or on written instruments, or upon open accounts or contracts express or implied.

See § 629; In *re* Rome, 19 A. B. R. 820, 162 Fed. 971 (D. C. N. J.).

Thus, a claim for money loaned the bankrupt, after the filing of the bankruptcy petition though before the adjudication, is not allowable.

In *re* Rome, 19 A. B. R. 820, 162 Fed. 971 (D. C. N. J.).

§ 671. Attorney's Collection Fee Stipulated in Note.

Page 407, note 72. See, in addition, In *re* Hersey, 22 A. B. R. 863, 177 Fed. 1004 (D. C. Iowa); *McCabe v. Patton*, 23 A. B. R. 335, 174 Fed. 217 (C. C. A. Pa.).

Nor are they "absolutely owing at the time of the filing of the bankruptcy petition" even where reduced to judgment before the bankruptcy, if a transcript of the judgment is not filed with the proof, it has been held in one case.

McCabe v. Patton, 23 A. B. R. 335, 174 Fed. 217 (C. C. A. Pa.).

Although it would hardly seem requisite, on principle, to file such a transcript.

See *antè*, § 602.

Page 407, note 74. See, in addition, *In re Edens & Co.*, 18 A. B. R. 643, 151 Fed. 940 (D. C. S. C.). See post, § 796½. But compare, *In re Hersey*, 22 A. B. R. 863, 171 Fed. 1004 (D. C. Iowa).

And in some States the attorney's collection fee will not necessarily be allowed at the stipulated rate, especially not at any usurious rate, but will be cut down to what is reasonable.

Bank v. Walker, 20 A. B. R. 840, 163 Fed. 510 (C. C. A. Md.): "It is undoubtedly true that in a number of States it is held legal for creditor and debtor to contract that in case the debtor fail to pay upon maturity that then the creditor may recover, in addition to his debt, interest and costs, a reasonable sum for attorney's fees for collection. And this has been held to be the law in Maryland. *Bowie v. Hall*, 69 Md. 434, 16 Atl. 64; *Gaither v. Tolson*, 84 Md. 638, 36 Atl. 449. It is also true that in other States such contracts are held void, and in no State where usury laws are in effect are they permitted to be enforced, if such charges are either unreasonable or made a subterfuge for usurious exactions. A creditor would not, for instance, under the law of Maryland, under such a contract be permitted to exact a commission of \$500 for collecting a \$100 debt. Nor would it be permitted to collect a commission of \$1,400 'for collecting' a debt of \$28,000, which the debtor came forward, an hour after it was due, to pay and before any attorney had been employed to collect it, for, as said in *Bowie v. Hall*, supra, the purpose of such a provision 'is clearly not to put any money above the legal rate of interest into the pocket of the lender, but merely to enable him to get back his money with legal interest, and nothing more.'"

But it has been doubted, in one case, whether any attorney's fees are allowable, in bankruptcy, at all, as part of the allowance of a claim.

In re Hersey, 22 A. B. R. 863, 171 Fed. 1004 (D. C. Iowa).

§ 673. But to Be "Owing" Not Necessary to Be "Due," nor Damages Liquidated.

In order that the debt be "owing," it is not necessary that it be "due" nor that the damages be liquidated.

Compare post, § 685, et seq. See *Phoenix National Bank v. Waterbury*, 20 A. B. R. 140, 108 N. Y. Supp. 391, quoted at § 690.

§ 674. Bankruptcy Operating as Anticipatory Breach.

Page 410, note 28. Compare, § 690.

Page 412. *In re Neff*, 19 A. B. R. 23, 157 Fed. 57 (C. C. A. Ohio, affirming 19 A. B. R. 911): "The defense is that these claims were not 'fixed liabilities,' 'absolutely owing' at the time of the filing of the petition against the bankrupt. This is based upon the fact that the liability of the bankrupt is made dependent upon the surrender of the stock certificate at a date which had not then arrived and that it was optional with the promisees to surrender or keep the stock until that time and that the liability of the promisor was undetermined and contingent until such surrender at the time named. That the promisor might refuse performance until the time named is true. But,

if before the time of performance, one absolutely repudiate liability and disavow unequivocally any purpose to perform at any time, the other party may treat such repudiation, at his election, as a breach of the agreement and sue for his damages. So if one of the parties absolutely disables himself from performing the contract by putting performance out of his power the other party may treat that as a repudiation and bring his action to recover damages then or wait the time of performance at his election. This aspect of the question of an anticipatory breach is well put by Fuller, Chief Justice, in *Roehm v. Horst*, cited above, when he says: 'It is not disputed that if one party to a contract has destroyed the subject matter, or disabled himself so as to make performance impossible, his conduct is equivalent to a breach of the contract although the time of performance has not arrived; and also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform, but may treat the refusal as a breach of the entire contract, and recover accordingly.' Bankruptcy is a complete disablement from performance, and the equivalent of an out and out repudiation, subject only to the right of the trustee, at his election, to rehabilitate the contract by performance." Quoted further at § 629.

Page 412, note 79. In *re Inman & Co.*, 23 A. B. R. 566, 171 Fed. 185 (D. C. Ga.), quoted at § 690½.

§ 676. Judgments and Written Instruments "Absolutely Owing," Provable.

Page 412, note 82. Instance, lease as written instrument, *obiter*, *Martin v. Orgain*, 23 A. B. R. 454, 174 Fed. 772 (C. C. A. Tex.). Whether attaching of transcript to proof of claim on a judgment requisite, see *ante*, § 602.

§ 678. Must Be "Absolutely Owing" at Time of Bankruptcy Petition, but Need Not Be Due.

The written instrument must be fixed and absolutely owing at the time of the filing of the bankruptcy petition, else it will not be a provable claim.

In *re Neff*, 19 A. B. R. 23, 157 Fed. 57 (C. C. A. Ohio), quoted, on other point, at § 674; *Phoenix National Bank v. Waterbury*, 23 A. B. R. 250 (N. Y. Ct. App., affirming 20 A. B. R. 140, 108 N. Y. Supp. 391, quoted at § 690), quoted at § 2731.

Page 413. Thus, liability upon bonds may be a "fixed liability" absolutely owing.

Loeser v. Alexander, 24 A. B. R. 75, 176 Fed. 265 (C. C. A. Ohio), wherein a bond taken by a county treasurer from a deputy not authorized by statute, was held a provable debt.

§ 679. Interest.

Page 413, note 87. See *ante*, § 598. But compare, *In re Osborne's Sons & Co.*, 24 A. B. R. 65, 177 Fed. 184 (C. C. A. N. Y.).

Although in applying security upon a claim, interest may be computed to the date of payment.

See §§ 598, 758½, 1997½.

Page 413, note 88. See ante, § 598.

§ 680. Judgments for Personal Injuries and Similar Torts Provable, Though Torts Themselves Not.

But are not provable where not rendered before the filing of the bankruptcy petition. A fortiori, where the suits for their recovery are not brought until after adjudication.

In re Crescent Lumber Co., 19 A. B. R. 112, 154 Fed. 724 (D. C. Ala.). Also, see post, § 697.

§ 685. Damages for Breach of Contracts of Sale, Employment and Continuing Contracts, Provable.

Damages for breach of contracts of sale or of purchase and for breach of continuing contracts and perhaps also of contracts of employment are provable debts, although the time of performance has not expired (if there has been a repudiation or renunciation of the obligation by the bankrupt or if the bankruptcy operates as an anticipatory breach), so long as the amount is ascertainable that is necessary to be expended to compel the contract or the future profits of the contract or the wages are ascertainable that can be earned during the period contracted for.

Instance, damages for repudiation of contract to sell by receivers in State court, on subsequent bankruptcy. In re National Wire Corp., 22 A. B. R. 186, 166 Fed. 631 (D. C. Conn.).

§ 686. Contracts of Employment.

Some of the decisions seem to make the provability dependent upon the term of employment expiring within the year limited for proving claims.

In re (James) Dunlap Carpet Co., 20 A. B. R. 882, 163 Fed. 541 (D. C. Pa.).

But such qualification seems hardly necessary; for the deposition for proof of debt might be filed within the year and later be amended if later the liquidated amount be found to be different from that claimed in the proof of claim [compare, § 722]; and, also, § 57 (n) is not to be construed as enlarging the classes of debts to be considered "provable" [compare, § 641, note, and § 737¾].

But, on the other hand, well considered cases take the opposite view and deny, altogether, such provability.

In re Inman & Co., 22 A. B. R. 524, 171 Fed. 185 (D. C. Ga.): "The liability here on the part of the employers was certainly contingent. It was contingent

upon the life, health, and ability to render services on the part of the employee in the future, and contingent also upon the life of the members of the firm of Inman & Co. The death of one member would have dissolved the firm and necessitated the winding up of its affairs. * * * It will be seen from the foregoing that the conclusion reached in this case of *Watson v. Merrill* was that claims for future rent, and probably, from the language used in the opinion, for future personal services, are not provable in bankruptcy, though the reason given therefor is entirely different from that given in the other cases. According to this last opinion contracts such as those in question here will remain of force and unaffected by the bankruptcy proceedings. *Bailey v. Loeb*, 2 Fed. Cas. 376, was decided under the Act of 1867 by Circuit Judge Wood, afterwards a justice of the Supreme Court. An extract from the opinion in that case will show the view that Judge Wood entertained of the matter, as follows: 'For instance a business man has a manager or bookkeeper hired by the year, at a salary payable quarterly. At the end of two months he is adjudicated bankrupt. His manager or bookkeeper may prove for a proportionate part of his salary up to the time of the bankruptcy, but he cannot prove for any part that may accrue and fall due after the bankruptcy. The clear purpose of the Bankruptcy Act is to cut off all claims for rent to accrue, or for services to be rendered, after the date of the bankruptcy.' The fact that this decision by Judge Wood was under the Bankruptcy Act of 1867 strengthens it as an authority, because it is generally conceded that the Bankruptcy Act of 1867 was more liberal as to the proof of claims for contingent liabilities than is the present act. In *Malcomson v. Wappoo Mills et al.* (C. C.), 88 Fed. 680, Judge Simonton held that: 'Damages are not recoverable against a corporation for its failure to perform a contract for the sale and delivery of merchandise, where performance was prevented solely by the action of a court in appointing a receiver for the corporation, and enjoining all others from interfering with its business or property. In such cases the breach of contract is *damnum absque injuria*.' It seems clear to me that adjudication in bankruptcy ends contracts for rent, and for personal services, and I agree with the views expressed in the opinions in *In re Jefferson*, supra, *Bray v. Cobb*, supra, *In re Hayes, Foster & Ward Company*, supra, and *Malcomson v. Wappoo Mills et al.*, supra. The case of *James Dunlap Carpet Co.* (D. C.), 20 Am. B. R. 882, 163 Fed. 541, is a case favorable to the contention of the claimants here to the extent of allowing proof of claim. The difficulty about the case to my mind is that the learned judge based his decision on *Moch v. Market Street National Bank*, 6 Am. B. R. 11, 107 Fed. 897 * * * In the case of *Moch v. National Bank* the person seeking to prove had indorsed for the bankrupt and the paper matured after the bankruptcy proceedings were instituted. The indorser paid the paper, and then proposed to prove it as a debt against the bankrupt in the bankruptcy proceedings. I can see no similarity at all between such a case and the case of an employee seeking to prove for salary to be earned by services to be rendered in the future. The indorsement in the *Moch Case* was a definite and fixed liability which the indorser had undertaken for the bankrupt, and it was in existence before the bankruptcy proceedings commenced. It matured, and the indorser was compelled to pay the debt pending the bankruptcy proceedings. This is entirely different from a contract to render personal services. Such services depend upon the life, health, and ability otherwise of the employee to render the services, and also upon the life, certainty, and perhaps other contingencies as to the employer. But it is a partnership in bankruptcy here, and whatever is true as to individual cases there

would seem to be no doubt, first, that a partnership is dissolved by the bankruptcy proceedings (22 Am. & English Encyclopedia of Law [2d Ed.] 202, and 30 Cyc. 654, and cases cited in both); and, second, if the firm is dissolved by operation of law, then certainly the contracts of that firm are ended. In *Griggs v. Swift*, 82 Ga. 392, 9 S. E. 1062, * * * it is held in the opinion by Chief Justice Bleckley: 'From the very nature of a contract for the rendering of personal services to a partnership in its current business, where nothing is expressed to the contrary, both parties should be regarded as having by implication intended a condition dependent on the one hand upon the life of the employee, and, on the other, upon the life of the partnership, provided the death in either case was not voluntary.' Wood on Master and Servant, § 163, is then quoted with approval to the following effect: 'Where a servant is employed by a firm, a dissolution of the firm dissolves the contract, so that a servant is absolved therefrom; but, if the dissolution results from the act of the parties, they are liable to the servant for his loss therefrom, but, if the dissolution results from the death of a member of the firm, the dissolution resulting by operation of law, and not from the act of the parties, no action for damages will lie. * * * So, if a firm consists of two or more persons, and one or more of them dies, but the firm is not thereby dissolved, the contract still subsists, because one or more of his partners is still in the firm, and this is so even though other persons are taken into the firm. The test is whether the firm is dissolved. So long as it exists, the contract is in force, but, when it is dissolved, the contract is dissolved with it, and the question as to whether damages can be recovered therefor will depend upon the question whether the dissolution resulted from the act of God, the operation of law, or the act of the parties.' None of the cases cited from the United States courts seems to bear directly upon the question immediately involved here—that is, of the right of an employee to prove for future services—except, perhaps, the case of *James Dunlap Carpet Company*, supra, and with the utmost respect for the learned judge deciding the case I am, for the reason stated above, unable to agree with his conclusion. I have, perhaps, cited authorities at unnecessary length, but the question is an interesting one, and is presented in its present shape for the first time in this district. I do not believe that it was the intention and purpose of the Bankruptcy Act that contracts extending into the future for rent and personal services should be left hanging over the bankrupt to embarrass and harass him after his discharge in bankruptcy. It is said that if this is not true, and he is relieved of such liability by the Bankruptcy Act, it follows that claims for such rent and personal service should be admitted to proof in the bankruptcy proceedings. I do not think this follows at all. The adjudication in bankruptcy ends all such contracts. Of course, proof may be allowed for any amount due prior to the institution of the proceedings in bankruptcy. It is provided by the Bankruptcy Act that for most personal services the employee would have priority for any amount due him for as much as three months preceding the bankruptcy proceedings. This fact of priority of payment for three months extending to so large a class of employees is another reason why I believe it was the intention, in passing this act, that such contracts should terminate with the adjudication in bankruptcy. All this is certainly true as to a partnership. The adjudication dissolves it by operation of law, and that dissolution ends all its liabilities except such as are expressed in the act. My conclusion is that the referee in bankruptcy correctly decided that this claim should not be admitted to proof." Compare, however, quotation at § 690½.

The true rule would seem to be that stated in § 685, namely, that such damages are provable but only in the event that there has been a repudiation or renunciation of the obligation or that the bankruptcy operates as an anticipatory breach. The cases differ in their conclusions simply on the question as to whether or not, in the particular instance, a breach had been committed before bankruptcy or the bankruptcy had operated itself as a breach of the contract.

§ 687. Continuing Contract to Supply Goods.

Damages for breach of a continuing contract to supply goods are provable.

Instance, *In re National Wire Corporation*, 22 A. B. R. 186, 166 Fed. 631 (D. C. Conn.). As to what constitutes breach and damages, *ibid*.

§ 689. Continuing Contracts to Buy.

Page 417, note 99. See, in addition, *In re Neff*, 19 A. B. R. 23, 157 Fed. 57 (C. C. A. Ohio), quoted at §§ 629, 674.

Page 417, note 100. See, in addition, *Grant Shoe Co. v. Laird Co.*, 21 A. B. R. 484, 212 U. S. 445.

§ 690. But Not Provable, unless Obligation Renounced or Bankruptcy Itself Operates as Breach.

But, unless there has been a repudiation or renunciation of the continuing obligation by the bankrupt, or unless the bankruptcy itself operates as an anticipatory breach, the claim is not provable.

Page 418, note. Impliedly, *In re Spittler*, 18 A. B. R. 425, 151 Fed. 942 (D. C. Conn.), quoted, on other point, at § 690½. *In re Neff*, 19 A. B. R. 23, 157 Fed. 57 (C. C. A. Ohio), quoted at §§ 629, 674; also, *In re Neff*, 19 A. B. R. 911 (D. C. Ohio, affirmed in 19 A. B. R. 23, 157 Fed. 57).

Page 419. *Phoenix National Bank v. Waterbury*, 20 A. B. R. 140, 108 N. Y. Supp. 391 (affirmed in 23 A. B. R. 250), which see quoted, post, § 2731: "The question is whether the sum was 'absolutely owing at the time of the filing of the petition.' An examination of the contract shows that it is essentially an agreement for a sale and purchase in the future, and as we construe it cannot be regarded as in any sense a present sale with a postponement of payment. The language is that the defendants 'agree to purchase * * * on the first day of May, 1900.' Until that time the whole title remained in plaintiff. Before May 1, 1900, the plaintiff could not call upon defendants to take the stock, and consequently could not put defendants under a present obligation to pay the purchase price. In other words, the plaintiff could not prior to that date put the defendants in the position of debtors to it. The fact that the amount to be paid when the agreement to purchase should be consummated was to be the sum of \$25,000 with interest from a stated date, does not characterize the transaction as one creating a debt presently owing, but payable in the future. That method of fixing the amount to be paid resulted from the option given by the contract to defendants, not to plaintiff, to complete the purchase on an earlier date than May 1, 1900, and was only another

way of saying that the purchase price should be a sum equivalent to \$25,000, with interest from April 2, 1894, to the date of purchase. We are unable to find in the contract any words indicating that the transaction amounted to a present sale of the stock, with the date of payment deferred. If, for instance, the plaintiff had sold the stock to a third person, before the time came for the completion of the purchase, it is difficult to see how plaintiff could have been sued in conversion, or, if on the date of the filing of the petition in bankruptcy, the defendants had been seeking to reduce the assessment of their personal property for the purposes of taxation, they would not have been permitted to deduct the agreed purchase price of the stock as a debt which they then owed. The provability of a debt under the present Bankruptcy Act is specifically referred to the date of filing the petition. If it is owing then, it may be proved. If it becomes due after the filing of the petition, even if before the adjudication, it may not be proved and will not be discharged. Herein the present Bankruptcy Act differs from its predecessors. Both the Act of 1841 and that of 1867, besides providing for the proving of debts presently owing, but not presently payable, expressly provided that contingent debts and liabilities might be proven, and payment thereon made out of the bankrupt's assets. (Bankruptcy Act of 1867, § 19; Bankruptcy Act of 1841, § 5.) Both the Act of 1867 and that of 1841 carefully observed and preserved the distinction between contingent liabilities that were not due and might never become due, and debts which were owing but not payable until a future day. The present act has provided that the latter may be proved, but has made no provision for the former. In regard to other omissions in the present act of provisions contained in the former acts, the rule has obtained that the omissions must be deemed to have been deliberate and intentional, and should not be supplied by construction (*Bardes v. Hawarden Bank*, 173 U. S. 524, 4 Am. B. R. 163; *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, 5 Am. B. R. 814), and in at least one case this omission has been held to forbid the proof of contingent liabilities. (*Matter of Marks*, 6 Am. B. R. 641.) And even if we were permitted to make the attempt to read into the act by construction, that which the Congress had omitted, we should find ourselves confronted with the positive declaration that in order to be provable, a debt must be 'absolutely owing.' Clearly that which is only contingent, cannot be said to be 'absolutely' owing. The defendants' liability is not of that class of claims referred to in subdivision 4 of rule 21 of the United States Supreme Court General Orders in Bankruptcy which is limited to persons who may be contingently liable for some debt or default of the bankrupt. That the defendants' liability under their contract was contingent cannot, we think, be disputed. Such liability was not to become absolute until May 1, 1900, long after the petition in bankruptcy was filed. Up to that time the defendants owed plaintiff nothing, and there was nothing which plaintiff had a right to demand of defendants. Before that time, many things might happen in consequence of which no debt would become owing from defendants to plaintiff. In our view, therefore, whatever obligation the contract imposed upon defendants was merely contingent when the petition in bankruptcy was filed, was not provable in that proceeding, and was not discharged as a result of that proceeding."

§ 690½. Renunciation of Executory Contracts in General.

Page 419. A trustee is under no obligation to assume an executory contract of the bankrupt, and if the same be burdensome he may re-

nounce it, in which event the other party may be entitled to prove his damages, for the breach.

See post, §§ 932, 1144½.

What Does Not Constitute Breach of Bankrupt's Contract to Buy.—In re National Wire Corporation, 22 A. B. R. 186, 166 Fed. 631 (D. C. Conn.).

Similarly, if the bankrupt before the bankruptcy has renounced the contract, the other party may prove his claim for the damages caused by the breach.

In re Spittler, 18 A. B. R. 425, 151 Fed. 942 (D. C. Conn.): "On behalf of himself and his corporation, he stated, in no uncertain terms, the fact that the existing situation precluded and eliminated any possibility of performing the contract on their part. The referee allowed the claim with much hesitation. The doubts which assailed him do not trouble me. He thinks that the decided cases rather carry the idea that the refusal to perform, or the inability to perform, must be a wrongful refusal, or an inability growing out of a disposition to commit a wrongful act. I do not so read the cases. An absolute inability to perform, which is of such a nature that there is no reasonable probability that thereafter a situation will arise which will make performance possible, is enough. If to such inability is added a statement that it exists, then the party so informed is in a position to treat the contract as broken and to pursue his remedy." Referred to in In re Nat. Wire Corp., 22 A. B. R. 186, 166 Fed. 631 (D. C. Conn.).

But it has been held that involuntary bankruptcy proceedings are not to be considered anticipatory breach of a contract of sale.

In re Inman & Co., 23 A. B. R. 566, 175 Fed. 312 (D. C. Ga.): "It is agreed that there had been no breach of the contract prior to the filing of the petition in bankruptcy proceedings. It is also agreed that there has been no tender since the commencement of the bankruptcy proceedings by S. Lësser of any of the goods to the receiver or trustee. He relies upon an anticipatory breach of the contract caused by the bankruptcy proceeding. I do not believe that, where involuntary proceedings in bankruptcy are instituted, and the bankrupt's business and effects are taken charge of by the court, and administered for the benefit of creditors, it constitutes such a breach of an executory contract as to authorize proof in bankruptcy for the amount of damages claimed to have been caused by the failure to carry out the contract, nor do I think that any of the cases cited go to this extent." Compare, however, quotation at § 686.

§ 694. Open Accounts and Contracts Express or Implied, Probable.

It has been held that there is no implied promise of reimbursement to be drawn from the use of the words "represent and warrant" except in cases of conveyances of real estate, transfers of personal property, or contracts of insurance, and then only as between the opposite parties; and that where one of several joint purchasers uses those words towards his co-purchasers no right of action for their failure to be true

will arise against him in their favor on the basis of any implied contract of reimbursement.

Switzer & Johnson v. Henking, 19 A. B. R. 300, 158 Fed. 784 (C. C. A. Ohio).
Partners for Contributory Share.—See post, §§ 2247½, 2259.

Accounts Stated.—What constitutes an “account stated;” also when an “account rendered” becomes an “account stated.” *Little, Trustee, v. McClain*, 22 A. B. R. 837, 118 N. Y. Supp. 917.

§ 697. Original Obligation Must Have Been “Provable.”

Thus, a judgment for personal injury rendered before discharge but after the filing of the petition, is not a provable debt.

In re *Crescent Lumber Co.*, 19 A. B. R. 112, 154 Fed. 724 (D. C. Ala.). Also, see ante, § 680.

§ 699. Whether Judgment Itself Still Valid, as *Res Adjudicata*.

It has been held that the judgment itself is not annulled, simply its lien.

Perhaps it is still valid as *res adjudicata*.

§ 704. Claim May Be “Provable” Though “Unliquidated.”

Page 423, note 117. See, in addition, *Grant Shoe Co. v. Laird Co.*, 21 A. B. R. 484, 212 U. S. 445, affirming *In re Grant Shoe Co.*, supra.

Page 424. Damages for breach of contract to marry are “provable,” though unliquidated. On the other hand a claim for moneys loaned is a liquidated and not an unliquidated claim.

In re *Halsey Elec. Generator Co.*, 20 A. B. R. 738, 163 Fed. 118 (D. C. N. J.).

Page 424, note 120. Inferentially, *Grant Shoe Co. v. Laird Co.*, 21 A. B. R. 484, 212 U. S. 445.

§ 705. “Unliquidated Claims” Do Not Enlarge Classes of “Provable” Debts.

Page 424, note 121. See, in addition, *In re Inman & Co.*, 22 A. B. R. 524, 171 Fed. 185 (D. C. Ga.).

Page 425. In re *New York Tunnel Co.*, 20 A. B. R. 25, 159 Fed. 688 (C. C. A. N. Y.): “This paragraph evidently relates to procedure. It provides for the liquidation of such of the claims enumerated in the preceding paragraph, e. g., for breach of contract, as might require such process. The one paragraph particularly enumerating the debts which are provable, we see no ground for holding that the other opens the door to unliquidated demands of every nature.”

Page 425. Inferentially, *In re Grant Shoe Co.*, 21 A. B. R. 350, 130 Fed. 881 (C. C. A. N. Y., affirming 11 A. B. R. 48, and affirmed sub nom. *Grant Shoe Co. v. Laird Co.*, 21 A. B. R. 484, 212 U. S. 445), quoted, on other point, at § 639½.

§ 708. Liquidated Amount Stipulated in Contract.

Page 426, note 135. Compare, to similar effect, *In re Bevier Wood Pavement Co.*, 19 A. B. R. 462, 156 Fed. 583 (D. C. N. Y.).

But unearned installments of rent, although liquidated by a written lease, cannot be proven.

In re Rubel, 21 A. B. R. 566, 166 Fed. 131 (D. C. Wis.).

§ 709. Stockholders', Officers' and Directors' Liabilities.

Stockholders' secondary liability for debts of the corporation in some of the states is not only a debt created by the statute, but is also one founded upon an implied contract, and it is provable in bankruptcy if the circumstances are such that the claimant could have maintained a suit to enforce the stockholders' liability.

Compare post, § 978.

Page 427, note 136. See, in addition, *In re Walker*, 21 A. B. R. 132, 164 Fed. 680 (C. C. A. Calif.).

Likewise, the statutory or constitutional liability of officers and directors to creditors for funds embezzled or misappropriated is contractual and self-operating, and is a provable debt.

In re Brown, 21 A. B. R. 123, 164 Fed. 673 (C. C. A. Calif.).

And the construction put upon such constitutional or statutory provision by the highest court of the state will govern in determining the nature of the liability in bankruptcy.

In re Brown, 21 A. B. R. 123, 164 Fed. 573 (C. C. A. Calif.); *In re Walker*, 21 A. B. R. 132, 164 Fed. 680 (C. C. A. Calif.).

§ 710. Liquidation of Claims Ex Delicto Not Authorized, Unless.

Page 427, note 138. See, in addition, *In re New York Tunnel Co.*, 20 A. B. R. 26, 159 Fed. 688 (C. C. A. N. Y.), quoted, on other point, at § 705.

§ 711. Contingent Claims Not to Be Liquidated and Proved under § 63 (b).

Page 427. *In re Rubel*, 21 A. B. R. 566, 166 Fed. 131 (D. C. Wis.): "We have seen that the unearned installment of rent, although liquidated by a written lease, cannot be proven under § 63 (a), so that the proceeding to liquidate would have been unavailing in the instant case."

Thus, as to claims of a solvent partner liquidating the firm assets himself rather than permitting them to be administered in the individual bankruptcy of his partner, where the bankrupt partner was not indebted either to the firm or the solvent partner at the time of adjudication.

In re Walker, 23 A. B. R. 805, 164 Fed. 680 (D. C. Ala.), quoted at § 2259.

§ 712. Manner of Liquidation.

Page 428, note 140. Instance, *In re Faulkner*, 20 A. B. R. 542, 680 Fed. 900 (C. C. A. Kans.), quoted at § 734.

But application to that end should be made.

Obiter, *In re Rubel*, 21 A. B. R. 566, 166 Fed. 131 (D. C. Wis.): "The damages which he claims are entirely unliquidated, and under the provisions of § 63 (b) would not be ripe for presentation or allowance until they had been liquidated by such means as the court might direct upon a petition to that effect. It appears that no application had been made to liquidate this claim. Under these circumstances it would not be necessary to go further in order to justify the ruling of the referee."

§ 713. Bankruptcy Court Itself May Liquidate.

Page 428, note 141. See, in addition, *In re Buchan's Soap Corporation*, 22 A. B. R. 380, 169 Fed. 1017 (D. C. N. Y.). Compare, *In re Harper*, 23 A. B. R. 918, 175 Fed. 412 (D. C. N. Y.), quoted, on another point, § 2259.

§ 714. Liquidation by Litigation.

Page 428, note 142. See, in addition, *In re Buchan's Soap Corporation*, 22 A. B. R. 380, 169 Fed. 1017 (D. C. N. Y.). *Obiter*, *Graphophone Co. v. Leeds & Catlin*, 23 A. B. R. 337, 174 Fed. 158 (U. S. C. C.).

And amendment of proof may be allowed, after expiration of the year.

See ante, § 622; post, § 722.

§ 714½. Suffering Pending Action in State Court to Proceed to Judgment, as Liquidation.

It has been held that where an action upon an unliquidated claim is pending in a state court when the defendant is adjudicated bankrupt, and the trustee permits the case to go to judgment by default, the claim is thereby liquidated, and that if the trustee be dissatisfied with the judgment rendered in the state court action, his remedy is to move to open the default, and in case of his failure so to do that the proof of claim upon the judgment stands.

In re Buchan's Soap Corporation, 22 A. B. R. 380, 169 Fed. 1017 (D. C. N. Y.).

But such cannot be the correct rule unless the claimant shall first have obtained the direction of the bankruptcy court to so maintain the action for the purpose of liquidation, for the bankruptcy court has exclusive jurisdiction to determine the validity of claims presented for sharing in dividends, and, as to unliquidated claims, is given authority to direct the manner of liquidation. A contrary rule would result in the tying up of estates indefinitely and in the necessity of the trustee's defending every pending suit in personam against the bankrupt. If the claimant has a right to bind the bankruptcy trustee by a subsequently rendered judgment in

personam against simply the bankrupt, then he has the right to proceed to such judgment and may not be stayed. The fallacy of the court's reasoning seems to consist in confusing a proceedings against the bankrupt for a personal judgment with a proceedings against the trustee for a share in dividends—two different rights with different defendants and different defenses.

§ 715. Original Proof Not Necessarily Formal.

The original proof need not have been formal.

In *re Faulkner*, 20 A. B. R. 542, 161 Fed. 900 (C. C. A. Kans.), quoted, on other point, at § 734. But compare, § 595½, "Agreeing to Treat Informal Papers as 'Proofs of Claim.'"

Page 429. Similarly, where an assignment of a claim has been duly filed within the year, it has been held to be a sufficient filing to permit of an amendment, after the expiration of the year, though the deposition for proof of debt itself is not filed until after the year.

Bennett v. Am. Credit Indemnity Co., 20 A. B. R. 258, 159 Fed. 624 (C. C. A. Ky.).

§ 716. Whether, after Trustee's Recovery of Preference, etc., in Independent Suit after Expiration of Year, Defeated Party's Pleadings to Be Considered Proofs Filed within Year, or Litigation "a Liquidation."

A preferred creditor from whom a preference has been recovered after the expiration of one year from the date of the adjudication, in a suit filed by the trustee within the year, and who now seeks to prove his claim for the debt, is held not to be presenting his claim too late.

See post, § 727½. In *re Keyes*, 20 A. B. R. 183, 160 Fed. 763 (D. C. Mass.); In *re Coventry Evans Furniture Co.*, 22 A. B. R. 623, 171 Fed. 673 (D. C. N. Y.); In *re Lange Co.*, 22 A. B. R. 414, 170 Fed. 114 (D. C. Iowa), quoted at § 727½; contra, In *re Damon*, 14 A. B. R. 809 (Ref. N. Y.). See post, § 1770½.

Indeed, it does not appear that the suit need even have been begun within the year [see post, § 727½]; perhaps the theory being that the dividend would be a permissible offset in any event and would be taken into account as such in the State court regardless of any bankruptcy limitation of time for the presentation of claims for sharing in dividends, and that therefore, by grace, instead of delaying the judgment in the State court to permit of the ascertainment of the dividend, the whole matter should be left to the bankruptcy court as a matter outside of § 57 (n); or, perhaps, the theory being that § 57 (g) and not § 57 (n) is controlling [see post, § 727½].

Likewise, where an attaching creditor, under advice of counsel, failed to file his claim but litigated the matter up to the Supreme Court, on his

final defeat, after the expiration of the year, it was held that his claim might be filed.

In re Baird, 18 A. B. R. 655, 154 Fed. 215 (D. C. Pa., reversing 18 A. B. R. 228).

And a proof, duly filed within the year, may be amended after the year, by striking out a credit which was a preference and which the trustee had meanwhile recovered by litigation.

See post, § 737¼.

§ 716½. Likewise as to Unsuccessful Litigation over Property in Custody of Bankruptcy Court.

Similarly, after the termination of unsuccessful litigation over property in the custody of the bankruptcy court, the claimant may prove up for the amount due him even though the year has expired.

In re Landis, 19 A. B. R. 420, 156 Fed. 318 (D. C. Pa.). Also, see post, § 727¾.

§ 717. If Liquidated by Litigation within 30 Days before, or after Expiration of Year, Then 60 Days Longer Granted.

Page 429, note 152. In re Noell (Powell v. Leavitt), 18 A. B. R. 10, 150 Fed. 89 (C. C. A. N. H.); In re Keyes, 20 A. B. R. 183, 160 Fed. 763 (D. C. Mass.); In re Baird, 18 A. B. R. 655, 154 Fed. 215 (D. C. reversing same court 18 A. B. R. 228).

Page 430, note 154. Compare, § 714. But see § 716.

Page 430, note 155. But compare, In re Noel (Powell v. Leavitt), 18 A. B. R. 10, 150 Fed. 89 (C. C. A. N. H.), quoted post.

Page 431. And a still more liberal construction is that, if the liquidation be not accomplished until after the beginning of the thirty days preceding the expiration of the year, then it will be sufficient if proof of claim be filed within sixty days after the liquidation is accomplished by final judgment, no matter when such final judgment be rendered, whether within the zone of thirty days before, or at any time after the expiration of the year.

In re Noel (Powell v. Leavitt), 18 A. B. R. 10, 150 Fed. 89 (C. C. A. N. H.), followed in In re Baird, 18 A. B. R. 655, 154 Fed. 215 (D. C. Pa.). Compare, In re Lange Co., 22 A. B. R. 414, 170 Fed. 114 (D. C. Iowa), quoted at § 727½.

Page 432. But after all no real hardship is put upon the creditor by adhering to the rule that an actual, written proof of claim must be filed within the year. There is no obstacle to prevent the creditor filing his proof of claim at any time within the time fixed by the act, without surrendering his preference. True, he cannot secure its allowance until it is liquidated, and until he has surrendered the preference, nor can he until then be

permitted to vote at a meeting of creditors, yet there would be all the time a pending claim, and by thus making his formal proof he would have brought himself within the statutory requirement as to time.

In re Clover Creamery Ass'n (*Evans v. Claridge*), 23 A. B. R. 884, 176 Fed. 907 (C. C. A. Wis.).

Page 433, note 156. In re Noel (*Powell v. Leavitt*), 18 A. B. R. 10, 150 Fed. 89 (C. C. A. N. H.), quoted supra; In re Keyes, 20 A. B. R. 183, 160 Fed. 763 (D. C. Mass.).

Page 433. Thus, also, it has been held that he will be in time, after unsuccessful appeal from court to court until final defeat in the Supreme Court, the claimant being an attaching creditor within four months.

In re Baird, 18 A. B. R. 655, 154 Fed. 215 (D. C. Pa.).

But if he fails to file proof of his claim within sixty days after final judgment is rendered, he will be barred.

In re Clover Creamery Ass'n (*Evans v. Claridge*), 23 A. B. R. 884, 176 Fed. 907 (C. C. A. Wis.), quoted, on other points, at § 717½.

§ 717½. Date of "Final Judgment."

Page 433. Since, in all events, the claim must be filed within sixty days after the rendition of final judgment, it becomes important to determine the date of final judgment. Negotiations between the parties, after the entry of the final judgment in the action, will not suffice to prolong the time, notwithstanding the negotiations might be entered on the court records, as for instance, by the offsetting of judgments by the stipulation of the parties.

In re Clover Creamery Ass'n (*Evans v. Claridge*), 23 A. B. R. 884, 176 Fed. 907 (C. C. A. Wis.): "While not entirely clear, it may be conceded that it appears from the stipulation of facts that on January 26, 1909, in pursuance of a stipulation between the parties, the Supreme Court entered an order offsetting the two judgments for costs against each other, leaving a judgment for costs in appellee's favor on that date of \$119.70. Whether or not this latter order was a part of the liquidation proceedings contemplated by the statute may be doubted. Nor is it important, as we view it. Certainly, after this was done and the several amounts of the two judgments thus definitely ascertained, there remained nothing more that the State courts could do in liquidating appellee's claim. Between themselves, they proceeded very leisurely—i. e., from January 26, 1909, to April 16, 1909—to offset one judgment against the other and satisfy the balance due the trustee. Surely this transaction, covering the period from March 29, 1909, to April 16, 1909, was in no sense a part of the liquidation by litigation described in said § 57n of the statute. It was simply the negotiations of the parties, which might have been long or short, as they chose. It never has been held that, in the absence of fraud, delays so caused would avail to suspend any statute of limitation, much less the exception of § 57n afore-said."

§ 718. Despatch in Administration.

Page 434, note 1. Also, compare ante, § 23. *Obiter*, In re Faulkner, 20 A. B. R. 542, 161 Fed. 900 (C. C. Kans.), quoted at § 734. See also, § 387.

For general discussion of the nature of the limitation of time for proving claims, see In re Peck, 20 A. B. R. 629, 161 Fed. 762 (D. C. N. Y.).

§ 719. Year's Limitation for Filing Claims.

Page 434, note 2. See, in addition, *Steinhardt v. National Bank*, 19 A. B. R. 72, 122 App. Div. N. Y. 55. See "Unliquidated Claims," ante, § 704, et seq.

In cases of appeal or review, the year does not begin to run until the date of entry of the dismissal of the appeal.

In re Lee, 22 A. B. R. 820, 171 Fed. 266 (D. C. Pa.). Also, Bankr. Act, § 1, a, (2): "Adjudication shall mean the date of the entry of a decree that the defendant in a bankruptcy proceeding is a bankrupt, or, if such decree is appealed from, then the date on which such decree is finally confirmed."

Or of the affirmance of adjudication.

§ 719½. Subject Involved in That of Provability of "Unliquidated Claims."

The subject of the year's limitation for the proof of claims is somewhat involved in the preceding subject of the "Provability of Unliquidated Claims." See § 704, et seq.

But § 59 (n) does not operate to make claims provable which otherwise would not be so.

Page 435, note 2. *Steinhardt v. Nat'l Bank*, 19 A. B. R. 72, 122 A. D. 55; In re Clover Creamery Ass'n (*Evans v. Claridge*), 23 A. B. R. 884, 176 Fed. 907 (C. C. A. Wis.), quoted, on other point, at § 717½; In re Roth & Appel, 22 A. B. R. 504, 174 Fed. 64 (D. C. N. Y.).

§ 722. May Be "Liquidated" after Expiration of Year, if "Filed" within.

Page 436, note 4. See, in addition, In re Faulkner, 20 A. B. R. 542, 161 Fed. 900 (C. C. A. Kans.), quoted at § 734. Also, see post, § 2139.

Inferentially, though claim filed too late because not filed within sixty days after final judgment in the liquidation, In re Clover Creamery Ass'n (*Evans v. Claridge*), 23 A. B. R. 884, 176 Fed. 907 (C. C. A. Wis.), quoted at § 717½.

§ 722½. Priority May Be Claimed for It Afterwards.

Similarly, priority over other claims in the distribution of the assets may be asserted after the expiration of the year.

In re Ashland Steele Co., 21 A. B. R. 834, 168 Fed. 679 (C. C. A. Ky.): "We think that the substantive claims having been proven within the time allowed by the act, it was within the power of the court to allow the claim priority and give them the preference to which by law they were entitled, notwithstanding no definite claim of the kind had been made within the year."

§ 723. Court's Power Absolutely Ceases.

Page 436. In re Sanderson, 20 A. B. R. 396, 160 Fed. 278 (D. C. Vt.): "It is useless here to consider whether the court is not ordinarily vested with sufficient equity powers to grant relief where it is equity so to do, because this statute cuts out any common law equity powers vested in the court, for such allowance. The courts have construed this statute literally. The claim in question cannot be allowed as it is barred by this statute. In re Stein, 1 Am. B. R. 662, 94 Fed. 124. * * * Some courts have gone so far as to hold that a creditor not named in the schedule and having received no notice, directly or indirectly, is barred in one year from proving or having his claim allowed."

In re Peck, 21 A. B. R. 707, 161 Fed. 762 (C. C. A. N. Y., affirming 20 A. B. R. 629): "The latter clause of this paragraph (§ 57n) is somewhat ambiguous, and has been construed in cases which are relied upon by the petitioner. Such are In re Noel, 18 Am. B. R. 10, 150 Fed. 89, 80 C. C. A. 43; In re Baird (D. C.), 18 Am. B. R. 655, 154 Fed. 215; Keppel v. Tiffin Savings Bank, 197 U. S. 356, 13 Am. B. R. 552, * * *. But the first clause of the paragraph is unobscure and specific; it prescribes a period of limitations, and there is nothing in the act which relieves any creditor from its operation, except in the case where claims are being liquidated by litigation. Whether or not there may be exceptional cases which would not fall within the statute is a question on which we now express no opinion; but to hold that this clear and imperative provision is to be disregarded whenever a creditor may assert that he was misled because the bankrupt's schedules stated that some particular asset was of little or no value, seems to us to be legislation, not construction."

Page 436, note 5. Also, compare contra observations (obiter) in In re Peck, 20 A. B. R. 629, 161 Fed. 762 (D. C. N. Y.).

§ 725. Limitation Applies Even Where Creditor Not Notified, etc.

The limitation applies even as to claims where the creditor has not had the requisite notice nor knowledge or has been misled by erroneous statements of assets in the schedules.

In re Peck, 21 A. B. R. 707, 161 Fed. 762 (C. C. A. N. Y.), quoted supra. But compare, In re Peck, 20 A. B. R. 629, 161 Fed. 762 (D. C. N. Y.). Also compare, In re Pierson, 23 A. B. R. 58, 174 Fed. 160 (D. C. N. Y.).

§ 726. Applies Though Assets Not Distributed, or New Assets Discovered.

Page 437, note 10. Contra, where no claims had originally been presented, no meeting of creditors ever called and no trustee appointed, In re Pierson, 23 A. B. R. 58, 174 Fed. 160 (D. C. N. Y.), which, as a precedent, is hardly to be approved, or, at best, is to be confined strictly within the facts therein displayed—of apparent dereliction on the part of the bankruptcy referee in the original proceedings.

And, although new assets have been discovered which the bankrupt innocently failed to schedule.

In re Peck, 20 A. B. R. 629, 161 Fed. 762 (D. C. N. Y., affirmed in 21 A. B. R. 717, 161 Fed. 762). Contra, In re Pierson, 23 A. B. R. 58, 174 Fed. 160

(D. C. N. Y.), wherein, however, the facts display woeful neglect by the bankruptcy referee in the original case.

§ 727¼. Except Where Litigation Be for Liquidation.

Except that, where litigation is pending involving the liquidation of the claim, and such litigation is not ended before eleven months after the adjudication, the creditor may file his claim at any time within sixty days after final judgment has been rendered therein.

In re Keyes, 20 A. B. R. 183, 160 Fed. 763 (D. C. Mass.). Such is the doctrine of the case In re Noel (Powell v. Leavitt), 18 A. B. R. 10, 150 Fed. 89 (C. C. A. N. H.), discussed ante, § 717.

§ 727½. Or Perhaps Where Litigation Be Over a Preference or Other Transfer Where Claim Would Be Reduced if Creditor Successful.

Perhaps even judgments in suits brought by trustees to recover preferences or other improper transfers may be considered to be liquidation by litigation, such as to permit the creditor, within sixty days after the final judgment, to file his claim for the balance due him.

In re Noel (Powell v. Leavitt), 18 A. B. R. 10, 150 Fed. 89 (C. C. A. N. H.), quoted at § 717; In re Coventry Evans Furniture Co., 22 A. B. R. 623, 171 Fed. 673 (D. C. N. Y.). But see discussion ante, §§ 716, 717.

Although such a liberal doctrine is fraught with many dangers and seems to the author not to be wholly consistent with other provisions of the act.

Compare §§ 716, 717.

In re Keyes, 20 A. B. R. 183, 160 Fed. 763 (D. C. Mass.): "The referee's certificate recites the history of the litigation in the State courts to set aside the conveyance of property which the bankrupt had made to these petitioners before adjudication. It further states that, if the bill of sale had been held to be good, the claims of the petitioners would have been satisfied, and they would not have presented any claims against the bankrupt estate. They sought to hold the property covered by the bill of sale as security for these very claims now presented. Their claims were satisfied or unsatisfied, according as the bill of sale was held good or bad in the result of the litigation. Although the litigation did not in terms relate to the amounts due these creditors, yet, since the question litigated necessarily involved the determination of the net amount for which their claims should be finally allowed, I think the claims are to be considered as 'liquidated by litigation,' within the meaning of § 57n."

Indeed, one court says that the United States Supreme Court apparently has held that § 57 (n) of the act prohibiting proof of claims after the expiration of a year, is not applicable at all to claims arising through the surrender of preferences—that such claims come rather under § 57

(g) permitting the allowance of claims on surrender of preferences and that the latter section is absolutely controlling.

In *re Lange Co.*, 22 A. B. R. 414, 170 Fed. 114 (D. C. Iowa): “* * * the Supreme Court does not regard the claims of creditors who have been deprived of merely voidable preference as falling within the provisions of § 57n, but as claims accruing under § 57g at the time the preference is surrendered or the creditor is deprived thereof by the judgment of the court, and that they may be proved and allowed thereafter before the estate is finally settled. *Page v. Rogers* was not referred to upon the argument of this case, and the opinion had not been published at the time the suit of the trustee against this bank was determined.”

And, whatever be the reasoning whereby the apparently strict wording of § 57 (n) is obviated, the rule seems to be thoroughly established that the section does not apply to the presentation of claims of a creditor from whom a preference has been recovered by suit.

In *re Coventry Evans Furniture Co.*, 22 A. B. R. 623, 171 Fed. 673 (D. C. N. Y.): “The facts are that the note was paid by the bankrupt, prior to the filing of the petition; that suit was brought by the trustee to recover the amount, the claim being that it was a preferential payment; and that in such suit as to such note the Citizens Trust Company was defeated and compelled to pay back the amount. Thereupon, and more than one year after the adjudication, the note was duly proved and presented for allowance, and rejected by the referee, for the reason [that it was] not proved and presented within the year or time fixed by § 57 (n) of the act. This was erroneous. *Keffel v. Tiffin Savings Bank*, 197 U. S. 356, 13 A. B. R. 552. That case is decisive of the question. The claim must be allowed.”

§ 727¾. Litigation Over Property in Custody of Bankruptcy Court, Sufficient Filing.

Where litigation is carried on over property in the custody of the bankruptcy court, the papers filed in the case will be sufficient to prevent the bar of the statute; thus, after the unsuccessful determination of the claimant's contest over the question of the ownership of property in the possession of the court, he is not too late to claim on contract even though the year has expired.

In *re Landis*, 19 A. B. R. 420, 156 Fed. 318 (D. C. Pa.). See also, § 716½; In *re Strobel*, 20 A. B. R. 884, 160 Fed. 916 (D. C. N. Y.).

It has even been held unnecessary to file a formal deposition for proof of debt in such cases.

In *re Strobel*, 20 A. B. R. 884, 160 Fed. 916 (D. C. N. Y.).

But such ruling is unnecessary—the papers in the original litigation should be treated as informal claims and the formal proof subsequently filed be considered as being by way of amendment.

§ 728. Applies Also to Secure Claims as to Deficit.

In *re Sampter*, 22 A. B. R. 357, 170 Fed. 938 (C. C. A. N. Y.): "In this state of things Marks filed August 16, 1907, more than two years after the adjudication, his claim against the individual estate of Arnold Sampter for the deficiency resulting in the foreclosure actions above mentioned, amounting to \$8,866.36. * * * Under §§ 57a and 57e, of the Bankruptcy Act, Marks could have proved his claim, though it was secured, and not liquidated. Besides this, it was liquidated within a year of the adjudication. Service of copies of the complaints in the foreclosure actions on the trustee was not a proof of claim in bankruptcy. There is no ground for holding, assuming the power to do so, that the peremptory requirements of § 57n should be disregarded."

Page 437, note 13. *Steinhardt v. National Bank*, 19 A. B. R. 72, 122 App. Div. (N. Y.) 55; inferentially, *In re Clover Creamery Ass'n (Evans v. Claridge)*, 23 A. B. R. 884, 176 Fed. 907 (C. C. A. Wis.).

§ 731. Withholding of Dividend until Expiration of Year Not Required.

Page 439, note 16. See post, § 2214.

§ 733. Claims Not Proved within Year, Nevertheless Available as Offsets.

Page 439, note 18. See post, § 1178; ante, § 716. But compare, limitation of rule, *In re Clover Creamery Ass'n (Evans v. Claridge)*, 23 A. B. R. 884, 176 Fed. 907 (C. C. A. Wis.).

§ 734. Amendment of Claim after Expiration of Year.

Page 439. In *re Faulkner*, 20 A. B. R. 542, 161 Fed. 900 (C. C. A. Kans.): "It matters not what the paper filed with the referee on July 5, 1905, was styled. Scrutiny of it discloses that it contained every essential statement required by § 57 to constitute proof of a claim, and fully and accurately informed the court of the amount of petitioner's claims and the securities held for their payment. The referee by his order made a finding of the exact sums due the petitioner, as well as the amount of interest thereon, and ordered the collateral sold and the proceeds to be applied on 'said indebtedness,' and that report of sale be made to him for confirmation. All this was done within the year following the date of the adjudication, and it cannot be denied that it constituted a complete scheme by the execution of which the balance due the petitioner after application of the proceeds of sale of the collateral could be ascertained from the court records. No further act on the part of the petitioner was necessary to definitely fix the balance due him. Notwithstanding this, however, he, after the year expired, out of abundant precaution made a resumé of the proceedings taken and the result thereof, and definitely stated the same, and formally asked for an allowance of the balance so found to be due him, in order that he might participate pro rata with other unsecured creditors in the assets of the bankrupt's estate. This was denied, and his claim was expunged. We think this was wrong. The limitation of time within which proofs of claim should be made must necessarily be observed. Such disposition of bankruptcy cases that creditors may expeditiously realize

what they may is important and necessary; but the substance of things, and not the forms merely, should be observed. Bankruptcy proceedings are equitable in their nature, and should be as far as possible conducted on broad lines to accomplish the ultimate purpose of distributing the assets of a bankrupt pro rata among his creditors. *Atchison, T. & S. F. Ry. Co. v. Hurley*, 18 Am. B. R. 396, * * * 153 Fed. 503, 508. In this case everything necessary to determine the balance due the petitioner was done before the year expired within which proof of claims could be made. All the statements required by § 57 had been made, the debt had been judicially determined and stated, the collateral had been ascertained, an upset price fixed, a sale ordered, and provision had been made for the application of the proceeds of sale to the satisfaction of the debt pro tanto. The working out of this scheme necessarily and accurately resulted in the amount due the petitioner. 'Id certum est quod certum reddi potest.' Assuming, however, but not deciding, that the proceedings taken and orders made did not constitute technical proof of petitioner's claims within the year, as required by § 57, we have no doubt they constituted such substantial showing of it as warranted the amendment of the original proof of claim as made by the petitioner in his affidavits filed July 18, 1906."

Page 439, note 19. See, in addition, *Bennett v. Am. Credit Indemnity Co.*, 20 A. B. R. 258, 159 Fed. 624 (C. C. A. Ky.). Instance, amendment of wife's claim, to show credit to obviate statute of limitations, refused, evidently for fraud, *In re Given*, 20 A. B. R. 490, 160 Fed. 199 (D. C. N. Y.); *In re Horne & Co.*, 23 A. B. R. 590 (Ref. Miss.).

§ 735. But an Original Claim Must Exist, Filed within Year.

Of course, there must have been an original proof duly filed within the year; otherwise there would be nothing by which to amend; and the power of amendment is not to be distorted to let in dilatory creditors who have filed no proof within the limited year.

In re Kessler & Co., 23 A. B. R. 901, 176 Fed. 647 (D. C. N. Y.): "I do not think it is necessary to make any decision upon the first point, although I can see many evils which would arise from permitting oral testimony to show that some of the papers, which came into the hands of the trustee, he agreed to treat as proofs of claims. When the Congress says that the proof of claim must be in writing, it must mean that there are certain essential elements without which it is no 'claim' at all. I should think that one of those elements must be some indication in the writing that the 'claim' is a demand against the bankrupt estate. No case goes so far as to remove that essential. However, I make no decision upon that question, because it is not necessary. The most that the petitioner can claim is that, because of the conversation between the trustee, then receiver, and Mr. McCurdy, the trustee consented that the petitioner's statement and letter, which he had received with the other papers from the assignee, should stand in the place of a proof of claim. If any paper is to be treated as a proof of claim which the parties agree on, I am certainly of opinion that the oral testimony on which the parties rely must be clear and explicit. The trustee has no recollection of the conversation, but assuming that Mr. McCurdy's recollection is accurate, it by no means goes far enough to show that the trustee consented to accept the papers in lieu of a formal proof of claim. He was asked whether he had received them from the assignee, and he said that he had and that they were

all right. At the time when this conversation took place no trustee had been appointed and no adjudication had taken place. No proof of claim could have been filed. It is inconceivable to my mind that either party to the conversation could have intended that the papers referred to should stand in lieu of a proof of claim. The receiver did not know that he would be elected trustee; he did not know that there would be an adjudication. It would have been rash and improper for him to have agreed on behalf of the future trustee and in the event of a future adjudication, that any existing papers should have stood in place of a proof of claim. I do not even mean to decide that it would be most unreasonable to construe the language used as intended by the parties to constitute so certain an agreement as must exist, if this paper is by estoppel to be construed as a proof of claim. Therefore, the proof falls short, in my opinion, of an agreement that the papers should stand as a proof of claim."

Also, *In re Mowery*, 22 A. B. R. 239 (D. C. Ohio).

Where an assignment of a claim was filed within the year, but the deposition for proof of debt itself was not filed until after, it has been held a sufficient filing of the claim.

In re Bennett, 18 A. B. R. 320, 153 Fed. 673 (C. C. A. Ky.).

And to be amendable thereafter.

Bennett v. Am. Credit Indemnity Co., 20 A. B. R. 258, 159 Fed. 624 (C. C. A. Ky.).

But the original claim need not have been styled "proof of debt."

In re Faulkner, 20 A. B. R. 542, 161 Fed. 900 (C. C. A. Kans.), quoted at § 734.

§ 737. **Nor to Let Dilatory Creditors Filing Claims against Firm to File Claims against Separate Partners.**

But this rule is perhaps too strict, and it has been held on the other hand that, after the expiration of the year, a creditor may withdraw a claim filed against an individual estate and file it against the partnership estate.

In re Horne & Co., 23 A. B. R. 590 (Ref. Miss.).

§ 737¼. **Amending after Year on Surrender of Preference.**

A claim may be amended after the expiration of the year by adding thereto the amount covered by a preferential transfer that has meanwhile been surrendered.

See ante, §§ 715, 716, 716½, 727¼, 727½, 727¾; *In re Sheibler*, 21 A. B. R. 309, 163 Fed. 545 (D. C. N. Y.); contra, *In re Kemper*, 15 A. B. R. 677, 142 Fed. 210 (D. C. Iowa).

The claim is not increased—merely a credit is stricken out.

§ 737½. Increasing Claim or Adding New Claim.

It is probably permissible by amendment after the expiration of the year to increase the amount of the claim already filed.

Contra, obiter, *In re Mowery*, 22 A. B. R. 239 (D. C. Ohio).

Otherwise, too, than by the mere striking out of surrendered preferences, although the question is not free from doubt. But it would seem, on principle, to be wholly improper, at any rate, to permit an entirely new and distinct claim to be added after expiration of the year by way of an amendment to a claim already duly filed.

In re Mowery, 22 A. B. R. 239 (D. C. Ohio).

§ 737¾. Section 57 (n) Does Not Enlarge Classes of Provable Debts.

Section 57 (n) does not operate to enlarge the classes of debts to be considered "provable"; thus, not to make provable a claim that was contingent at the time of the filing of the bankruptcy petition, but which has become fixed within the year after the adjudication.

In re Roth & Appel, 22 A. B. R. 504, 174 Fed. 64 (D. C. N. Y.): "Nor can I think that § 57 (n) affects the matter at all. That 'claims shall not be proved' subsequent to a 'year after the adjudication' is not an enlargement of the class of provable claims, but merely a restriction of the time wherein provable claims may be presented."

§ 742. Assigned after Filing.

Page 442, note 6. Subrogation of Sureties Paying Claim, Assignees, etc.—Sureties who pay claims after the bankruptcy, also assignees, may be subrogated to the claimant's rights, even the right of rescission of sales. *Sessler v. Paducah Dist. Co.*, 21 A. B. R. 723, 168 Fed. 44 (C. C. A. La.).

§ 744½. Assignment Filed within Year, Though Deposition for Proof of Debt, Not.

Where an assignment of a claim has been filed within the year, though the deposition for proof of debt is not filed until after, it has been held a sufficient filing to avoid the prohibition of Bankruptcy Act, § 57 (n).

Bennett v. Am. Credit Indemnity Co., 20 A. B. R. 258, 159 Fed. 624 (C. C. A. Ky.).

§ 749. Distinguishable from "Provable" Claim.

Page 446, note 3. *Steinhardt v. National Bank*, 19 A. B. R. 72, 122 App. Div. N. Y. 55.

§ 750. Distinguished from "Preferred" Claim.

Page 446, note 4. Question of Surrender of Preference to Be Determined before Determination of Value of Securities.—*In re Quinn*, 21 A. B. R. 264, 165 Fed. 144 (C. C. A. Ill.). See post, § 767½.

§ 751. "Allowable" Only after Deduction of Securities.

In re Stevens, 23 A. B. R. 239, 173 Fed. 842 (D. C. Ore.): "There seems to be no provision for the allowance of any claim fully secured. The allowance can go only to any balance that may remain of the claimant's demand after applying the value of the property incumbered by the claim." Compare, Flint v. Chaloupka, 18 A. B. R. 293, 78 Neb. 594.

Page 446, note 5. Inferentially, Flint v. Chaloupka, 18 A. B. R. 293, 78 Neb. 594. Compare also, ante, § 220.

Impliedly, In re Milne, Turnbull & Co., 20 A. B. R. 248, 159 Fed. 280 (D. C. N. Y.).

Election between deducting as collateral and surrendering as without consideration, In re Waterloo Organ Co., 20 A. B. R. 110, 159 Fed. 426 (C. C. A. N. Y.).

Thus, subcontractor's claims are allowable only for the deficit after deduction of the funds appropriated to them by the attested accounts which they have filed.

In re Grive, 18 A. B. R. 737, 153 Fed. 597 (D. C. Conn.).

Page 446, note 6. See, in addition, In re Stevens, 23 A. B. R. 239, 173 Fed. 842 (D. C. Ore.), quoted supra.

§ 755. Whether Securities on Exempt Property, Deducted.

Page 448. The contrary also has been held, namely, that exempt property should not be deducted because "not of a nature to be assignable under the act," although the meaning of the term in this connection is at least obscure.

In re Bailey, 24 A. B. R. 201 (D. C. Utah).

It was similarly apparently held, under the law of 1867, that securities on the bankrupt's exempt homestead should not be deducted, since the homestead was property in which creditors would have had no interest, in any event.

(1867) In re Stillwell, 7 Nat. B. Reg. 225.

And there is considerable apparent logic in the position that the value of exempt property held as security should not be deducted, since such liens do not diminish the fund otherwise belonging to the trustee. Yet, in most instances, such a rule would be difficult of application in practice, to say the least; besides which there seems no sound warrant for it, since the property, though exempt, is, nevertheless, property of the bankrupt.

§ 756. No Deduction Where Securities Not on Bankrupt's Property.

Where the property held as security is not the property of the bank-

rupt, the claim should be allowed without deduction for the value of the securities.

In re Graves, 20 A. B. R. 818, 163 Fed. 358 (D. C. Vt.); In re Lange, 22 A. B. R. 414, 170 Fed. 114 (D. C. Iowa).

§ 758. No Deduction for Property of Principal Held as Security by Creditor Where Surety Bankrupt.

But, of course, if the collateral has been realized upon, it must be deducted.

In re Graves, 20 A. B. R. 818, 163 Fed. 358 (D. C. Vt.): "Mr. Clement was entitled to prove his claim for the amount due thereon, but having foreclosed on the property of another and obtained full and complete title thereto, he should have dividends only on the balance after deducting the value of the mortgaged property which he has received from said corporation, which is his principal debtor."

§ 758½. Interest, after Deduction.

Interest is to be computed on the lien to the date, of payment, or of readiness to pay, so far as the lien is paid from the fund derived from such property.

Coder v. Arts, 22 A. B. R. 1, 213 U. S. 223, affirming 18 A. B. R. 513, 152 Fed. 943: "Nor do we think the Circuit Court of Appeals erred in holding that, inasmuch as the estate was ample for that purpose, Arts was entitled to interest on his mortgage debt."

In re Stevens, 23 A. B. R. 239, 173 Fed. 842 (D. C. Ore.): "Thus is evinced a purpose of fixing the date of the filing of the petition as a time with reference to which all claims shall be computed with a view to ascertaining their amounts, and thus is a basis established for striking and paying dividends. The estate pays no accruing interest thereafter. In re Haake, 11 Fed. Cas. 134, No. 5,883. The rule is convenient, fair and equitable to all concerned, and affords a ready and indubitable basis for distribution of the assets under the provisions of the act among the creditors of the estate. By § 67d it is declared that liens given and accepted in good faith shall not be affected by the act. A lien in the usual course of business is given to secure interest accruing, as well as the principal of a demand, and it needs no argument to demonstrate the fact that, if the act should declare that interest shall cease upon secured demands at a given date, whether the demands are paid or not, it would affect the lien constituting such security. Another proposition is true also,—that, while the Bankruptcy Act contemplates that a secured creditor shall prove his claim, he may, notwithstanding, decline to make proof, and he does not thereby waive or lose his lien upon the property pledged. In re Goldsmith (D. C.), 9 Am. B. R. 419, 118 Fed. 763. His lien is yet simply unaffected by the Bankruptcy Act. * * * Now, if the secured claimant is entitled to his interest when he omits to make proof of his claim, it would not seem that it was the purpose of the act to cut off the running of his interest at the time of the filing of the petition in bankruptcy when his claim is proved. Indeed, § 67d is indicative of the opposite intendment, in declaring that good-faith liens shall not be affected by the act. The act, otherwise construed, would result in the impairment of the lienor's contract, and could not stand

under the Federal Constitution. Of course, the lienor may waive his security, and, if that is done, he comes in as one of the general creditors, and will share their rights and none other. But, if there be no waiver of the security, the estate is incumbered with the entire demand, including principal and interest. The next inquiry is, then, when does the interest cease to run upon a secured claim? The manifest answer to this is, when the money is realized from the property pledged. That is the end of the proceedings, we might say, for foreclosing the lien, and the duty then devolves upon the trustee to pay the claimant his debt. The estate ought not to be burdened with the payment of interest subsequent to that time. Sturgis was, therefore, entitled to interest on his demand to the time the realty covered by his mortgage was sold and the money realized therefor with which to pay such demand."

In determining the amount of the deficit to be "allowed" for sharing in dividends, the security may be marshaled first against the interest as thus computed to date, and the remainder is the allowable deficit, not to exceed, however, what would have been the amount of the debt, principal and interest, as it stood at the date of the filing of the bankruptcy petition.

In re Kessler & Co., 22 A. B. R. 607, 171 Fed. 751 (D. C. N. Y.): "It is hardly necessary to cite authorities to show that the creditor, before the debtor's insolvency, has the right to marshal the security upon interest first and principal afterwards. This rule itself seems to have been in some doubt early in America, but it was laid down in the note to *Williams v. Houghtaling* in 3 Cow., on page 87, and I think it cannot be disputed that it is the law, generally speaking, at present. It certainly was adopted by the Supreme Court in *Story v. Livingston*, 13 Pet. 359, 371, * * * and it is quite obvious that otherwise the debtor might compel the creditor to leave the interest unpaid and keep reducing the principal. Moreover, the creditor, in the absence of any provision to the contrary, has in general the right to attribute payments as he pleases. The Bankruptcy Act provides that liens, as would in justice necessarily be the case, shall not be affected by bankruptcy, and the mortgagee collects all interest upon his claims if the security is sufficient. *Coder v. Arts* (C. C. A.), 18 Am. B. R. 513, 152 Fed. 943, * * *. Section 57 provides that the value of the securities shall be determined by the converting them into money 'according to the terms of the agreement pursuant to which such securities were delivered to such creditors.' The common law being, as it is, an implied term of the agreement under 'which such securities are delivered,' he may marshal the securities against interest, and that right is a part of the lien itself. The statute directs that proof be made for the balance after the value as so ascertained is credited. The question comes down to what value shall be credited upon the claim. If the contract expressly provided that certain expenses of collection should first be paid out of the security, I suppose no one will contend that bankruptcy will change that provision, and that the full value of the security must be credited upon the amount of the claim without first deducting those expenses allowed by the very agreement. I think interest is in the same category as any other deduction which the agreement may allow. By the implied term of the agreement the creditor has the right before he pays any of the face of the claim to make certain deductions, among which is the deduction for interest accrued upon it. The balance is all that is applicable to payment. This is the course which the referee has adopted, and I think he is right. As I have

said, the English law has for a long time been to the contrary, and, although this is not binding upon me, I should regard it as of the greatest moment, except in a case where the rule clearly arises through inadvertence. I say it with the utmost respect. * * * The analogy is apposite which they suggest, that where a creditor has security for two claims, one provable and the other unprovable he may marshal his security against the unprovable claim. They very pertinently ask whether there is any valid distinction between that and the right to marshal the security against interest falling due after the date of the commission. * * * Under these circumstances, in spite of the extremely persuasive character of any rule so well settled in English law, I cannot feel that it should be binding here. Of course, in a case in which the security was not sufficient to pay the interest which accrued upon the claim from the date of the adjudication until its liquidation, I do not mean to be understood to hold that the creditor could prove for any part of that interest remaining unpaid. In no event could the creditor prove for more than the amount of the claim at the time of the adjudication. I only decide that the implied right given him under the original contract of marshaling the security in the first instance against the interest is not taken from him by the bankruptcy of the debtor."

§ 760. Creditor Entitled to Pursue Method Stipulated in Contract.

Page 451, note 15. In re Mayer, Leslie & Baylis, 19 A. B. R. 356, 157 Fed. 836 (C. C. A. N. Y.); In re Peacock, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.).

This right, it is said, implies the right to marshal the value of the security against interest first. In re Kessler & Co., 22 A. B. R. 606, 171 Fed. 751 (D. C. N. Y.).

Page 452, note 16. See § 761. See In re Peacock, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.).

Page 453, note 17. In re Mayer, Leslie & Baylis, 19 A. B. R. 356, 157 Fed. 836 (C. C. A. N. Y.). See post, § 1913.

§ 761. Unless Oppressively or Unfairly Exercised.

Page 454, note 20. In re Davis, 23 A. B. R. 446, 174 Fed. 556 (C. C. A. Pa.); In re Dix, 23 A. B. R. 889, 176 Fed. 582 (D. C. Pa.), which, though cases of determination of value by litigation, e. g., by foreclosure sale, rather than by pursuing the contract method, yet were cases where the bidding was merely formal and afforded no test of real value and was disregarded as unfair.

Page 454. The trustee also may sue the creditor for an accounting.

Obiter, In re Peacock, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.).

§ 762. Which of Remaining Four Methods, Left to Court's Discretion.

Page 454, note 21. Instance, agreeing with trustee, In re Grive, 18 A. B. R. 737, 153 Fed. 597 (D. C. Conn.).

And it has been held that where the court was not asked to direct the manner of determining the value of the securities, and the purchase

price paid by the mortgagee buying in the property at foreclosure sale was merely nominal and wholly inadequate, such purchase price would not be conclusive.

In re Davis, 23 A. B. R. 157 (Ref. Pa.). Compare, also, In re Davis, 23 A. B. R. 446, 174 Fed. 556 (C. C. A. Pa.); In re Dix, 23 A. B. R. 889, 176 Fed. 582 (D. C. Pa.).

§ 762¼. Value Not Necessarily That at Date of Bankruptcy.

It is not necessary that the value be determined as of the date of the bankruptcy. It is sufficient that it be the amount actually realized or be the value at the time of the determination.

Impliedly, Steinhardt v. National Bank, 19 A. B. R. 72, 122 App. Div. N. Y. 55.

§ 762½. Determination by Litigation.

The value of securities may be determined by litigation.

Bankr. Act, § 57 (h). Instance, In re Davis (Winter's Appeal), 23 A. B. R. 446, 174 Fed. 556 (C. C. A. Pa.).

But where the creditor buys in the property at foreclosure sale at a nominal figure, although its actual value is vastly greater and perhaps enough to pay the principal and interest, such foreclosure sale price has been disregarded as a "determination by litigation," and the bankruptcy court has taken evidence of actual value.

In re Davis (Winter's Appeal), 23 A. B. R. 446, 174 Fed. 556 (C. C. Pa.); In re Dix, 23 A. B. R. 889, 176 Fed. 582 (D. C. Pa.); In re Davis, 23 A. B. R. 157 (Ref. Pa.).

The court held in one case that the sum bid at the sheriff's sale not being conclusive evidence of such value under the State law would not be held to be such in the bankruptcy court, although conceding, obiter, that had the State law made such price realized at sheriff's sale conclusive evidence of value, the bankruptcy court might have followed it.

In re Davis (Winter's Appeal), 23 A. B. R. 446, 174 Fed. 556 (C. C. A. Pa.).

§ 763. Preliminary Determination of Values for Voting Purposes.

Page 454, note 22. In re Stevens, 23 A. B. R. 239, 173 Fed. 842 (D. C. Ore.); Instance, In re Milne, Turnbull & Co., 20 A. B. R. 248, 159 Fed. 280 (D. C. N. Y.).

§ 764. No Judgment in Bankruptcy Proceedings against Claimant for Excess of Security.

Page 454, note 23. In re Peacock, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.).

§ 766. Proof of Secured Debt as Unsecured, Waiver or Not.

Proof of a secured debt as unsecured may amount to a waiver of the security.

(1867) *White v. Crawford*, 9 Fed. 371 (C. C.): "A creditor waives any lien he may have upon the property of his debtor by proving up his debt as an unsecured claim."

(1867) *Shoorten v. Booth*, 32 La. Ann. 397: "A creditor who proves his whole debt as one without security, or against a bankrupt's estate, thereby releases any mortgage he may have."

Dunn, Salmon Co. v. Pillmore, 19 A. B. R. 172, 106 N. Y. Supp. 546.

Page 455, note 26. Instance held not waiver to assert "vendor's privilege" under Civil Code of Louisiana. *Sessler v. Paducah Distilleries Co.*, 21 A. B. R. 723, 168 Fed. 44 (C. C. A. Ala.).

Page 455, note 27. Analogously, as to priority claims, *In re Ashland Steel Co.*, 21 A. B. R. 834, 168 Fed. 679 (C. C. A. Ky.). See post, § 2139.

But such proof is a waiver only as to the trustee; and it has been held in one case [*Flint v. Chaloupka*, 18 A. B. R. 293, 78 Neb. 594] that where a creditor had instituted a fraudulent conveyance suit more than four months before the debtor's bankruptcy, and thereafter had filed his claim in the bankruptcy proceedings as an unsecured claim, without disclosure of the security, the debtor's subsequent discharge in bankruptcy was not pleadable as a bar, since the suit was one in rem and not in personam, and that, even if it had been in personam, the fraudulent grantee could not take advantage of the waiver. The court in that case, however, in obiter affirms the main proposition of this section, § 766.

Flint v. Chaloupka, 18 A. B. R. 293, 78 Neb. 594: "Plaintiff herein filed proof of her claim with the referee in bankruptcy and participated in the election of a trustee. She did not disclose to the court of bankruptcy that she had or claimed a lien upon the land here in controversy by virtue of the institution of this suit. Defendants contend that, by the filing of the claim with the bankruptcy court without reference to the security claimed, plaintiff abandoned such security, and the subsequent discharge of the elder Chaloupka operates as a bar to this suit. Had plaintiff remained out of the bankruptcy court, no doubt would arise as to her right to prosecute her creditor's bill. Had the bankrupt listed with the trustee the land in controversy and a disposition thereof made by the trustee, no doubt would exist but that the plaintiff, not having disclosed nor claimed under her lien, would have been estopped from the prosecution of this suit. And, further, in an action properly brought by the trustee in bankruptcy against the plaintiff herein, we think that, under the existing facts, the trustee would have prevailed, and the land in controversy would have been subjected to the payment of all claims against the bankrupt. But none of these propositions exist here. Can the bankrupt, or his fraudulent grantee of the land which was never in the jurisdiction of the bankruptcy court, plead a discharge in bankruptcy as a bar to a creditor's suit against a creditor who wrongfully failed to disclose his security to the bankruptcy court? * * * Cases directly in point are few, but the weight of au-

thority, we believe, and the rule more in harmony with justice, will not permit a fraudulent grantee to plead the subsequent discharge of his grantor as a defense in a creditor's suit brought more than four months prior to the institution of the bankruptcy proceeding, and which pertains to land which was never brought within the jurisdiction of the bankruptcy court."

§ 767. Security Surrendered, Claim Allowed without Deduction.

Page 455, note 31. **Signing Subsequent "Liquidation Agreement," Whether Waiver of Security.**—In re Cyclopean Co., 21 A. B. R. 679, 167 Fed. 971 (C. C. A. N. Y.).

Thus, sub-contractors waiving their attested accounts may share *pari passu*.

In re Grive, 18 A. B. R. 737, 153 Fed. 597 (D. C. Conn.).

§ 767½. Question of Preference Settled before Value of Securities Determined.

It is the proper practice that any question as to whether or not the security is a preference should be determined before the security is converted into money.

In re Quinn, 21 A. B. R. 264, 165 Fed. 144 (C. C. A. Ill.): "The District Court and the referee in bankruptcy, upon the presentation by a creditor of the customary proof of a secured debt which is objected to by the trustee on the ground that the security claimed constitutes a voidable preference, may hear and decide the issue and allow the claim as a secured or an unsecured debt before the alleged security is converted into money, under the provisions of § 57h * * *, and this is the preferable practice because it enables parties to know the extent of their interests before the property is sold."

§ 768. Surrender of "Preferences" Prerequisite to Allowance.

Page 456, note 32. See, in addition, In re Rice, 21 A. B. R. 212, 164 Fed. 589 (D. C. Pa.).

If a creditor or his agent has received a preference within four months preceding the bankruptcy and has received it when he has had reasonable cause for believing that [the debtor intended thereby to give a preference, before the Amendment of 1910] a preference would thereby be effected, such creditor's claim shall not be allowed until the preference has been surrendered.

Practice on Hearing of Objections to Allowance.—See post, §§ 811, 830, et seq.

Deposition for Proof of Debt Makes Prima Facie Case against Objections on the Ground of Preference, When.—In re Milne, Turnbull & Co., 20 A. B. R. 248, 159 Fed. 280 (D. C. N. Y.).

Question of Preference to Be Settled before Security Converted into Money.—See ante, § 767½.

Whether Liens on Exempt Property to Be Surrendered.—It has also been held that liens upon or other transfers of exempt property need not be surrendered, because they do not constitute preferences, the title to exempt property in no event passing to the trustee.

In re Bailey, 24 A. B. R. 201, 176 Fed. 990 (D. C. Utah). Also, see ante, § 755.

The "surrender" must be to the trustee, not to the bankrupt nor to any other person.

In re Bailey, 24 A. B. R. 201, 176 Fed. 990 (D. C. Utah).

§ **769. Preference Surrendered, Claim "Allowable."**

Page 456, note 34. See, in addition, *Ohio Valley Bank v. Mack*, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio).

§ **770. Not Voluntarily Surrendered but Only on Litigation, Yet Allowable.**

Page 456, note 35. See, in addition, *Ohio Valley Bank v. Mack*, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio); *Page v. Rogers*, 21 A. B. R. 496, 211 U. S. 575, quoted at § 1770¼; In re Lange, 22 A. B. R. 414, 170 Fed. 114 (D. C. Iowa).

§ **771. Allowable if Not Surrendered until Adverse Ruling by Referee When Presented for Allowance.**

The rule is the same whether the compulsory surrender be accomplished by independent action outside of the bankruptcy proceedings or by orders made in the bankruptcy proceedings themselves by the referee disallowing the claim.

Instance, *Ohio Valley Bank v. Mack*, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio).

A fortiori, *Page v. Rogers*, 21 A. B. R. 496, 211 U. S. 575. Also, see post, § 1770¼.

And the prospective dividend may be applied on the preference to be surrendered.

Page v. Rogers, 21 A. B. R. 496, 211 U. S. 575, quoted at § 1770¼.

§ **773½. Distinct Claims, and Preference on One Only, Yet to Be Surrendered before Any Allowed.**

The operation of § 57 (g), requiring the surrender of preferences as a prerequisite to allowance, cannot be avoided by showing the payment claimed to be a preference to have been made on a different debt of the creditor than the one presented for allowance. The total indebtedness between the parties is the basis for the determination of a preference, regardless of the form and number of the component debts.

See post, § 1421; also, *Swartz v. Fourth National Bank*, 8 A. B. R. 673, 117 Fed. 1 (C. C. A. Mo.); In re Beswick, 7 A. B. R. 395 (Ref. Ohio); *Dunn v.*

Gans, 12 A. B. R. 316, 129 Fed. 750 (C. C. A. Pa.), quoted post at § 1421; In re Meyer, 8 A. B. R. 598, 115 Fed. 997 (D. C. Tex.), quoted at § 1421.

In re Mayo v. Contracting Co., 19 A. B. R. 551, 157 Fed. 469 (D. C. Mass.): "The petitioner contends that his two claims are distinct and independent, and that in any case, whether the \$2,000 be surrendered or not, his claim of \$2,131.18, which did not arise under the contract of May 13, 1905, and was not included in his suit in equity wherein the decree of January 12, 1906, was entered, ought to be allowed. I do not think the two claims can be considered distinct and independent in such a sense as to require this result. Both were due at the time of the preference. The suit in equity might have been brought upon both as well as upon one only. The only difference between them in the nature of the indebtedness claimed is that one claim arose under an implied contract, the other under an express contract. Both might have been included in one and the same proof of claim."

§ 774½. Surrender of Fraudulent Transfers.

It is doubtless also true that the claim of one who has received a transfer which is not merely preferential but is actually fraudulent may be refused allowance until the transferred property is surrendered.

Compare, In re Bloch, 15 A. B. R. 748, 142 Fed. 676 (C. C. A. N. Y.).

§ 775. Allowability of Claims of Fraudulent or Preferential Transferees after Setting Aside Transfers.

Page 459, note 38. Quoted at § 1734½.

Whether Reimbursement of Transferee for Care, etc., of Property Meanwhile Allowable.—Compare, In re Nechamkes, 19 A. B. R. 189, 155 Fed. 867 (D. C. N. Y.). Compare ante, §§ 716, 717, 717½, 733; post, § 1179½.

Indeed, the alleged preferential transferee may, by cross-bill, offset his claim for dividends in the trustee's suit to set aside the preference.

Ommen, trustee, v. Talcott, 23 A. B. R. 570, 175 Fed. 259 (D. C. N. Y.).

§ 775½. Burden of Proof.

The burden of proof is on the trustee to establish that the transaction amounted to a preference and that the property was received with "reasonable cause for belief."

See post, §§ 1403½, 1768. Also see, In re Pfaffinger, 18 A. B. R. 807, 154 Fed. 528 (D. C. Ky.).

§ 777. Judgments, Whose Liens Null under § 67 "f," Nevertheless "Allowable."

Page 460, note 42. In re Smith, 23 A. B. R. 864, 176 Fed. 426 (D. C. N. Y.), quoted ante, § 234.

§ 780. Validity of Claims Determined, in General, by State Law.

Page 461, note 45. Impliedly, In re Elletson Co., 23 A. B. R. 530, 174 Fed.

859 (D. C. W. Va.), quoted at § 1896. Also compare similar propositions post, §§ 1140, 1896.

Page 461, note 46. In re Brown, 21 A. B. R. 123, 164 Fed. 673 (C. C. A. Calif.).

§ 782. Trustee Entitled to All Objections Bankrupt Might Have Urged, but Not Limited to Such.

Page 462. Thus, he may urge lack of consideration.

[Merchants & Manufacturers] National Bank of Columbus v. Galbraith, 19 A. B. R. 319, 157 Fed. 208 (C. C. A. Ohio).

The trustee is entitled to counterclaim for damages suffered by the bankrupt in carrying out a contract involved in the claim, which he was induced to enter into by the claimant's false representations.

In re Harper, 23 A. B. R. 918, 175 Fed. 412 (D. C. N. Y.).

§ 783. Creditors and Trustee Bound by Bankrupt's Contracts and Acts.

Page 462, note 50. **Effect of Adjudication of Bankruptcy on Contract Claims.**—The subject of the effect of the adjudication of bankruptcy upon contractual rights and rights of property has already been discussed herein under the titles, "Adjudication as Res Adjudicata" (§ 444); "Contractual Relations Not Affected unless Merged in Provable Debts" (§ 451); "Damages for Breach of Contracts of Sale, Employment and Continuing Contracts" (§ 685, et seq.); "Damages on Contracts Accruing after Bankruptcy" (§ 707); "Does Bankruptcy Sever Relation of Landlord and Tenant" (§ 652); and is also discussed later under the general subjects of "Leaseholds" (981), etc. The subject of "Bankruptcy as an Anticipatory Breach of Contract" is discussed at §§ 674, 675, 685, et seq.

Thus, the trustee "stands in the bankrupt's shoes" as to claims against a bankrupt stock broker for money left for the purchase of stock, but wrongfully converted by the broker to his own use.

West v. McLaughlin Co., 20 A. B. R. 654, 162 Fed. 124 (C. C. A. Mich.): "The testimony leaves no doubt that the money was paid to the bankrupt for the purpose of buying the 350 shares of stock in the Virginia, etc., Company; and, this being true, we think the court below proceeded upon an erroneous theory of the principles of law upon which the case was to be tried and determined. The trustee represented the bankrupt, stood in his shoes, and the burden of proof rested upon him, precisely as it would have rested upon the bankrupt, had there been no adjudication, and it devolved upon appellee to show that the purchase had in fact been made by the bankrupt in order to defeat the claim. If the purchase had not been made, the bankrupt held the \$5,000 for appellant's use, and as money which, in equity and good conscience, he ought not to retain. The burden was not upon the creditor to show that there was no actual purchase of stock, and it was error to disallow and reject the claim upon the contrary assumption."

Thus, the trustee is bound by the bankrupt's assumption of debts.

Instance, *In re Sickman & Glenn*, 19 A. B. R. 232, 155 Fed. 508 (D. C. Pa.).

And by his assumption of liens, where such assumption is binding by State law; for example, where a partnership buys out a corporation and assumes its debts.

Instance, *In re Sickman & Glenn*, 19 A. B. R. 232, 155 Fed. 508 (D. C. Pa.).

§ 784. Statute of Limitations as Defense to Allowance.

Page 462, note 51. Obiter, *In re Kuffler*, 19 A. B. R. 181, 155 Fed. 1018 (D. C. N. Y.).

Amendment of Wife's Claim Apparently Outlawed, to State Credit to Remove the Bar, Refused under Circumstances of Bad Faith.—*In re Girvin*, 20 A. B. R. 490, 160 Fed. 197 (D. C. N. Y.).

§ 788. What Statute of Limitations Governs.

Page 463, note 58. See, in addition, *In re Stoddard Bros. Lumber Co.*, 22 A. B. R. 435, 169 Fed. 190 (D. C. Idaho).

§ 792. Trustee's Failure to Contest Allowance, Bar to Suit to Recover Preference.

Page 464, note 66. Compare analogous proposition post, § 1751½.

§ 794. Negotiability Unimpaired by Bankruptcy.

Page 465. Likewise, where accommodation paper has been diverted from the purpose for which it was originally given, only innocent purchasers for value in the due course of business will be protected against the defense.

In re Hopper-Morgan Co., 19 A. B. R. 518, 158 Fed. 351 (D. C. N. Y.).

And the burden of proof of bona fides is on the holder.

In re Hopper-Morgan Co., 19 A. B. R. 539, 158 Fed. 351 (D. C. N. Y.).

Also the ordinary rules as to each endorser having recourse against prior parties, prevails in the absence of agreement among them to the contrary.

In re McCord, 22 A. B. R. 204 (Ref. N. Y.).

Thus, the ordinary rules of commercial paper apply as to filling in blanks and altering the place of payment, etc.

First National Bank of Wilkesbarre v. Barnum, 20 A. B. R. 439, 160 Fed. 245 (D. C. Pa.).

§ 796¼. Note Allowed in Full Though Another Also Liable.

Where a bankrupt, for a valuable consideration, has assumed the

payment of promissory notes, his estate is liable for their full amount, though another party is also liable thereon.

In re Girvin, 20 A. B. R. 320, 160 Fed. 197 (D. C. N. Y.).

§ 796½. Stipulation for Attorney's Fees.

Notes containing stipulations as to attorney's fees for collection have been allowed in bankruptcy, including the fee stipulated.

In re Edens & Co., 18 A. B. R. 643, 151 Fed. 940 (D. C. S. C.). See ante, § 671; Merchant's Bank *v.* Thomas, 10 A. B. R. 299, 121 Fed. 306 (C. C. A.); obiter, In re Milling Co., 16 A. B. R. 456 (D. C. Tex.). But compare, obiter, In re Hersey, 22 A. B. R. 863, 171 Fed. 1004 (D. C. Iowa).

But the validity and extent of such claims are to be determined by the local law.

§ 796¾. Miscellaneous Defenses to Commercial Paper.

A note given in consideration of a "clearing check" has been upheld as being upon valuable consideration.

[Merchants and Manufacturers] National Bank of Columbus *v.* Galbraith, 19 A. B. R. 319, 157 Fed. 208 (C. C. A. Ohio).

§ 797. Allowability of Claims of Relatives, Stockholders, etc.

Claims of relatives are allowable in bankruptcy if valid by State law and not in contravention of the provisions of the Bankruptcy Act.

Instance, In re Macauley, 18 A. B. R. 459, 158 Fed. 322 (D. C. Mich.).

Ohio Valley Bank Co. *v.* Mack, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio): "The fact that the bankrupt is closely related to a creditor is a circumstance which justifies a more rigid scrutinizing than would be the case if no such relation existed. Nevertheless the honest or dishonest character of a debt is not to be determined by any mere question of relationship." Citing Davis *v.* Schwartz, 155 U. S. 638; Estes *v.* Gunter, 122 U. S. 456.

Likewise are the claims of stockholders.

In re Bennett Shoe Co., 20 A. B. R. 704, 162 Fed. 691 (D. C. Conn.).

§ 798. Thus, Wife's Claims.

Page 466, note 80. Obiter, In re Suckle, 23 A. B. R. 861, 176 Fed. 828 (D. C. Ark.).

Page 466. In one case a wife's claim for money loaned at different times, aggregating \$10,000 and more, was disallowed on review because of the bar of the statute of limitations, although the referee had found that there had been a payment on account of some \$1,000 sufficient to revive the debt, the wife's proof having failed originally to show such credit, and amendment having been allowed after expiration of the year

for filing claims, the court considering the testimony not worthy of credit.

In re Girvin, 20 A. B. R. 490, 160 Fed. 197 (D. C. N. Y.).

Similarly, a note given by a corporation to the wife of its principal stockholder (she herself being also a stockholder) for money loaned to effect a proposed composition with creditors, is an allowable claim against the corporation when later adjudged bankrupt.

In re Bennett Shoe Co., 20 A. B. R. 704, 162 Fed. 691 (D. C. Conn.).

Page 467. And the wife's claim for money loaned out of her separate estate has been held allowable in Pennsylvania.

In re Kyte, 21 A. B. R. 110, 164 Fed. 302 (D. C. Pa.).

A wife's claim for salary as clerk for her bankrupt husband is held in Arkansas, on grounds of public policy, not to be allowable, notwithstanding the Married Women's Act of that State.

In re Suckle, 23 A. B. R. 861, 176 Fed. 828 (D. C. Ark.).

Nor can the wife form a mercantile partnership with her husband, although a married woman may form a partnership with any other person.

In re Suckle, 23 A. B. R. 861, 176 Fed. 828 (D. C. Ark.).

Likewise, a promissory note of a married woman, not for the benefit of her separate estate, is not allowable in Arkansas.

In re Suckle, 23 A. B. R. 861, 176 Fed. 828 (D. C. Ark.).

§ 799. Child's Claim and Parent's Claim.

Page 467, note 95. See, in addition, *Ohio Valley Bank Co. v. Mack*, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio), quoted at § 797; *Embry v. Bennett*, 20 A. B. R. 651, 162 Fed. 139 (C. C. A. Ky.), in which case it was held the trustee could not offset against the childrens' claims (for loss of their money which the bankrupt had held as their guardian) the sums expended by him for their education at college.

§ 800. But Ordinary Rule of Close Scrutiny Prevails.

Ohio Valley Bank Co. v. Mack, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio): "The fact that the bankrupt is closely related to a creditor is a circumstance which justifies a more rigid scrutiny than would be the case if no such relation existed."

Page 467, note 96. See, in addition, *In re Domenig*, 11 A. B. R. 555, 128 Fed. 146 (D. C. Pa.), quoted ante, § 556; inferentially, but obiter, *Union Trust Co. v. Bulkeley*, 18 A. B. R. 43, 150 Fed. 510 (C. C. A. Mich.), quoted ante, § 556; also, *In re Kyte*, 21 A. B. R. 110, 164 Fed. 302 (D. C. Pa.); impliedly, *In re Sanger*, 22 A. B. R. 145, 169 Fed. 722 (D. C. W. Va.).

§ 801. In General.

In general, claims are allowable in bankruptcy if they be provable, and if they be by State law valid.

Page 468, note 97. No. 14. **Infant's Claim upon Repudiation of Contract.**—In re Huntenberg, 18 A. B. R. 698, 153 Fed. 768 (D. C. N. Y.).

15. **Unauthorized Contract by Officer of Corporation, May Not Be Ratified by Him.**—In re Roanoke Furnace Co., 21 A. B. R. 597, 166 Fed. 944 (D. C. Pa.).

16. **Release of Security by Liquidation Agreement.**—No release of security is caused by the signing of a "liquidation agreement" before the bankruptcy. In re Cyclopean Co., 21 A. B. R. 679, 167 Fed. 971 (C. C. A. N. Y.).

17. **Partnership—When Claim Is Allowable against Partnership, When Not.**—See post, § 2230, et seq.

18. **Forged Endorsement.**—In re Lamon, 22 A. B. R. 635, 171 Fed. 516 (D. C. N. Y.).

§ 802. Thus, Claims Alleged to Be Ultra Vires.

Page 469. Likewise, the giving of a note and mortgage by a corporation to secure an individual debt of its managing officer and principal stockholder has been held ultra vires, and the note has been held not allowable.

Am. Mach. Co. v. Norment, 19 A. B. R. 679, 157 Fed. 801 (C. C. A. N. Car.).

Likewise, as to sales and other transactions between corporations and their officers, directors or stockholders, the ordinary rules will prevail; thus, when the president of an insolvent furnace company and the principal owner of its stock, made an assignment to it of his rights as the lessee of certain coal mines owned by claimant, which assignment without authority of the corporation contained a provision that it should indemnify him against liability thereon, and claimant's bills for ore mined and delivered on his order were paid by him until the adjudication of himself and the company, the claimant was held not to be a creditor of the company, and its claim for a balance due was held to be provable only against the bankrupt estate of the president.

In re Roanoke Furnace Co., 21 A. B. R. 597, 166 Fed. 944 (D. C. Pa.).

The guaranty or payment by a corporation, without benefit to itself, of the debt of another, in which it has no interest, is beyond its powers.

Mapes v. German Bank of Tilden, 23 A. B. R. 713, 176 Fed. 89 (C. C. A. Neb.).

§ 803. Claims Tainted with Illegality or Fraud.

Page 469. Thus, as to claims in restraint of trade or contrary to public policy.

Held not contrary to public policy nor in restraint of trade. In re Clark, 21 A. B. R. 776 (Ref. Calif.).

Thus, as to gambling contracts.

In re *Ætna Cotton Mills*, 22 A. B. R. 629, 171 Fed. 994 (D. C. S. Car.).

Page 470. Claims of those engaged with the bankrupt in a conspiracy to defraud creditors, of course are not to be allowed.

In re *Friedman*, 21 A. B. R. 213, 164 Fed. 131 (D. C. Wis.).

Nor are they allowable for any part.

In re *Friedman*, 21 A. B. R. 213, 164 Fed. 131 (D. C. Wis.).

And the proof of such conspiracy may be made from circumstantial evidence, even against positive affirmative testimony where such testimony is inherently improbable; and, to prove the existence of the conspiracy, it is only necessary to show, from circumstantial evidence, a mere tacit understanding among the parties to work to a common purpose.

In re *Friedman*, 21 A. B. R. 213, 164 Fed. 131 (D. C. Wis.). Instance of proof of conspiracy to defraud, *Pratt v. Columbia Bank*, 18 A. B. R. 406, 157 Fed. 137 (D. C. N. Y.).

A fraudulent transferee's claim for the rent of fraudulently conveyed property, upon the transfer being set aside, has been disallowed.

In re *Hurst*, 23 A. B. R. 554 (Ref. W. Va.).

Thus, as to validity of contracts for the sale of liquors.

Compare, where held valid as not contrary to State statute, In re *Fenn*, 24 A. B. R. 130, 177 Fed. 334 (C. C. A. Vt., reversing In re *Fenn*, 22 A. B. R. 833, 172 Fed. 620 D. C. Vt.).

§ 803½. Non-Compliance with Statutory Prerequisites for "Doing Business" or "Maintaining Suit."

It has been held that a claim of a foreign corporation which has failed to comply with certain statutory requirements before "doing business" within the State will not be allowed.

In re *Montello Brick Works*, 20 A. B. R. 855, 163 Fed. 621 (D. C. Pa.); In re *Montello Brick Works*, 23 A. B. R. 374, 375, 174 Fed. 498 (C. C. A. Pa.).

On the other hand, it has also been held that State statutes prohibiting parties from instituting or maintaining suits until they have complied with certain registry or deposit requirements, have no applicability to suits in the federal courts; the federal court accepting the substantive rights of parties as it finds them by State law, but itself determining what shall be prerequisite to the maintenance of suits in its own forum.

See post, § 1753. Also, see In re *Dunlop*, 19 A. B. R. 361, 156 Fed. 945 (C. C. A. Minn.).

§ 804. Claims by Customers against Bankrupt Stockbroker.

Page 470, note 109. Compare, *In re Neff*, 19 A. B. R. 23, 157 Fed. 57 (C. C. A. Ohio).

Page 470, note 110. **Claims on Contracts to Purchase Stock Where Buyer Becomes Bankrupt.**—*Phenix Nat. Bank v. Waterbury*, 20 A. B. R. 140, 123 App. Div. 453, 108 N. Y. Supp. 391, quoted at § 690.

Claims for money left with brokers, who later become bankrupt, for the purchase of shares of stock, but which the brokers wrongfully convert, are valid claims; and probably are such though left for the purpose of buying stock on margin, since any illegality attaching to the contract would simply excuse nonperformance of the contract and would not permit the detention of the money itself from its rightful owner.

West v. McLaughlin Co., 20 A. B. R. 654, 162 Fed. 124 (C. C. A. Mich.).

And the burden rests on the trustee to prove illegality, not on the claimant to prove legality; especially, "strict proof" is not to be required of him.

West v. McLaughlin Co., 20 A. B. R. 654, 162 Fed. 124 (C. C. A. Mich.).

§ 805. Unpaid Stock Subscriptions.

Page 470, note 111. **Bankruptcy as Breach of Contract to Purchase Corporate Stock.**—*In re Neff*, 19 A. B. R. 23, 157 Fed. 57 (C. C. A. Ohio).

§ 805½. No Rescission of Stock Subscription after Bankruptcy of Corporation.

After bankruptcy of a corporation it has been held to be too late, as against creditors, to rescind a subscription for fraud and misrepresentation, and to prefer a claim for moneys paid, even though the fraud be not discovered before.

Scott v. Abbott, 20 A. B. R. 335, 160 Fed. 573 (C. C. A. Mo.): "From the foregoing summary of the main and essential facts we find ourselves confronted with the following question of law: Whether persons who have been induced by false statements of the officers of a corporation to innocently purchase some of its preferred stock, and who for a year or more have accepted dividends declared quarterly upon the stock purchased by them, may, after discovering the falsity of the statements made, and after a state of insolvency and actual bankruptcy of the corporation has supervened, repudiate their purchases, and participate in the assets of the insolvent estate pro rata with general creditors who innocently contracted their debts on the strength of the validity of the increase of stock and of the additional resources which appellants and others similarly situated have reasonably caused them to believe the corporation possessed? Ordinarily it is true that any person who has been deceived by false and material statements of another into making a contract with him may, by timely action and observance of other equitable principles, rescind the same and recover back money paid in its performance. And this is ordinarily true when individuals make contracts with corporations. The executive officers of the corporations, acting within the scope of their

general authority, may so misrepresent material facts as to entitle persons dealing with them to rescind their contracts. But is there nothing in the present case which differentiates it from such cases? Appellants have admittedly been for some time and now are *prima facie* stockholders of the shoe company, and nothing else. They have from the beginning allowed themselves to be held out as such. The real party against which they are seeking relief is the body of general creditors of their corporation. Whatever relief may be granted to them in this case will reduce the percentage which the general creditors will ultimately realize upon their claims. Although a corporation is in law treated as an entity separate from its component stockholders, the latter are, in substance, all there is to a corporation. They, by their duly chosen agents, conduct all its business. They enjoy the net earnings which is the final object and purpose of a manufacturing and business corporation. They own all the assets, but own the same subject to a well-recognized prior right of creditors thereto. * * * In view of the foregoing facts and principles the rights of the innocent general creditors are superior to those of the deceived stockholders. It is a familiar, general principle of law, as well as of morals, that when one of two innocent parties must suffer by the fraud of another, the one who has enabled such third party to commit the fraud ought to sustain the loss. * * * While it is there assumed, without commitment, however, that a stockholder may, by proper proceedings, instituted in good faith and in due time before the suspension of a bank, secure a rescission of his contract of subscription for fraud practiced upon him by the officers, yet the case affords direct authority for what we deem to be a just and practical general rule: That when one has for a considerable period of time prior to the failure of a corporation occupied the position of one of its stockholders, and exercised and enjoyed the rights, privileges, and fruits of that relation, including the chance of enhanced value of his holdings, when fortune frowns, and the chances turn against him, it is too late to assert, as against creditors of the corporation, the right to rescind his contract of stock subscription on the ground of false representations after a state of insolvency has supervened, and after proceedings to wind up the corporation for the benefit of creditors have been or are about to be instituted. * * * A case involving the foregoing elements inevitably discloses such want of diligence, such delay or inactivity, or such counter-equities in favor of creditors as within well-recognized principles precludes resort to a court of equity for redress by a defrauded stockholder. The rule just announced has not been established without opposition and vigorous dissent, but we think it is now so firmly fixed as to command general obedience."

Nor may a stockholder exercise his right under a secret agreement made by the corporation at the time of the purchase of the stock to repurchase it, on ninety days' notice.

In re Owen Pub. Co., 20 A. B. R. 639 (Ref. N. Y.).

§ 810½. Corporations with Same Stockholders.

That the stockholders of two separately chartered corporations are identical; that one is a shareholder in the other, and that they have mutual dealings, will not, as a general rule, merge them into one corporation, or prevent the enforcement by one of an otherwise valid claim against the other.

In re Watertown Paper Co., 22 A. B. R. 190, 169 Fed. 252 (C. C. A. N. Y.). But compare, on analogous proposition, "Consolidation of Partnership, Corporation*and Individual Petitions," ante, § 304 $\frac{1}{2}$.

Officers Pledging Bonds as Collateral—Rights of Subsequent Purchaser of Secured Debt.—In re Watertown Paper Co., 22 A. B. R. 190, 169 Fed. 252 (C. C. A. N. Y.).

§ 810 $\frac{1}{4}$. Partner's Claim for Excess Contribution.

A partner's claim for excess of contribution to the partnership enterprise is both a provable debt and an allowable claim.

In re Rice, 21 A. B. R. 205, 164 Fed. 509 (D. C. Pa.).

Although it is not entitled to share in partnership assets until after satisfaction of firm debts, on the marshaling of firm and individual estates in bankruptcy.

In re Rice, 21 A. B. R. 205, 164 Fed. 509 (D. C. Pa.).

§ 810 $\frac{1}{2}$. Offsets.

Claims against which the trustee holds valid offsets are allowable only for the balance due. This is the converse of the proposition that the "Right of Offset and Counterclaim" is unimpaired, discussed post, § 1170, et seq., for of course the claim of the trustee against the claimant is pro tanto an asset. But it has been held that where a stockholder in a bankrupt corporation owes a balance on his stock at the time of the bankruptcy and has also a claim against the bankrupt for money loaned, for which he holds notes of the bankrupt, he cannot be permitted to share in a dividend until he pays his liability for the balance of the stock issued to him.

In re Standard Dairy & Ice Co., 20 A. B. R. 321 (Ref. D. C.). Also, see post, § 1185.

§ 810 $\frac{3}{4}$. Miscellaneous Claims.

Claims for royalties, where not in the nature of penalties but for liquidated damages have been held allowable.

In re Bevier Wood Pavement Co., 19 A. B. R. 462, 156 Fed. 583 (D. C. N. Y.).

A claim for expenses and commissions incurred by a trustee under a deed of trust before the bankruptcy, has been refused allowance as not coming within the enumeration of § 63.

In re Standard Dairy & Ice Co., 20 A. B. R. 321 (Ref. D. C.).

But this is doubtful law if the trustees were appointed under a valid deed of trust executed by the bankrupt; for it was then surely a claim upon a contract.

A claim for goods sold to the bankrupt for cash, but wrongfully ob-

tained by the bankrupt from the carrier without payment, is for conversion and is provable.

Clingmam v. Miller, 20 A. B. R. 360, 160 Fed. 326 (C. C. A. Kans.).

A note given for a loan of money with which to effect a composition with creditors before the bankruptcy, is a valid claim.

In re Bennett Shoe Co., 20 A. B. R. 704, 162 Fed. 691 (D. C. Conn.).

§ 811. Allowance, Disallowance and Reconsideration of Claims.

Page 473, note 1. *In re Syracuse Paper and Pulp Co.*, 21 A. B. R. 174, 164 Fed. 275 (D. C. N. Y.), quoted at § 817.

Bankruptcy Act, 57 (k): "Claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part, according to the equities of the case, before, but not after, the estate has been closed." See *In re Hurst*, 23 A. B. R. 535 (Ref. W. Va.).

§ 812. "Provisional" Allowance, for Voting, etc.

Page 473. It would seem, on principle that claims may not be allowed "provisionally" to permit creditors to vote.

See post, § 865. But compare instance, contra, *In re Harper*, 23 A. B. R. 918, 175 Fed. 412 (D. C. N. Y.).

It would seem that they must either be allowed or disallowed absolutely; at any rate, that the annexing of the term "provisionally" to the order of allowance is without legal effect.

Page 474. But there is quite a line of authorities to the contrary, holding that an allowance may be made, temporarily, where a hearing on the objections would unduly prolong the election of a trustee.

In re Kelly Dry Goods Co., 4 A. B. R. 528, 102 Fed. 747 (D. C. Wis.), quoted at § 865. Also see ante, § 579½.

Obiter, *In re Evening Standard Pub. Co.*, 21 A. B. R. 156, 164 Fed. 517 (D. C. N. Y.): "Claims should not be voted where duly verified legal objections are filed thereto. Of course, the referee may proceed to take proof, and if the objecting party cannot produce sufficient evidence to sustain them he will allow the claim. If the objecting party shows legal cause for delay for the purpose of producing evidence not at hand, the referee may in some cases allow the claim for voting purposes; but a better practice is to proceed to an election on the allowed claims, if the condition of the estate demands prompt action. If so many verified objections, apparently valid are filed, that an election by creditors is impossible, let the referee appoint."

In re Milne, Turnbull & Co., 20 A. B. R. 248, 159 Fed. 280 (D. C. N. Y.): "This argument raises the very vexed question as to how far the referee is bound to go in the liquidation and allowance of claims before proceeding to the election of a trustee. In this case he did proceed so far as to ascertain that the proofs left him in doubt as to whether the largest creditor of the bankrupt was a preferred creditor. The only decision in this district is *In re*

Malino (D. C.), 8 Am. B. R. 205, 118 Fed. 368, and it is there held that 'in proper cases provisional allowances or disallowances may be made in order that a trustee may be expeditiously selected.' This ruling is hardly consistent with that in *Re Columbia Iron Works* (D. C.), 14 Am. B. R. 526, 142 Fed. 242. If such provisional allowances cannot be made by a referee in doubt after the objecting creditor has had an opportunity of examining the bankrupt (as is the case here), the only other possible course where the largest claim in the estate is attacked is to defer the election of a trustee until intricate questions both of fact and law have been settled before the referee and by the District Court. It seems to me that such practice would be intolerable, and the necessary evil of receiverships unnecessarily increased. In this case the burden was upon the objecting creditors to establish by a fair preponderance of testimony that Kessler & Co. were preferred creditors. They were unable to do this to the satisfaction either of the referee or myself after a prolonged hearing. They have only succeeded in suggesting a series of questions which will require for elucidation an exhaustive examination of transactions between the Milne firm and the Kessler firm extending over many months, if not several years; and I think the referee was right, after twice adjourning the election and then affording an opportunity to the objecting creditors to examine the bankrupt in support of their objection, in provisionally allowing the Kessler vote for an amount much smaller than the probable deficit in collateral, and in holding that because the objection of preference had not been sustained by a fair preponderance of evidence it should be provisionally overruled. The election is confirmed, and the petition of review dismissed."

§ 813. Procedure Where Claim "Duly Proved" and Not Objected to.

Page 474. Compare, *In re* (James) Dunlop Carpet Co., 22 A. B. R. 788, 171 Fed. 532 (D. C. Pa.): "Was the bank's claim 'duly proved?' Not, was it definitely and finally proved, but was it sufficiently proved, proved, *prima facie*, so as to require its allowance unless objection * * * be made by parties in interest."

It is good practice to make these allowances at some creditors meeting, so that interested parties might be present.

Obiter, *In re* (James) Dunlop Carpet Co., 22 A. B. R. 788, 171 Fed. 532 (D. C. Pa.): "Ordinarily—I do not say necessarily—it (the order of allowance) should be performed at some meeting of creditors, when the act may be done with a certain degree of publicity."

§ 814. Where Claim Not "Duly Proved."

And, if a claim which has not been "duly proved," has, nevertheless, been allowed, the order of allowance may be vacated.

In re Coventry Evans Furn. Co., 22 A. B. R. 272, 171 Fed. 673 (D. C. N. Y.), quoted at § 603.

§ 816. Court on Own Motion, Postponing Allowance.

The court (referee) may, however, even though no party objects

and the claim be "duly proved," postpone the allowance, "for cause." What will constitute "cause" under this section is not defined.

Compare ante, § 579½.

§ 816½. Allowance in Compositions before Adjudication.

The Amendment of 1910, permitting compositions before adjudication of bankruptcy, provides for a meeting of creditors for the allowance of claims, thus impliedly authorizing the allowance of claims before adjudication of bankruptcy.

Bankr. Act 12a, as amended in 1910: " * * * in compositions before adjudication, the bankrupt shall file the required schedules and thereupon the court shall call a meeting of creditors for the allowance of claims, etc." See also, §§ 593½, 2358, et seq.

§ 817. Reconsideration of Claims.

Page 475. In re Syracuse Paper and Pulp Co., 21 A. B. R. 174, 164 Fed. 275 (D. C. N. Y.): "But the allowance of a claim is not final; for if, at a later time, it is desired to open it and try out its validity, it can be done." Quoted further at § 838.

Page 475, note 5. In re Hurst, 23 A. B. R. 554 (Ref. W. Va.).

§ 818½. Counterclaim and Offset.

The trustee is entitled to file objections by way of counterclaim or offset.

See post, § 1203; In re Harper, 23 A. B. R. 918, 175 Fed. 412 (D. C. N. Y.).

§ 820. Others May Not Object.

Parties, other than the bankrupt, who are not creditors may not be heard on the hearing of contested claims against the estate; and it has been held that a creditor, before his standing as such has been established by the allowance of his own claim, may not object to the allowance of others; although the true rule would seem to be simply that he must prove he is a creditor, and that this proof may be supplied either by the order of allowance or otherwise, it being remembered always that the deposition for proof of debt is itself to be taken as *prima facie* proof.

Compare inferentially, and obiter, [claim of objecting creditor not yet allowed], In re Evening Standard Pub. Co., 21 A. B. R. 156, 164 Fed. 517 (D. C. N. Y.): "Tyner had the right, at the first meeting, as an alleged creditor to file verified objections to the claims of other alleged creditors."

The rule, whatever may be its limitations, does not exclude the bankrupt, for it is one of the bankrupt's duties to object to erroneous claims.

§ 824. After Trustee Elected, All Objections, etc., to Be by Him or in His Name.

Page 477, note 15. *Obiter*, In re Roadarmour, 24 A. B. R. 49, 177 Fed. 379 (C. C. A. Ohio).

Page 478. In re (Narciso) Ferrer, 22 A. B. R. 785, 162 Fed. 139 (D. C. Porto Rico): "We think, though, that after the trustee is appointed, he is the proper person to contest all claims against the estate because he represents all of the creditors in representing the estate."

Contra, In re Hatem, 20 A. B. R. 470, 161 Fed. 895 (D. C. N. Car.): "The only question argued here is, 'Can an unsecured creditor object to the proof of claim by another unsecured creditor?' there being a receiver and a trustee in bankruptcy, and it not being shown the trustee has been applied to and refused to act. The general doctrine is that, where there is a trustee, *cestui que trust* must act through or by the trustee, and when they assume to act in *propria personæ* they must show the trustee has, upon application duly made to him, refused to act. This is not 'new' law, but old, well-settled law. It has been so held time out of memory. Where a trustee or any creditor shall desire the examination of a claim filed against the bankrupt estate, he may apply by petition to the referee for an order for such examination. Where a trustee has been appointed, he must file the petition for re-examination of a creditor's claim, and not another creditor. * * * But does this rule obtain in bankruptcy? Is there not a statutory provision to the contrary? Section 57d * * * provides: 'Allowance of Claims.—Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest,' etc. True, the trustee is a party in interest; but this provision for objection to their allowance by parties in interest clearly indicates the purpose of Congress to abrogate the rule as to proceedings in bankruptcy, and provides for objections being made by parties in interest, other creditors."

And prior objections filed by creditors are superseded by those of the trustee.

In re Harper, 23 A. B. R. 918, 175 Fed. 412 (D. C. N. Y.); and the proper practice is to have the trustee substituted for the creditor therein.

§ 826. On Trustee's Refusal, He May Be Ordered, etc., or Creditor or Bankrupt May Proceed.

Page 479, note 17. See, in addition, In re (Narciso) Ferrer, 22 A. B. R. 785, 162 Fed. 139 (D. C. Porto Rico). *Obiter*, In re Roadarmour, 24 A. B. R. 40, 177 Fed. 379 (C. C. A. Ohio).

Page 479. *Obiter*, Ohio Valley Bank v. Mack, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio): "This appeal is by a creditor who was, upon application, allowed to appeal, the trustee refusing to appeal though requested to do so. This practice seems admissible in the sound discretion of the district judge when the trustee refuses to appeal, though the better practice would be to order the trustee to appeal or to allow the dissatisfied creditor to appeal in his name, being indemnified in either case against costs by such creditors."

Obiter, In re Syracuse Paper & Pulp Co., 21 A. B. R. 174, 164 Fed. 275 (D. C. N. Y.): "True, the trustee represents the creditors, and this reopening of a claim is done by the trustee; but if a creditor, one or more, makes a *prima*

facie case, and asks the trustee to take measures for the opening of the claim, and he refuses, an appeal to the referee or court would effect the desired result, and perhaps result in the removal of the trustee."

Page 479, note 18. See, in addition, *In re Syracuse Paper and Pulp Co.*, 21 A. B. R. 174, 164 Fed. 275 (D. C. N. Y.), quoted at § 826.

Page 479, note 19. See, in addition, *Ohio Valley Bank Co. v. Mack*, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio), quoted, *supra*. *Obiter*, *In re Roadarmour*, 24 A. B. R. 49, 177 Fed. 379 (C. C. A. Ohio).

Page 479, note 22. *Obiter*, *Ohio Valley Bk. Co. v. Mack*, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio), quoted, *supra*. *Obiter*, *In re Roadarmour*, 24 A. B. R. 49, 179 Fed. 377 (C. C. A. Ohio).

And, of course, this rule does not require the trustee to contest claims unless he believes the objections to be proper.

In re Ferrer, 22 A. B. R. 785, 162 Fed. 139 (D. C. Porto Rico): "It is not intended by the views herein expressed that the trustee or referee shall be obliged at the instance of contentious counsel or contentious bankrupts or individual creditors, to contest or move for reconsideration of any or every claim against the estate unless such officers believe that the application has merit."

It is the duty of the referee to enquire into the merits of any application by a creditor or the bankrupt for an order on the trustee to contest a claim.

In re (Narciso) Ferrer, 22 A. B. R. 785, 162 Fed. 139 (D. C. Porto Rico).

§ 831. Objections for Substance Properly in Writing.

Page 481, note 31. But compare, *contra* (where "precise amount disputed from the first") *Embry v. Bennett*, 20 A. B. R. 651, 162 Fed. 139 (C. C. A. Ky.).

Page 481. Compare, inferentially to same effect, *In re Syracuse Paper & Pulp Co.*, 21 A. B. R. 174, 164 Fed. 275 (D. C. N. Y.): "The objections were not verified or reduced to writing. Evidently they were made at random and for purposes of delay. * * * The referee, in the absence of verified objections, and in the absence of any offer of evidence to sustain the oral objections made, overruled the objections in most instances and proceeded to obey the statute, which is imperative that the trustee shall be elected or appointed by the creditors at their first meeting. * * * I do not doubt that it is competent for the referee to adjourn this first meeting of creditors for a reasonable time, and from time to time when necessary, and in a proper case it is his duty so to do. But when it is apparent, as it was here, that certain attorneys in their own interest take it upon themselves to orally object to all, or substantially all, claims presented which may be voted against their nominee for trustee, and fail to file written and verified objections, or to offer then and there some evidence tending to support those made, and it is apparent that to try out the validity of such unsupported oral objections would unduly postpone the election of a trustee or trustees, it is the duty of the referee to obey the spirit and letter of the law and proceed with the election of a trustee. Any other course in such a case should not be tolerated. It is quite true that the creditors are to elect the trustee; but it is also true that at the

first meeting they are to perform this duty, and that they should come prepared to act with reasonable expedition, and that these matters should not be dragged along on mere oral objections to verified claims apparently valid, and which are conceded by the bankrupt to be valid. And verified claims, presumptively valid, and which are entitled to probative force, which in effect prove themselves, should not be held up or denied allowance or participation in the election of trustees on mere oral objections in any case, unless some written evidence is placed before the court tending to impeach their validity, or some oral evidence is offered at the time having that tendency, or it is made to appear that such evidence exists, but cannot be then obtained and presented."

Page 482. It has been held in some cases that the objections need not be under oath; and that, in the discretion of the court, need not even be in writing, but may be stated orally.

Embry v. Bennett, 20 A. B. R. 650, 162 Fed. 139 (C. C. A. Ky.).

But the better rule is that they should be under oath.

Impliedly, *In re Evening Standard Pub. Co.*, 21 A. B. R. 156, 164 Fed. 517 (D. C. N. Y.), quoted at § 812.

And be in writing.

§ 832. Each Claim, Properly, to Be Separately Objected to.

It is undoubtedly the better practice not to join in one pleading objections to different claims. The same objections may not be applicable to all; the same evidence may not be requisite; and on review the record would be inconveniently voluminous.

Page 482. Impliedly, *Ohio Valley Bank Co. v. Mack*, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio): "Neither are the six claims in question to be treated en masse. Each claim must stand upon its own bottom and is to be judged by the evidence which tends to prove or disprove it."

Objections may be by way of off-set or counterclaim.

Compare post, § 1203. *In re Harper*, 23 A. B. R. 918, 175 Fed. 412 (D. C. N. Y.), quoted at § 837.

§ 834. Amendment of Objections Permissible.

But the proper practice is for the proposed amendment to be presented along with the application.

Analogously, *Knapp & Spencer v. Drew*, 20 A. B. R. 355, 160 Fed. 413 (C. C. A. Neb.).

And if it fails to allege facts sufficient to constitute a valid objection to the claim, leave to file the amendment may be refused.

Compare, analogously, to this effect *Johnson v. Anderson*, 11 A. B. R. 294, 70 Neb. 233, quoted at § 1770½.

§ 837. To Be Specific, and Sufficiency Tested in Usual Way.

Page 483. In re Harper, 23 A. B. R. 918, 175 Fed. 412 (D. C. N. Y.): "These objections must be tested by the same rules as would apply to a complaint, setting up a cause of action."

§ 838. Good Cause to Be Shown.

Page 483. In re Syracuse Paper & Pulp Co., 21 A. B. R. 174, 164 Fed. 275 (D. C. N. Y.): "And it is the duty of the referee and judge to afford such a rehearing on a prima facie case." Quoted at §§ 817, 826.

§ 841. Creditor to File Answer.

And where the time allowed a claimant to file an answer to a petition to expunge his claim expires without an answer being filed, an application for leave to file an answer, made after the trustee has presented all his testimony is properly denied.

In re (Lewis) Eck & Co., 18 A. B. R. 657, 153 Fed. 495 (D. C. Pa.): "It will be observed that the precise question before the court is, whether the referee was right in deciding that upon the facts stated he had no authority to allow the claimants to file an answer at the time when they asked leave so to do. In my opinion, this decision of the referee was correct. The claimants had ample opportunity to make defence to the petition; for, if the fifteen days originally allowed for this purpose had for any reason been insufficient, further time would no doubt have been granted upon cause shown either to the referee or to the court. It was only necessary that a prompt application should be made, but it was too late to ask for leave after the trustee's case had been put in, and the claimants were thus fully advised of the evidence which they were obliged to meet. To grant leave now—no unusual excuse being offered—would give them an undue advantage, which the court, no more than the referee, is disposed to allow them."

Compare, analogously, ante, § 553½ and post, § 858½.

§ 843. Burden of Proof—Original Order of Allowance, Prima Facie Case.

Page 484, note 44. Compare, In re Osborne's Sons, 24 A. B. R. 65, 177 Fed. 184 (C. C. A. N. Y.).

§ 844. Deposition for Proof of Debt Prima Facie Case for Claimant.

Page 484, note 46. In re Harper, 23 A. B. R. 918, 175 Fed. 412 (D. C. N. Y.); In re McIntyre & Co., 24 A. B. R. 1, 174 Fed. 627 (C. C. A. N. Y.), quoted in this paragraph, on another point.

Page 487. In re Syracuse Paper & Pulp Co., 21 A. B. R. 174, 164 Fed. 275 (D. C. N. Y.): "The claims stood proved, and were entitled to allowance, unless met and overthrown by proof." Quoted, on other points, at § 826, 831.

In re Milne, Turnbull & Co., 20 A. B. R. 248, 159 Fed. 280 (D. C. N. Y.): "It is to be remembered that some probative force is to be given the sworn proof of claim. That proof negated a preference, and the burden of prov-

ing a preference is therefore upon the creditors objecting on that ground to the voting power of the claim. To sustain that burden there was introduced in evidence an agreement," etc.

Page 488. In any event, the claimant must rely and stand upon the deposition as proof of debt and not go ahead with his proof aliunde in the first instance.

In re McIntyre & Co., 24 A. B. R. 1, 176 Fed. 552 (C. C. A. N. Y.): "There would, therefore, be much force in the claimant's contention if he had taken the same position before the referee. He might properly have stood upon his proof of claim and have insisted that the objections should go forward. But he did not do so. He offered to establish the allegations of his proof of claim by the entries in the stock record book and contended that the inference to be drawn therefrom supported the charge of conversion. Having thus attempted to establish the allegations in his proof of claim, he cannot be permitted to use those very allegations to supply the deficiencies in his testimony. A proof of claim may have some probative force but it certainly should not be regarded as self-proving unless relied upon."

§ 845. But, at Any Rate, Prima Facie Case for Allowance as Priority Claim, Not So Established.

Whether Prima Facie Proof, Also of Ownership of Claim.—In re (James) Dunlop Carpet Co., 22 A. B. R. 788, 171 Fed. 532 (D. C. Pa.).

§ 845½. Nor Prima Facie Case for Reclamation of Converted Property.

And it would certainly be improper to give the proof of debt any probative force in support of a claimant seeking to recover converted property or its proceeds, as was the apparent, though obiter, holding in one case.

Obiter, In re McIntyre & Co., 24 A. B. R. 1, 176 Fed. 552 (C. C. A. N. Y.), quoted at § 1883.

Indeed, whatever probative force such deposition could have, would rather be against such a claimant, as being an admission that the relation of debtor and creditor existed, rather than that of bailee and bailor.

§ 846. Claimant Must Present Himself for Examination.

Page 488, note 47. Impliedly, *Laffoon v. Ives*, 20 A. B. R. 174, 159 Fed. 861 (C. C. A. Wash.).

§ 847. Place for His Examination.

Page 489, note 49. Compare, *Laffoon v. Ives*, 20 A. B. R. 174, 159 Fed. 861 (C. C. A. Wash.).

§ 851. Trustee's Attorney Not to Act as Claimant's Attorney.

Page 490, note 52. See, in addition, *Ohio Valley Bank v. Mack*, 20 A. B. R. 919, 163 Fed. 155 (D. C. Ohio).

§ 852. Untrustworthy, Though Uncontradicted, Testimony May Be Rejected.

Uncontradicted testimony in support of a claim may be so unsatisfactory that it may be rejected and the claim be disallowed.

Page 490. Compare, analogously, § 2650. Also, see instance *Ohio Valley Bank v. Mack*, 20 A. B. R. 919, 163 Fed. 155 (D. C. Ohio), quoted at § 554.

In re *Friedman*, 21 A. B. R. 213, 164 Fed. 131 (D. C. Wis.): "Louis Friedman and E. M. Rieselbach testified unequivocally that they had no knowledge of the financial condition of the bankrupt at any time. The bankrupt corroborated them in this regard, and there was slight positive evidence to the contrary. Counsel therefore argues that the court must, as matter of law, find their contention established. But such is not the law. If the positive evidence is inherently improbable, the court may reach a conclusion based upon the circumstantial evidence in the case which is more convincing. *Quock v. Ting*, 140 U. S. 417."

In re *Rome*, 19 A. B. R. 820, 162 Fed. 971 (D. C. N. J.): "These statements and facts certainly call for satisfactory evidence on the part of *Fleischman* to support his claim. He has sought to support it by the testimony of himself and his wife and of the bankrupt and his daughter. Notwithstanding the testimony of these four witnesses, the referee has rejected the claim. He has filed an opinion which is a sad commentary on the credibility of these four witnesses. The claim cannot be rejected on any other theory than that they are unworthy of belief. It is a serious matter to reject the claim on such a ground. But their statements bear such marks of inherent improbability, and in some respects are so inconsistent with one another, that I have been forced to a conclusion in accord with that expressed by the referee."

§ 856⅓. Omission of Items from Books, Destruction of Papers, etc., as Badges of Fraud.

The omission of items from books, the destruction or mutilation of books, checks or other papers, are also badges of fraud.

In re *Friedman*, 21 A. B. R. 213, 164 Fed. 131 (D. C. Wis.). Quoted at § 856¼.

§ 856¼. Conspiracy to Defraud Creditors.

A mere tacit understanding between parties to work to a common unlawful purpose is all that is necessary to constitute a conspiracy; and it may be proved by circumstantial evidence, even in the face of uncontradicted, if incredible, testimony.

In re *Friedman*, 21 A. B. R. 213, 164 Fed. 131 (D. C. Wis.): "Books are intended to show a correct history of all business transactions. A dishonest set of books is the surest earmark of fraud, while the destruction or mutilation of books of account amounts practically to a confession. Not only were two of the bankrupt's books destroyed, but those that remained were made to conceal the debts to the family aggregating nearly \$30,000. The books of claimants were produced, and were equally defective and unsatisfactory. There are numerous checks from the bankrupt to *Rieselbach*, amounting to

\$2,600, that were not the subject of entry anywhere. The checks of the bankrupt to Louis, produced by the trustee, would more than balance all loans made by Louis that found their way into the bank account of the bankrupt. Yet the books on both sides omit all reference to such checks. The stubs in Rieselbach's check books covering the critical period were unfortunately destroyed, which would have thrown light upon his participation in the purchase of the original stock of goods. The volume of business thus concealed, and the number of transactions thus hidden by concerted action, leave little doubt that the parties were pursuing a common purpose. In contemplation of law this amounts to confederation. A mere tacit understanding between conspirators to work to a common purpose is all that is essential to constitute a guilty actionable combination. *Patnode v. Westenhaber*, 114 Wis. 460, 90 N. W. 467."

So, also, is the omission of items from the books of account a badge of fraud.

In *re Friedman*, 21 A. B. R. 221, 164 Fed. 131 (D. C. Wis.): "To further discredit the bankrupt's good faith it appeared in evidence that many of the sales made at wholesale to peddlers and others were not entered in any book, and never passed through the hands of the cashier, but the proceeds of such sales were pocketed by the bankrupt."

§ 856¾. Unusual Manner of Conducting Business, as Badge of Fraud.

The conducting of the business in an unusual manner, is a badge of fraud; as, for instance, a retailer selling at less than cost, or selling job lots, or selling without entering the items in the books, etc.

In *re Friedman*, 21 A. B. R. 213, 164 Fed. 131 (D. C. Wis.): "It further appears that shortly before the failure six cases of goods were shipped by the bankrupt to the Friedman Mercantile Company, of St. Louis, in the original packages of the consignors, for which that company were to pay the bankrupt the cost price in cash, to furnish him ready money. It further appears that similar shipments were made to the claimants, Rieselbach and Louis Friedman, to an amount which cannot now be ascertained. As bearing upon the extent of this back-door trade, the expert accountants testified that according to the books there should have been on hand at the time of the failure goods to the amount of \$81,000, whereas in truth and in fact such goods inventoried at cost price about \$38,000. The bankrupt can make no explanation of this deficit of over \$40,000, and the books throw no light upon the subject. The books do not show the advances made and money loaned by the several relatives of the bankrupt which are the subjects of these claims. Again, the fraudulent purpose of the bankrupt is disclosed by the fact that shortly before the failure, and when he was owing over \$56,000 to merchandise creditors, he distributed \$7,600 in cash among his relatives."

§ 856½. Similar Fraudulent Transactions.

Evidence of similar fraudulent transactions is admissible on the proof of intent, and to show the same parties to be associated.

In *re Friedman*, 21 A. B. R. 213, 164 Fed. 131 (D. C. Wis.).

§ 856½. Money Actually Advanced in Furtherance of Conspiracy Not Refunded nor Allowed, on Disallowance of Claim.

Money actually advanced by conspirators in furtherance of their scheme to defraud will not be allowed as a debt nor refunded on disallowance.

In *re Friedman*, 21 A. B. R. 213, 164 Fed. 131 (D. C. Wis.). "It is urged, however, with great confidence that, inasmuch as the evidence shows that the several sums of money represented by the notes were in fact advanced to the bankrupt, therefore these claims must be allowed. It would be a new doctrine, indeed, if a court of equity were called upon to hand back conspirators money which they have embarked in a fraudulent scheme and by means of which the fraudulent purpose has been effectuated. It has been repeatedly held that, where a fraudulent conveyance is set aside by a court of equity, no accounting is to be taken of the money which the fraudulent grantee has actually invested to secure the fraudulent conveyance. This contention of claimants is disposed of by the following authorities: *Ferguson v. Hillman*, 55 Wis. 181, 190, 12 N. W. 389, is a leading case, where a large number of authorities to the same effect are collated and cited in the opinion. This doctrine was adhered to in *Bank of Commerce v. Fowler*, 93 Wis. 241, 245, 67 N. W. 423. See, also, *In re Flick* (D. C.), 5 Am. B. R. 465, 105 Fed. 503; *Burt v. Gotzian*, 102 Fed. 937, 43 C. C. A. 59, and *Lynch v. Burt*, 132 Fed. 417, 67 C. C. A. 305, both of which were decisions of the Circuit Court of Appeals of the Eighth Circuit. The theory of these cases is that when a creditor participates in a scheme to defraud other creditors, and in furtherance thereof advances money or incurs expense, the entire transaction is contaminated by the fraud, and a court of equity will not practically pay a bonus upon the fraud by returning such advance or expense."

§ 856¾. Great Latitude in Admission of Evidence in Cases Where Fraud Claimed.

In the investigation of questions of fraud, great latitude is allowed in the admission of evidence. Questions of fraud can scarcely ever be proved by direct evidence, hence the necessity for the admission of all the circumstances fairly connected with the transaction.

In *re Luber*, 18 A. B. R. 476, 152 Fed. 492 (D. C. Pa.).

§ 857. Agent's Admissions Not Binding unless within Scope.

Likewise, a corporation is not bound by the admissions or declarations of its officers unless in the performance of some duty.

In *re Coventry Evans Furn. Co.*, 22 A. B. R. 272, 171 Fed. 673 (D. C. N. Y.).

§ 858. Vacating of Allowance or Disallowance after Expiration of Current Term.

Vacating of an order of allowance or of disallowance may be had after the expiration of the current term of the United States District Court, for there are no terms in bankruptcy proceedings.

Page 491, note 60. In *re Keyes*, 20 A. B. R. 183, 160 Fed. 763 (D. C. Mass.): "The terms of the court within which its decision was made came to an end before this petition for rehearing was filed; but I think I am justified in holding that, in bankruptcy proceedings, the court's power to reconsider and revise its orders and decrees does not expire with the term at which they were made." Also, compare ante, § 431, note. See, in addition, *In re Tucker*, 18 A. B. R. 378, 153 Fed. 91 (C. C. A. Mass.).

§ 858½. Reopening of Case for Further Testimony.

After a party has had an opportunity to call and examine his witnesses and the matter is closed, he should not be permitted to reopen the case for the introduction of evidence which he subsequently concludes would have been an advantage to him, unless for special reason.

In *re Booss*, 18 A. B. R. 658, 154 Fed. 494 (D. C. Pa.), quoted at § 553½. Also, see §§ 553½, 841.

§ 861½. Costs on Disallowance.

The costs may be taxed against the unsuccessful claimant.

See ante, § 535; post, § 2004.

It has been held, that on disallowance of a claim, there cannot be taxed an attorney's fee for the trustee.

In *re Rome*, 19 A. B. R. 820, 162 Fed. 971 (D. C. N. J.).

However, there are no "costs" in bankruptcy except commissions and expenses outside of the filing fees, so it is difficult to see what costs ever can be taxed against an unsuccessful claimant other than the expenses of the trustee incurred by reason of the litigation, and assuredly the trustee's attorney's fees are precisely such expense.

§ 862. Appointment of Trustee at First Meeting, etc.

Page 496, note 1. See, in addition, *In re Syracuse Paper & Pulp Co.*, 21 A. B. R. 174, 164 Fed. 275 (D. C. N. Y.).

§ 863. Election May Be Postponed.

And, whether the referee will or will not postpone the election of a trustee, where claims are objected to, is a matter of sound discretion.

In *re Evening Standard Pub. Co.*, 21 A. B. R. 156, 164 Fed. 517 (D. C. N. Y.); impliedly, *In re Syracuse Paper & Pulp Co.*, 21 A. B. R. 174, 164 Fed. 275 (D. C. N. Y.).

Thus, it is, after all, discretionary to postpone it for the purpose of enabling creditors to amend their proofs of claims.

In *re Morris*, 18 A. B. R. 828, 154 Fed. 211 (D. C. Pa.): "There can be no question of the right of a referee, under ordinary circumstances to postpone a meeting of creditors, for the purpose of allowing a restatement or perfect-

ing of a proof of debt as was apparently the intention here. However inadvisable, as a rule, this may be, it is a matter of discretion, which is not to be interfered with except for abuse."

§ 864. Allowance of Claims May Be Postponed.

Page 496, note 5. See ante, § 816.

§ 865. "Provisional" Allowance for Voting Purposes.

It would seem that claims objected to may not be allowed for voting purposes and the consideration of the objections thereto postponed.

Page 497. *Clendenning v. Nat'l Bank*, 11 A. B. R. 245 (N. Dak. Sup. Ct.): "The contention that the allowance was temporary, and merely to enable the defendant to vote at the creditor's meetings, likewise contradicts the legal effect of the order of allowance."

But there is a line of authorities to the contrary, holding that an allowance may be made, temporarily, where a hearing on the objections would unduly prolong the election of a trustee.

See ante, § 812. In *re Evening Standard Pub. Co.*, 21 A. B. R. 156, 164 Fed. 517 (D. C. N. Y.), quoted at § 812; In *re Milne-Turnbull Co.*, 20 A. B. R. 248, 159 Fed. 280 (D. C. N. Y.), quoted at § 812.

§ 867½. Partnership Trustee Also of Individual Estates.

The partnership trustee is trustee also of the individual estates.

See ante, § 65; post, § 2233; also obiter, In *re Eagles & Crisp*, 3 A. B. R. 733, 99 Fed. 696 (D. C. N. Car.); In *re Stokes*, 6 A. B. R. 262, 106 Fed. 312 (D. C. Pa.).

In *re Coe*, 18 A. B. R. 715, 154 Fed. 162 (D. C. N. Y.): "Section 5 of the Bankrupt Act provides that the creditors of a partnership in bankruptcy shall appoint the trustee, and that such trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners. There is no specific provision in the act authorizing a different trustee for the separate estate of individual partners, and I think that § 5 contemplates that the partnership trustee shall be the trustee of the individual partners. There are obvious advantages in such a practice, and there would be serious objections to having different trustees for the partnership assets and the individual assets. It is claimed in this case that the partnership has a large claim against the estate of Coe, and that the trustee elected by the partnership creditors would presumably act in the interests of the firm creditors. It is his duty not to do so, but to be strictly impartial as between the creditors of the partnership and of each individual partner. I think, under such circumstances, that it would be proper for the referee to permit any creditors either of the individual partners or of the firm to appear and contest the claim of the partnership estate against the individual estate of the partner Coe, notwithstanding the general rule that a trustee only can contest claims. But I think that there is no authority for appointing separate trustees."

§ 869. No Such Majority, Court to Appoint.

Page 498, note 9. See, in addition, In *re Morris*, 18 A. B. R. 828, 154 Fed. 211 (D. C. Pa.).

Page 498. When the court (referee) makes the appointment, it is the better practice not to appoint either of the opposing candidates.

Instance, *In re Cohen*, 11 A. B. R. 441, 131 Fed. 391 (D. C. Mass.); instance, contra (noting the trouble resulting therefrom), *In re Richards*, 4 A. B. R. 631, 103 Fed. 849 (D. C. N. Y.).

§ 870. Court Also to Appoint Where Creditors Fail Altogether to Act.

When no creditors (with allowed claims) appear at all, the court, also, may appoint the trustee.

Bankr. Act, § 44 (a): "If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so."

But it has been held that the court has not authority to appoint a trustee unless the creditors have failed to act.

Obiter, *In re Fisher & Co.*, 14 A. B. R. 366, 370, 135 Fed. 223 (D. C. N. Y.); *Fowler v. Jenks*, 11 A. B. R. 255, 90 Minn. 74.

§ 870½. Also, Whether to Appoint Where Disputed Claims So Numerous That Determination Would Unduly Delay Administration.

On the other hand, it has been held, that where all or so many of the claims are disputed that a determination of their validity before the appointment of a trustee unduly delay the administration of the estate, the court may appoint.

In re Cohen, 11 A. B. R. 439, 131 Fed. 391 (D. C. Mass.).

Obiter, *In re Evening Standard Pub. Co.*, 21 A. B. R. 156, 164 Fed. 517 (D. C. N. Y.): "Whether the referee will or will not postpone the election of a trustee is a matter of sound discretion. If such a number of claims are duly objected to that an election by a majority in number and amount cannot be had, then, if the circumstances demand, he may and should himself appoint. All this is settled by the weight of well-considered authorities * * * If so many verified objections, apparently valid, are filed that an election by creditors is impossible, let the referee appoint."

Yet the right of creditors to participate in the election of a trustee is a substantial right.

See ante, §§ 597, 865, 812. Compare, also, collaterally, *In re Van De Mark*, 23 A. B. R. 760, 175 Fed. 287 (D. C. N. Y.).

And the power to appoint the trustee where claims are excluded from voting merely because disputed, is doubtful, and, at best, is to be exercised only in extreme cases.

§ 877. Qualifying of Trustees.

Page 502. An order on the trustee to account is not a prerequisite to a suit against the sureties on the bond, where the trustee has absconded.

Scofield v. U. S. ex rel Bond, 23 A. B. R. 259, 174 Fed. 1 (C. C. A. Ohio).

§ 878. Approval and Disapproval of Creditors' Election.

Page 502, note 36. See, in addition, *In re Hanson*, 19 A. B. R. 237, 156 Fed. 717 (D. C. Minn.); *In re Van De Mark*, 23 A. B. R. 760, 175 Fed. 287 (D. C. N. Y.), quoted at § 882.

Page 502. *Scofield v. United States ex rel Bond*, 23 A. B. R. 259, 174 Fed. 1 (C. C. A. Ohio): "It appears that the creditors were not summoned to elect a new trustee [on absconding of old one] and it is urged that the court could only appoint the trustee in case the creditors failed to elect one. But the appointment of a trustee is finally subject to the approval of the court, and in some conditions the court might itself make the appointment. The whole matter of appointing trustees is subject to the power and superintendence of the court. If the court ought to have summoned the creditors to elect a trustee, its failure to do so was a mere irregularity, and cannot be taken advantage of collaterally, certainly not by those who are not creditors or otherwise interested in the appointment."

In fact, the theory of the law is that creditors simply recommend the trustee and that the court appoints him.

To such general effect, *Scofield v. United States ex rel Bond*, 23 A. B. R. 259, 174 Fed. 1 (C. C. A. Ohio), quoted *supra*, § 878.

§ 880. Neither Residence nor Citizenship Requisite, if Office in District.

Neither residence nor citizenship is required, but merely that the proposed trustee have an office or residence within the judicial district; that is to say, in this respect it is sufficient if the trustee have an office or residence anywhere in the district.

As to effect of subsequent removal of residence from district, see *post*, § 943.

It must be an actual residence or office.

Obiter, *In re Seider*, 20 A. B. R. 709, 163 Fed. 139 (D. C. N. Y.).

An alien is competent, if capable of performing his duties, and if he have an office or residence within the district.

In re Coe, 18 A. B. R. 715, 154 Fed. 162 (D. C. N. Y.).

But it is no disqualification that a nonresident trustee would cause additional expense to the estate for traveling expenses; especially is it true that the referee should not refuse to confirm the creditor's election on that ground.

In re Jacobs & Roth, 18 A. B. R. 723, 157 Fed. 988 (D. C. Pa.).

§ 881½. Referee to Be Impartial.

The referee must be impartial, not even indicating his preference for one candidate over another.

In re Jacobs & Roth, 18 A. B. R. 728, 157 Fed. 988 (D. C. Pa.): "The whole aspect of the case gives one the impression that the referee was taking too active an interest in the selection of a trustee. It is not the part of a referee to identify himself in any manner with the interest of either the bankrupt, or his creditors, or the counsel interested in the case. His duty is to keep himself entirely free from any interest or any manifestation of interest in the case one way or the other, and the more perfectly he can accomplish this the better can he perform the duties of his position."

§ 882. Creditors' Choice Not to Be Lightly Interfered with.

Page 504, note 39. Compare, on facts, to same effect, In re Jacobs & Roth, 18 A. B. R. 728, 157 Fed. 988 (D. C. Pa.); In re Hare, 9 A. B. R. 520, 119 Fed. 246 (D. C. N. Y.).

Page 504. In re Van De Mark, 23 A. B. R. 760, 175 Fed. 287 (D. C. N. Y.): "The statute plainly and unequivocally provides that the creditors shall have the power to appoint a trustee or trustees, subject to the approval or disapproval of the referee; and this statutory right without adequate cause cannot be taken from them by the bankruptcy court."

§ 887. Trustee Elected in Bankrupt's Own Interest Incompetent.

Page 505, note 44. Compare ante, § 384½; obiter, In re Van De Mark, 23 A. B. R. 760, 175 Fed. 287 (D. C. N. Y.).

Page 505. In re Hanson, 19 A. B. R. 235, 156 Fed. 717 (D. C. Minn.): "At an adjourned session of the first meeting of creditors at the office of the referee on March 18, 1902, Mr. Byrnes appeared as attorney for the bankrupts, and also as attorney for a large number of the creditors, having powers of attorney authorizing him to represent them in making proofs of their claims and in the appointment of trustee. Among the creditors so represented by Mr. Byrnes was Hannah Hanson, the mother of the bankrupts, whose claim was upon a promissory note made to her by the bankrupts jointly July 16, 1901, for \$4,893.85, payable on demand, with 8 per cent. interest, on which note was endorsed \$2,450, as paid February 7, 1902, one day before the date of the petition in bankruptcy. On the objection of other creditors that it appeared that said Hannah Hanson had received an unlawful preference, proof of her claim was not allowed. On proceeding to the appointment of trustee, Thomas H. Green was nominated by the attorney in fact of certain creditors, and John S. Anderson was nominated by said John T. Byrnes on behalf of the creditors represented by him, although other creditors then objected that said Byrnes, because he was the attorney of record of the bankrupt and then acting as such, was disqualified from participating in the appointment of trustee. Pending the appointment of trustee, the meeting of creditors was adjourned until the next day; and in the interim, by the advice of said Byrnes, and through the active personal exertions of the bankrupts, most of the creditors represented by said Byrnes revoked their powers of attorney to him and executed like powers of attorney to L. E. Covell, with the understanding that said Covell should as their representative vote for said John S. Anderson for trustee. On the next day a majority of the creditors in number and amount, including the creditors so represented by said Covell, voted for said John S. Anderson, although other creditors objected to the appointment of said Anderson, on the ground that he was the choice of the bankrupts, and that his majority vote was the result of the proxies and powers of attorney procured

from creditors by the active interference of the bankrupts and their attorney. * * * As even the objecting creditors freely admit that Mr. Anderson is a man of responsibility, integrity, and high standing, it seems unfortunate that his appointment was brought about by such improper interference on the part of the bankrupts as should have caused it to be disapproved. But it is well settled by all the authorities that the trustee represents the creditors, and not the bankrupt, in the administration of the estate; and that it is improper that the bankrupt shall actively interfere with the matter of his selection and appointment; and that, if he does interfere and the person aided by him is appointed by votes procured by such interference, the appointment should for that reason be disapproved. * * * The rule is a salutary one, and based on obviously sound reason. It often happens that it becomes the duty of the trustee to actively antagonize the bankrupt by efforts to discover secreted assets, or to set aside conveyances as fraudulent, or to recover preferences. There should be no color of basis for suspicion of any partiality or sense of obligation on the part of the trustee toward the bankrupt. Hence, however high the character of a proposed trustee may be, the active interference of the bankrupt in favor of his appointment will render him practically ineligible to appointment as trustee in that bankruptcy."

Page 506. And the furnishing of a list of creditors in advance of the filing of the schedules is a reprehensible practice; although it is not improper where such advance list of creditors is furnished at the solicitation of creditors and for their aid and not at the instigation of the bankrupt nor in his interest.

In re Turner, 20 A. B. R. 646 (Ref. Mass.).

Page 507, note 46. See, in addition, In re Morris, 18 A. B. R. 828, 154 Fed. 211 (D. C. Pa.).

Page 507, note 49. See, in addition, In re Syracuse Paper and Pulp Co., 21 A. B. R. 174, 164 Fed. 275 (D. C. N. Y.).

And it has been held, apparently, that some showing of actual influence effected must be made and that the mere existence of such relation is not, in and of itself, a disqualification.

Page 508. In re Kaufman, 24 A. B. R. 117, 179 Fed. 552 (D. C. Ky.): "We should by no means approve a practice which would permit an attorney to act at the same time for a bankrupt and for the bankrupt's creditors, and especially at the first meeting of creditors. Such disapproval would be much emphasized if the creditors, in making their selection of an agent, were influenced by the bankrupt himself and in his interest. But the relation of attorney for the bankrupt may have ceased in this case with the filing of the consent to the adjudication, or the creditors may have appointed their attorney and agent entirely upon their own desire and without any thought or suggestion of the interest of the bankrupt. These matters could hardly be fairly settled upon the mere oral suggestion at the meeting of the fact that the same man was the attorney who had appeared for the bankrupt and who now appeared for the creditors. The creditors did not do an unlawful thing but they did a thing which, under circumstances such as we have indicated, might meet with judicial disapproval. But those circumstances ought first to be inquired into before they could be the basis of a fair decision. Upon

consideration of the matter, and upon reading * * * authorities * * * we have reached the conclusion that the proper practice in such contingencies as arose in this case would be to postpone an election for a day or two in order to get at the exact facts instead of assuming anything to be true upon the mere fact alone that the same person appeared to be the attorney both for the bankrupt and for creditors. Peradventure, his relations with the bankrupt may have ceased when the consent was filed. Prompt inquiry would develop the real facts, and if necessary the creditors might be given an opportunity to authorize a new agent. The attainment of a fair expression of the wishes of the creditors as to the control and management of a business which became theirs when the adjudication was made, is abundantly worth the short time it will take to get it."

Yet the mere existence of such dual relation is at any rate sufficient to cast the burden of rebuttal upon such attorney.

Page 508. In one case it was held not improper to elect a director of a bankrupt corporation as one of three trustees.

In *re* Syracuse Paper & Pulp Co., 21 A. B. R. 174, 164 Fed. 275 (D. C. N. Y.), quoted further at § 888: "As stated, two of those elected and confirmed by the referee are men of the highest probity and business ability, and entirely disinterested; and the inclusion of Driscoll, familiar with all the books and affairs of the company, was wise and proper. Should he attempt to hide or cover the transactions, or balk proper legal proceedings, it would be ground of removal, and the referee should not hesitate to report the facts, and this court would speedily remove him. It was suggested on the argument that there is a possibility that it will become the duty of the trustees to bring action against some or all the directors, including Driscoll, and that he, as trustee, cannot sue himself as director, or as an individual. There will be ample opportunity to cross that bridge when reached, if it ever is; but I am of opinion that a trustee as such may be party complainant or plaintiff as such, and also defendant as an individual. In this case Hakes and Bosworth may prosecute all necessary actions, making Driscoll as director or personally, or even as trustee, a party defendant, stating the necessity for such action."

But the decision in the case *In re* Syracuse Paper & Pulp Co. was undoubtedly based on the fact that there were three trustees elected, two of whom were in no way occupying inconsistent positions, the third trustee being chosen merely as a convenience because of his familiarity with the details of the bankrupt's business. To extend the doctrine in that case enunciated, to cases where only one trustee is elected would be subversive of proper administration and be a shock to the moral sense as well; for that "one cannot serve two masters" is both sound sense and good law. It would be worse than kneeling to "socialistic doctrine" which the court in that case, obiter, seems to consider involved. And the question, after all, is one largely of the facts of a particular case.

Instance where facts held insufficient to warrant disapproval, *In re* Ketterer Mfg. Co., 19 A. B. R. 225, 155 Fed. 987.

There is no statutory provision, either in the Bankruptcy Act or elsewhere, which forbids a creditor having as his attorney or agent the person who has acted as attorney for the bankrupt in the preparation of his consent to an adjudication, but judicial policy greatly discourages the practice of attorneys at law acting as attorneys at the same time both for the bankrupt and for his creditors, because such a practice might lead to conduct and results which would be strongly condemned.

Obiter, In re Kaufman, 24 A. B. R. 117, 179 Fed. 552 (D. C. Ky.), quoted *supra*.

However, it has been held that if, by want of proper advice, creditors exercise their right to name and do name as their agent to act for them a person whom mere judicial policy discourages from so doing, the creditors should not, for that reason alone, be absolutely denied a voice in the selection of a trustee.

In re Kaufman, 24 A. B. R. 117, 179 Fed. 552 (D. C. Ky.).

§ 888. Votes Cast by Relatives, Stockholders, Directors and Employees.

It would seem that votes cast by relatives of the bankrupt should be closely scanned, before allowing the election to turn on them. And the same rule should apply to those cast by employees or by stockholders or directors of a bankrupt corporation.

In re Day & Co., 23 A. B. R. 56, 176 Fed. 377 (D. C. N. Y.): “ * * * that Wodiska was a director of the company and a brother-in-law of the president, and that his subdivision of the claims, although bona fide, was with the aim of controlling the appointment of the trustee. With this admitted, the case comes within *Re McGill*, 5 A. B. R. 155, 106 Fed. 57 and all those votes should not have been counted * * * If the referee had known these facts he would doubtless have thrown out the votes, and declared elected the rival candidate. * * * The situation therefore is that not only has there never been an election in fact, but the creditors have never had a fair opportunity for an election—by which I mean an opportunity without the interference of the bankrupt's officers. This they should have. I believe I might throw out the votes illegally cast, and now declare the other candidate elected, but that course does not seem to be as satisfactory. * * * ”

Yet directors, stockholders and employees of bankrupt corporations are entitled to vote.

In re Syracuse Paper & Pulp Co., 21 A. B. R. 174, 164 Fed. 275 (D. C. N. Y.), quoted further at § 887: “A vote on the claim of Mr. Lattner was objected to on the ground that the claimant was an employee of the bankrupt company, and therefore not a proper person to vote for the election of a trustee. No such disability is imposed by the Bankruptcy Act or by common sense. It might be that two-thirds of the creditors of the bankrupt company were employees of the concern. Are they to be debarred from voting on the suspicion that they may have a friendly feeling for the com-

pany that has given them employment? * * * were objected to on the same ground, with the addition that he was also a director. The law imposes no such disability on the creditor of such a corporation who happens to be a stockholder or director therein, and there is no valid reason why he should be debarred from voting for trustee. To be a stockholder in or attorney for a corporation may be a bar to his holding political office in the minds of those who would strike down corporate industries, or in the minds of political demagogues; but this socialistic doctrine has not yet been applied by the Congress of the United States to creditors of bankrupt corporations who have been so unfortunate or unwise as to become stockholders therein. Political preferment may be denied by the people to stockholders in corporations, and laws may be hereafter enacted which will deny property rights to that, now unfortunate, class of our citizens, as a punishment for association with corporations; but such disabilities are not yet written upon the statute books of these United States of America. This court declines to anticipate legislation in that regard. Cases may arise where the directors of a bankrupt corporation, also creditors thereof, may seek to control the election of the trustee in the interest of the bankrupt itself, and in opposition to the interests of the general creditors. In such a case I do not doubt that the referee or judge has the power to set aside such an election, if made; but it would be on other grounds than that the directors were not entitled to vote for the appointment of the trustee. In this case there was no combination of directors; no attempt to elect trustees in the interest of the bankrupt corporation."

However, there is nothing to prevent an officer or director or attorney of a bankrupt corporation nor any relative of such from voting on his own allowed claim, even though the votes of others procured by him may be invalidated.

Obiter, In re Day & Co., 24 A. B. R. 252, 178 Fed. 545 (C. C. A. N. Y., affirming 23 A. B. R. 56): "As to so much of the order, however, which forbids an officer of the corporation, or its attorney or Wodiska from themselves voting on any allowed claims of their own we are not inclined to assent to the proposition that they may thus summarily be deprived of the right to vote secured by them by § 56 of the Bankruptcy Act. No question of irregular or improper proxy is presented, as in the case relied on. * * * We are satisfied from the record that the claims which Wodiska turned over, without consideration therefor, to persons from whom he obtained proxies to vote for trustee should have been excluded from voting, and concur with the district judge in his disposition of them."

§ 889. Prior Assignee or Receiver as Candidate.

Page 508, note 51. Instance, where precisely this situation occurred. *Loveless v. Southern Grocer Co.*, 20 A. B. R. 180, 159 Fed. 415 (C. C. A. La.).

§ 893½. Improper Votes Not to Be Counted.

Page 509. The proper practice, perhaps, is that the votes improperly obtained should be excluded when offered to be cast.

In re Van De Mark, obiter, 23 A. B. R. 760, 175 Fed. 287 (D. C. N. Y.): "It is true, votes for trustee may be rejected on the ground that they are in the

interest of the bankrupt and were cast for a trustee who presumably would assist in carrying out a fraud upon the creditors. * * * It is contended that counsel for the bankrupt had solicited proxies of creditors authorizing him to vote for trustee, and that such votes for Mr. Storrs should not be considered or counted. The practice of counsel for the bankrupt of soliciting proxies from creditors and voting them to control the election of a trustee is not viewed with favor by the bankruptcy law, and the referee would have been justified in excluding such votes or proxies as being manifestly in the interest of the bankrupt; but no such order was made, and the objection to certain creditors voting for trustee was overruled."

Compare, *In re Kaufman*, 24 A. B. R. 117, 179 Fed. 552 (D. C. Ky.): "Here the majority creditors in fact voted through their attorney for one person for trustee and the minority creditors voted for another. When the referee passed upon the objections he held that the majority creditors could not be represented by the attorney they had named. He did so upon the ground indicated, and thereupon excluded their votes. Those creditors were not in fact present at the meeting and were not otherwise represented thereat. But the referee held that the majority creditors, though not permitted to be represented by the attorney of their choice, nevertheless had to be taken into the estimate when it came to be determined whether the person voted for by the minority creditors had received the votes of a majority in number and value of the creditors who were present and whose claims had been allowed. In this ruling he must have regarded the majority creditors as being present for the count but not present for the voting. The result was that he declared that there had been no election, and himself appointed another person as trustee. This result is not maintainable upon any ground. If the majority were present, then the minority creditors who were present had the right to conduct the meeting, and as their candidate did receive the votes of the majority in number and value of the creditors present, the referee was without power to disregard that result, and especially was he without power to disregard it upon the grounds upon which he acted. The creditors are not to be counted as present simply because their claims have been allowed. In order to be present they must attend in person or by duly authorized agent or attorney, and those creditors who do so attend constitute the meeting, whether they constitute a majority in number and value of the claims allowed or not."

Page 509. Distinctions are to be noted between the throwing out of votes because improperly obtained and the disqualification of the candidate himself. Votes improperly obtained may be thrown out and yet the candidate for whom they would be voted not be disqualified. On the other hand, a candidate may be disqualified though the votes be legal. Also, undoubtedly, a candidate may be refused approval precisely because he has been elected through votes improperly obtained.

§ 895. Upon Final Disapproval, Another Election Requisite, Referee Not to Appoint.

Page 510, note 57. See, in addition, *In re Jacobs & Roth*, 18 A. B. R. 728, 157 Fed. 988 (D. C. Pa.); *Contra*, *obiter*, *In re Day*, 23 A. B. R. 56, 176 Fed. 377 (D. C. N. Y.). And compare, where trustee had abandoned his trusteeship. *Scofield v. United States ex rel Bond*, 23 A. B. R. 259, 174 Fed. 1 (C.

C. A. Ohio), quoted at § 878. See also, in re Van De Mark, 23 A. B. R. 760, 175 Fed. 287 (D. C. N. Y.).

Where Election of Trustee Set Aside and New Election Ordered, Intervening Sales Not Invalidated.—In re Evening Standard Pub. Co., 21 A. B. R. 156, 164 Fed. 517 (D. C. N. Y.).

Page 511. But the new trustee's appointment may not be collaterally attacked for such failure to call another election.

Scofield v. United States ex rel Bond, 23 A. B. R. 254, 174 Fed. 1 (C. C. A. Ohio), quoted at § 878.

§ 897. Occupies Fiduciary Relation.

He is chosen to represent *all* creditors.

Page 513, note 61. In re MacDougall, 23 A. B. R. 762, 175 Fed. 400 (D. C. N. Y.).

§ 898. Trustee Not to Be Dictated to by Creditors.

Page 514, note 66. Compare also, to such effect, In re Harper, 23 A. B. R. 918, 175 Fed. 412 (D. C. N. Y.), quoted at § 899.

§ 898¼. Trustee, in Administrative Matters, Not to Be Controlled by Outside Courts.

The trustee, in the exercise of his discretion, as well as in the carrying out of orders of the bankruptcy court in the administration of the estate, is not to be interfered with nor controlled by proceedings brought in other courts.

See post, §§ 1788½, 1910½. Also, see In re Kranich, 23 A. B. R. 550, 174 Fed. 908 (D. C. Pa.); also compare, In re Leeds & Catlin Co., 23 A. B. R. 679, 175 Fed. 309 (D. C. N. Y.). Graphophone Co. v. Leeds & Catlin Co., 23 A. B. R. 337, 174 Fed. 158 (U. S. C. C.), quoted at § 1806¼.

§ 898½. But Not to Oppose Bankrupt's Discharge unless Authorized by Creditors.

However, by the Amendment of 1910, making the trustee a competent party to oppose the bankrupt's discharge, the qualification is imposed that he shall only do so when authorized by creditors at a meeting called for that purpose.

Bankr. Act, as amended in 1910, § 14B; see ante, §§ 565¼, 572; also, see post, §§ 940½, 2458, et seq.

§ 899. Approval of Court before Starting Litigation Not Necessary Except Where Substituted in Pending Suit.

Page 515, note 70. Compare, In re Harper, 23 A. B. R. 918, 175 Fed. 412 (D. C. N. Y.), quoted at § 933.

Page 516, note 71. Also, see post, § 1641; Kessler v. Herklotz, 22 A. B. R. 257 (N. Y. Sup. Ct. App. Div.).

§ 907. To Collect Assets and Reduce Them to Money.

Page 519, note 81. In *re MacDougall*, 23 A. B. R. 762, 175 Fed. 400 (D. C. N. Y.).

And he must use due diligence in collecting the assets and may be charged with the value of assets lost by failure to discharge such duty.

In *re Reinboth*, 19 A. B. R. 15, 157 Fed. 672 (C. C. A. N. Y.): "The referee misconceived the law. A trustee may be charged with the value of assets which never came into his possession if he fail in his duty to get them into his possession. Trustees in bankruptcy, like executors and administrators, are bound to use due diligence to get in the assets of the estate—to secure possession of the tangible property and collect the debts. If they fail in their duty they may be charged in their accounts with the value of the assets thereby lost. If they take no steps to secure property or collect debts, of which they have knowledge, they are presumptively negligent. The burden is upon them to explain their failure to act."

§ 909. To Deposit Moneys in Depository.

This order is mandatory, and may not be evaded even by another order of the District Court, unless such order amount to a "designation" under § 61, and such designated depository give bond in accordance therewith.

Huttig Mfg. Co. v. Edwards, 20 A. B. R. 349, 160 Fed. 619 (C. C. A. Iowa): "The remaining matter necessary to be considered arises on the appeal of the trustee. The District Court directed him to withdraw the proceeds of the sale of D. Winter's property from the depository of funds in bankruptcy and to deposit them in some national bank in the district, taking a certificate of deposit, payable six months from date, and bearing the highest current rate of interest. The objection to this order is well made. Section 61 of the Bankruptcy Act * * * makes it the duty of courts of bankruptcy to designate by order banking institutions as depositories of funds of bankrupt estates, and to require of them bonds for the safe-keeping and forthcoming thereof. It was from such a depository the court directed the funds to be taken. Section 47a (3) * * * makes it the duty of a trustee to deposit all money received by him in one of the designated depositories, and general order 29 * * * prescribes the method of withdrawals. These provisions of the act and the general order are mandatory in form, and were designed to insure the safety of the funds rather than an increment by way of interest while they were idle. The funds were those of litigants and the risk which always attends the making of profit should not be incurred unless the right is clear. Doubtless consent by all parties interested would justify a departure from the prescribed rule. Rev. Stat., § 5504 * * *. But such consent was not obtained."

It is possible, perhaps, that such depository be designated for a special case and not generally.

§ 914. Trustee to Furnish Information.

Furthermore, he is also subject to appear under subpoena, as a witness or to produce documents or books, in outside suits.

Obiter, *Graphophone Co. v. Leeds & Catlin Co.*, 23 A. B. R. 337, 174 Fed. 158 (U. S. C. C. N. Y.), quoted at § 1806¼.

§ 915. His Accounts and Papers Open to Inspection.

Page 521. And this right of inspection applies to the general examinations of bankrupts or witnesses already taken.

In re Samuelsohn, 23 A. B. R. 528, 174 Fed. 911 (D. C. N. Y.): "This is a petition for the review of an order made by the referee in bankruptcy herein, denying the petition of Simon M. Shimberg, a creditor herein, for an order directing the trustee to file with the referee, or with the clerk of this court, the testimony of the bankrupts, given upon their examination, or to permit said Shimberg to have access to the same. The question submitted for review is in principle controlled by In re Sauer (D. C.), 10 Am. B. R. 353, 122 Fed. 101. In that case, it is true, the claim had been proven and allowed; but such fact is not a material distinction from this case, in which the petitioner for review was scheduled by the bankrupts as a creditor, had received notice of the meeting of creditors, and had duly filed his claim. Under § 7a (9) of the Bankruptcy Act * * *, the petitioner had the unquestionable right to examine the bankrupts before the referee, even though his claim was not filed or formally proven (In re Price [D. C.], 1 Am. B. R. 419, 91 Fed. 635; In re Jehu [D. C.], 2 Am. B. R. 498, 94 Fed. 638; In re Walker [D. C.], 3 Am. B. R. 35, 90 Fed. 550); and under § 39 (9) a party in interest has the right to apply to the referee to preserve the evidence taken. The petitioner for review was a party in interest within the meaning of §§ 47 and 49, and § 39, subds. 3, 9, even though he may not have formally proved his claim. This would seem to be the effect of the decision of the Circuit Court of Appeals for the Second Circuit in Matter of Sully, 18 Am. B. R. 123, 152 Fed. 619. The testimony taken, as authorized by the referee, is a part of the record in the proceedings, and creditors generally have access to it while it remains in the custody of the referee. * * * It is urged in opposition to permitting the petitioner to examine the testimony of the bankrupts that the interests of the petitioner, and the trustee are antagonistic, and that he intends to bring suit against such petitioner to recover preferences given him by the bankrupts, and therefore a disclosure of the testimony of the bankrupts, who are hostile to the interests of the bankrupt estate, may result prejudicially to the creditors. This contention, however, is not maintainable, in view of the absolute right which a party in interest has to examine a bankrupt, and the right which he has to be informed concerning the estate by the trustee or referee. The trustee is not wholly at a disadvantage; for, if his surmise prove correct, there is nothing to prevent the impeachment of the bankrupts on the trial, if they should materially vary their former testimony."

And, applies even though the one asking for the inspection be a creditor who has not proved his claim.

In re Samuelsohn, 23 A. B. R. 528, 174 Fed. 911 (D. C. N. Y.), quoted *supra*.

Or is a creditor against whom the trustee contemplates bringing suit and where such inspection might hamper the trustee in such suit.

In re Samuelsohn, 23 A. B. R. 528, 174 Fed. 911 (D. C. N. Y.), quoted *supra*.

And such inspection should be allowed to State officers carrying on criminal prosecution.

In re Tracy, 23 A. B. R. 438, 177 Fed. 532 (D. C. N. Y.): "The petitioner insists that the trustee's duties are confined to the administration of the estate,
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and it is no part of those duties to assist in the prosecution of the bankrupt. I do not mean to say that the trustee has any such duties, or that he is delinquent when he does not aid a prosecution. It is one thing, however, to say that he has no such positive duties and another to say that it is an abuse of his powers so to assist. If the trustee proposed to show the books to trade rivals of the bankrupts so as to prejudice them in re-establishing themselves in business, it would clearly be a wanton and illegal misuse of power. However, the trustee is an officer of this court, and this court cannot remain impartial, a disinterested spectator, when the issue is of the detection and prosecution of crime. It cannot, and of course it does not, assume that this petitioner or anyone else is guilty of any crime, but when the responsible authorities of a State institute lawful proceedings to inquire into acts which may be criminal, in due course of law, that is a public purpose to which no court can remain indifferent, whether the prosecution be before the tribunals of the United States or of the State of New York. Any documents which are in our possession and to show which is not illegal, will, I hope, always be open to the inspection of any public officer charged with the prosecution of crime."

§ 917½. Exceptions to Trustee's Reports.

Page 522. Of course exceptions may be filed to trustee's reports. Thus, exceptions were filed in one case because the trustee had allowed the bankrupt to occupy a sawmill and to use horses, wagons, etc., without adequate rent.

Bank of Clinton v. Kondert, 20 A. B. R. 178, 159 Fed. 703 (C. C. A. La.).

Again, where the trustee had failed to contest a right of property, after being ordered by the court to contest, and had finally allowed a redelivery bond given therefor to be canceled.

In re Reinboth, 19 A. B. R. 15, 157 Fed. 672 (C. C. A. N. Y.).

And the burden of proof may shift to the trustee under some circumstances.

In re Reinboth, 19 A. B. R. 15, 157 Fed. 672 (C. C. A. N. Y.).

§ 919. To Set Apart Exempted Property.

The trustee must set apart the bankrupt's exemptions.

Page 522, note 100. "Lis Pendens"—Cancellation of, Duty of Trustee in Relation Thereto.—*In re Miller*, 22 A. B. R. 759 (N. Y. Sup. Ct.).

§ 926. Compromise of Controversies.

Page 523, note 108. See, in addition, *In re Linderman*, 22 A. B. R. 131, 166 Fed. 593 (D. C. Pa.); Instance, *In re Kranich*, 23 A. B. R. 550, 174 Fed. 908 (D. C. Pa.).

§ 929. Creditors Entitled to Be Heard, but Vote Not Conclusive.

Page 523, note 111. Impliedly, *In re Linderman*, 22 A. B. R. 131, 166 Fed. 593 (D. C. Pa.).

§ 930. What Claims May Be Compromised.

Thus, claims against third parties for alleged preferences may be compromised.

In re Linderman, 22 A. B. R. 131, 166 Fed. 593 (D. C. Pa.).

But the court will not sanction a compromise, even where assets be brought into the estate thereby, if it is based on a promise to stifle a criminal prosecution of the bankrupt.

In re Rosenblatt, 18 A. B. R. 663, 153 Fed. 335 (D. C. Pa.); Mulford v. Fourth St. Nat. Bank, 19 A. B. R. 742, 157 Fed. 897 (C. C. A. Pa.).

And it has been held under the facts in one case that the court had nothing to do with the part of the compromise agreement which dealt with the raising of funds to make payments outside and which did not come into the estate as an asset for distribution.

In re Linderman, 22 A. B. R. 131, 166 Fed. 593 (D. C. Pa.).

Thus, a claim against the bankrupt's wife for cash and bonds in her possession, claimed by the trustee to belong to the estate, may be compromised, where any attempt at recovery thereof might not only be tedious and expensive, but also might fail.

In re Kranich, 23 A. B. R. 550, 174 Fed. 908 (D. C. Pa.).

§ 932. Abandonment of Worthless or Burdensome Assets.

The trustee may decline to accept, or may abandon, property or contracts that are burdensome because worthless, encumbered with liens in excess of value or charged with burdens, or otherwise unprofitable.

See, in addition, *Watson v. Merrill*, 14 A. B. R. 454, 136 Fed. 359 (C. C. A. Kans.), quoted at § 982; *Kessler v. Herklotz*, 22 A. B. R. 257 (N. Y. Sup. Ct. App. Div.), quoted at § 1640.

Atchison, etc., R. Co. v. Hurley, 18 A. B. R. 396, 153 Fed. 503 (C. C. A. Kans.): "It is well settled that trustees in bankruptcy are not bound to accept property or take over contracts which are onerous and unprofitable, and which would burden rather than benefit the estate. In the execution of their trust they are confronted at the outset with the duty of electing whether to assume an existing executory contract, continue its performance, and ultimately dispose of it for the benefit of the estate or to renounce it and leave the injured party to such legal remedies, for the breach, as the case affords. [Cases cited.] If they elect to assume such a contract, they are required to take it 'cum onere,' as the bankrupt enjoyed it, subject to all its provisions and conditions in the same plight and condition that the bankrupt held it." Quoted further at §§ 1144, 1145.

Oldmixon v. Severance, 18 A. B. R. 823, 104 N. Y. Supp. 1042: "A trustee in bankruptcy is not bound to take property which may involve him in litigation."

§ 933. Is Matter of Discretion.

Page 524, note 116. Instance, *In re Linderman*, 22 A. B. R. 131, 166 Fed. 593 (D. C. Pa.).

Thus, as to unliquidated claims.

Compare, *In re Harper*, 23 A. B. R. 918, 175 Fed. 412 (D. C. N. Y.): "Trustees in bankruptcy are not justified in rushing the estates of bankrupts into doubtful or unproductive litigations. It is not their privilege to use the estates committed to their charge to settle questions of law which may arise. If success is doubtful in the case of a claim alleged to be due the estate and the fruits of success will not pay the expense of cultivating the field, it is their duty, as a general rule, to abandon the claim, unless the creditors, or a substantial majority of them, desire the litigation to proceed. Referees in bankruptcy should and must see to it that estates are administered in accordance with this rule, and should exercise their supervisory power over trustees accordingly."

§ 935. Declining, or Failing after Notice to Accept, Abandonment.

Page 524. [1867] *Dushane v. Beall*, 161 U. S. 513: "If, with knowledge of the facts, or being so situated as to be chargeable with such knowledge, an assignee, by definite declaration or distinct action, or forbearance to act, indicates, in view of the particular circumstances, his choice not to take certain property, or if, in the language of *Ware, J.*, in *Smith v. Gordon*, 6 Law Rep. 313, he, with such knowledge, 'stands by without asserting his claim for a length of time, and allows third persons in the possession of their legal rights to acquire an interest in the property,' then he may be held to have waived the assertion of his claim thereto."

[1867] *Sessions v. Romadka*, 145 U. S. 29: "In this case the assignee had taken a year to wind up the estate, and had given no sign of his wish to assume this property, if indeed he knew of its existence. On being asked with reference to it by the proposed purchaser, he replied that the estate was all settled up, that he had no power to do anything in the matter, and that *Poinier* (the bankrupt) was the only one who could give a title. A plainer election not to accept can hardly be imagined. Granting that up to that time he had known nothing about the happening, it was his duty to inquire into the matter if he had any thoughts of accepting them, and not to mislead the plaintiff's agent by referring him to the bankrupt as the proper person to apply. Under the circumstances plaintiff could do nothing but purchase of *Poinier*. Bearing in mind that no claim to this property is now made by the assignee, but that his alleged title to it is set up by a third person who confessedly has no interest in it himself, it is entirely clear that the defendants ought not to prevail as against a purchaser who bought it of the bankrupt after the assignee had disclaimed any interest in it. Had the existence of this patent been concealed by the bankrupt or the assignee had discovered it subsequently—after his discharge—and desired to take possession of it for the benefit of the estate, it is possible that the bankruptcy court might reopen the case and vacate the discharge for that purpose. *Clark v. Clark*, 17 How. 315. But it does not lie in the mouth of an alleged infringer to get up the right of the assignee as against a title from the bankrupt acquired with the consent of such assignee. It is quite evident from the facts stated that this patent, which seems to have been the cause of *Poinier's* insolvency, was thought to be of

little or no value, that the assignee so regarded it, and that its real value was only discovered when the plaintiff had brought to bear upon the manufacture of the device his own skill and enterprise."

But such declining will not so operate unless done with knowledge or notice of all essential facts. And abandonment implies, generally, some affirmative act.

First Nat. Bank *v. Lasater*, 13 A. B. R. 698, 196 U. S. 115: "The question then presented is, whether this right of action, having once passed to the trustee in bankruptcy, was retransferred to J. L. Lasater upon the termination of the bankruptcy proceedings, he having returned no assets to his trustee, and having failed to notify him or the creditors of this claim for usury, and beginning this action within less than two months after the final discharge of the trustee. We have held that trustees in bankruptcy are not bound to accept property of an onerous or unprofitable character, and that they have a reasonable time in which to elect whether they will accept or not. If they decline to take the property the bankrupt can assert title thereto. *American Fire Company v. Garrett*, 110 U. S. 288, * * * *Sparhawk v. Yerkes*, 142 U. S. 1, * * * *Sessions v. Romadka*, 145 U. S. 29, * * * *Dushane v. Beall*, 161 U. S. 513. * * * But that doctrine can have no application when the trustee is ignorant of the existence of the property, and has had no opportunity to make an election. It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee all knowledge of certain property, can, after his estate in bankruptcy has been finally closed up, immediately thereafter assert title to the property on the ground that the trustee had never taken any action in respect to it. If the claim was of value (as certainly this claim was, according to the judgment below), it was something to which the creditors were entitled, and this bankrupt could not, by withholding knowledge of its existence, obtain a release from his debts, and still assert title to the property."

In *re Wiseman & Wallace*, 20 A. B. R. 293, 150 Fed. 233 (D. C. Pa.): "In my opinion, neither refusal nor abandonment can be properly established by mere silence or inaction under the circumstances disclosed by the foregoing statement of facts. When there is a duty to act, either actually known to exist or legally imposed by reason of such notice as is the equivalent of knowledge in fact, failure to stir may be significant; but when no such duty exists, mere inaction furnishes ordinarily an unsafe basis for the inference that doing nothing should be held to be as weighty as conduct."

§ 940¼. May Oppose Bankrupt's Discharge.

Amendment of 1910.—By the Amendment of 1910, the trustee may, if authorized by creditors, at a meeting of creditors called for that purpose, oppose the bankrupt's discharge, at the expense of the estate.

Bankr. Act, as amended 1910, § 14b: "The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless, etc. * * * Provided, That a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized to do so at a meeting of creditors called for that purpose."

The object and effect of this amendment are obvious. It tends to distribute the expense of opposition to a bankrupt's discharge over the entire body of creditors, all of whom are supposed to receive the benefit thereof, rather than to impose it upon the individual creditor, who, theretofore, had been the party qualified to oppose such discharge; and at the same time it tends to prevent improvident and oppressive oppositions to discharge, by requiring authorization of the trustee at a meeting of creditors called for the purpose.

See Report No. 691 of the Senate Judiciary Committee of the 61st Congress, Second Session: "The first of these changes, making the trustee a competent party to oppose a bankrupt's discharge, is a desirable change, as thereby the expense of the proceedings in opposition to discharge will be spread over all of the creditors, and not be borne by a single creditor who may file objections. Moreover, it lessens the danger of improper oppositions to discharge by single creditors for the purpose of forcing settlements."

§ 940½. But Only When Authorized by Creditors at Meeting.

The trustee may not, of his own discretion, oppose the bankrupt's discharge, but only when authorized by the creditors at a meeting called for that purpose.

Bankr. Act as amended in 1910, § 14b, quoted at § 940¼.

There must be ten days' notice given of this meeting of creditors, for § 58 provides that there shall be ten days' notice of "all meetings of creditors." The notice should definitely state the object of the meeting to be that of determining whether the trustee should oppose the bankrupt's discharge, for the proviso to amended Section 14 (b) requires that the meeting shall be "called for that purpose." By a corresponding amendment of § 58, the time of notice of the bankrupt's application for discharge has been extended from ten days to thirty days, thus affording time for the meeting of creditors to be held in the meanwhile.

See Report No. 691 of the Senate Judiciary Committee of the 61st Congress, Second Session: "The second change, namely, that the trustee can only oppose discharge when authorized to do so at a meeting of creditors, is also desirable, affording a proper check upon improvident and improper opposition to discharge."

The authority for the trustee to oppose the discharge is to be conferred by a majority vote, in number and amount of claims, of all creditors whose claims have been allowed and are present at the meeting.

Bankruptcy Act, § 56 (a): "Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided." Also, see ante, § 572.

§ 941. Removal of Trustees.

Page 525. In re Syracuse Paper & Pulp Co., 21 A. B. R. 174, 164 Fed. 275 (D. C. N. Y.): "The creditors and all of them are at liberty to examine the directors, including Driscoll, and if it shall develop that he is an improper person to act as trustee, or that his presence as such interferes with the due and proper administration of the estate he can be removed."

§ 943. Good Cause to Be Shown.

Mere removal of residence from the district will not warrant removal from office, where the change neither makes it impossible for him to perform his duties as trustee, nor difficult for creditors to locate and communicate with him.

In re Seider, 20 A. B. R. 708, 163 Fed. 139 (D. C. N. Y.).

But a mere attitude of unfriendliness towards measures instituted to compel the bankrupts to turn over property appears to have been considered sufficient cause for removal where, at any rate, despite his lethargy, other creditors have gone ahead and by vigorous action secured the surrender of the property.

In re Fidler & Son, 23 A. B. R. 16, 172 Fed. 632 (D. C. Pa.).

§ 944. Notice and Due Hearing Requisite.

It has been held that the trustee may not, on the hearing, collaterally impeach the complaining creditor's status, where the creditor's claim has not been disallowed.

In re Roanoke Furnace Co., 18 A. B. R. 661, 152 Fed. 846 (D. C. Pa.).

But where the claim has not been allowed, it would hardly seem proper to give the mere filing of it the effect of *res adjudicata*, simply because the debt is *prima facie* proof.

§ 945. Hearing Should Be on Petition.

Upon this petition, rule to show cause should be issued upon the trustee.

Instance, In re Roanoke Furnace Co., 18 A. B. R. 661, 152 Fed. 846 (D. C. Pa.).

§ 947½. Expenses and Compensation of Trustee on Removal.

On removal for misconduct, the court has discretion to refuse all compensation.

See post, § 2113; obiter, In re Fidler & Son, 23 A. B. R. 16, 172 Fed. 632 (D. C. Pa.).

In re Leverton, 19 A. B. R. 434, 155 Fed. 931 (D. C. Pa.): "That the referee, under the circumstances, properly denied the accountant's claim for commissions, there can be no question. It is specifically provided by the Bank-

ruptcy Act (§ 48c) that: "The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause." But without this, upon the general principles which prevail with regard to the administration of trusts, compensation is to be withheld, where there is either fraud or willful misconduct. 28 Am. & Eng. Encycl. Law, 2d Ed. 1038."

And, perhaps, also, expenses, under some circumstances.

In *re Leverton*, 19 A. B. R. 434, 155 Fed. 931 (D. C. Pa.): "Nor do the expenses of the accountant stand any better. *Hanna v. Clark*, 204 Pa. 145. These, in the present instance, are made up of railroad fares, hotel bills, etc., made necessary because the bankrupt's estate was at Dushore, while the accountant lived at Scranton, seventy-five miles distant. Had a trustee been selected from the vicinity, as should have been done, in the interest of economy, this expense would have been entirely obviated. And as the accountant, through the solicitation of claims, not to say interest in the bankrupt, pushed himself forward into the place, now that occasion has been found to remove him, he must bear the brunt of it."

And where a trustee has resigned, to avoid removal, he may be denied compensation.

Instance, where denied in part, In *re Fidler & Son*, 23 A. B. R. 16, 172 Fed. 632 (D. C. Pa.).

Attorneys' Fees Allowed Creditors' Attorney Who Have Effected Removal of Improper Trustee.—See, In *re Fidler & Son*, 23 A. B. R. 16, 172 Fed. 632 (D. C. Pa.).

§ 948. Creditors to Elect New Trustee on Death, Removal, etc.

Creditors may elect not only at the first meeting, but also after a vacancy has occurred in the office of trustee, as by failure to qualify, final disapproval by the court, death, resignation, removal or abandonment.

Page 526, note 131. **Abandonment of Trust by Absconding Trustee.**—*Scofield v. United States ex rel. Bond*, 23 A. B. R. 259, 174 Fed. 1 (C. C. A. Ohio), quoted at § 878.

§ 951. Kinds of Property Passing and Not Passing to Trustee.

Page 534, note 1. Compare, Insolvency Statute of Massachusetts, In *re Littlefield*, 19 A. B. R. 18, 155 Fed. 838 (C. C. A. Mass.). Partially, *Hansen Mercantile Co. v. Wyman, Partridge & Co.*, 22 A. B. R. 877, 105 Minn. 491, 117 N. W. 926.

§ 953. Local Law Determines Whether Particular Property within Classification.

Page 535, note 2. Instance, **Lease for Ten Years a Chattel Real Not Subject to Chattel Mortgage under New York Law.**—In *re Fulton*, 18 A. B. R. 591, 153 Fed. 664 (D. C. N. Y.).

§ 954. Documents Pass.

Page 536, note 3. See, in addition, *Kerrch v. United States*, 22 A. B. R. 544, 171 Fed. 366 (C. C. A. Mass.); *Babbitt v. Dutcher*, 216 U. S. 102, 23 A. B. R. 519.

§ 955. **“Documents” Include Books, Deeds, Instruments, Papers, Relating to Business.**

Page 536, note 4. *Babbitt v. Dutcher*, 216 U. S. 102, 23 A. B. R. 519.

§ 956. **Title Itself Passes—Trustee Becomes Owner.**

Page 536, note 5. See, in addition, *Kerrch v. United States*, 22 A. B. R. 544, 171 Fed. 366 (C. C. A. Mass.); *Babbitt v. Dutcher*, 216 U. S. 102, 23 A. B. R. 519.

§ 958. **Patents, Copyrights and Trade Marks Pass.**

Page 537. Thus, licenses to sell patented articles will pass, subject to the conditions of the license.

In re *Spitzel*, 21 A. B. R. 729, 168 Fed. 156 (D. C. N. Y.).

§ 962. **Fraudulently Transferred Property Passes.**

Page 538, note 9. See, in addition, In re *Kohler*, 20 A. B. R. 89, 159 Fed. 871 (C. C. A. Ohio); impliedly, *Ruhl-Koblegard Co. v. Gillespie*, 22 A. B. R. 643, 61 W. Va. 554; In re *Hurst*, 23 A. B. R. 554 (Ref. W. Va.).

§ 963. **Property Transferable, or Capable of Subjection by Legal Process, Passes.**

Page 538, note 10. *Obiter*, Board of Commrs. *Kans. v. Hurley*, 22 A. B. R. 209, 169 Fed. 92 (C. C. A. Kan.), quoted on other points at §§ 629, 1519, 1521; In re *Perkins*, 19 A. B. R. 134, 155 Fed. 237 (D. C. Me.); *Hansen Mercantile Co. v. Wyman, Partridge & Co.*, 22 A. B. R. 877, 105 Minn. 491, 117 N. W. 926. For the general subject of the title taken by the trustee, see post, § 1144, et seq.

No Similar Clause under Act of 1867.—*Hansen v. Wyman*, 21 A. B. R. 398, 117 N. W. 926.

Instances Not Elsewhere Classified—Land under Water.—In re *Bailey*, 19 A. B. R. 470, 156 Fed. 691 (D. C. N. Y.).

Page 539. But this means property which the bankrupt could lawfully have transferred, not property which he could have transferred in violation of law.

But see, apparent disregard of the qualification, In re *Burke*, 22 A. B. R. 69, 168 Fed. 994 (D. C. Ga.): “Subd. 5 of § 70 of the Bankruptcy Act vests in the trustee the title of the bankrupt to all property which prior to the filing of the petition he could by any means have transferred, etc. If, then, these cultivators and implements could have been the subject of transfer by the express authority of the instrument of sale, it seems clear that the title of the trustee is good against the vendor.”

In re *Dunlop*, 19 A. B. R. 361, 156 Fed. 545 (C. C. A. Minn.): “The ‘property which prior to the filing of the petition he [the bankrupt] could by any means have transferred’ within the meaning of this clause of § 70, is property that he could by any means have transferred to another lawfully under the same terms that he transfers it by law to the trustee; that is to say, without consideration. It does not include the property of another, which the bankrupt is authorized to transfer only on the condition that he sells it for value, or sells it and holds its proceeds for its owner.”

§ 964. If Capable Either of Transfer or of Being Levied on.

Again, it has been held that where an elevator company or other company having goods in possession, for which elevator certificates or warehouse receipts have been issued, becomes bankrupt, the fact of outstanding certificates against the flour and grain in its storage tanks or goods in its warehouse is not sufficient to prevent title passing to the trustee in bankruptcy, since the property could have been levied upon by creditors.

See post, § 1884; compare, perhaps (*Security*) *Warehousing Co. v. Hand*, 19 A. B. R. 291, 206 U. S. 415 quoted at § 1146.

In *re Milbourne Mills Co.*, 20 A. B. R. 746, 162 Fed. 988 (D. C. Pa.): "As we read the cases of *York Mfg. Co. v. Cassel*, *supra*, and *Davis v. Crompton*, *supra*, the court in both held that the bankrupt never had title to property covered by a conditional sale and was not included in the property to which a trustee in bankruptcy took title under subdivision 5 of § 70a, because that subdivision not only requires that the property to which the trustee takes title shall be property which would have been liable to be levied upon and sold under judicial proceedings against the bankrupt by the creditors, but that the bankrupt must have had some previous title to it, or the rights of the creditors fixed by a previous lien placed upon it by levy or attachment. But neither of these cases go so far as to say that property upon which a creditor could have levied, concededly belonging to the bankrupt, to which it had title and possession before the bankruptcy proceedings and of which title it had never been divested, although covered by a certificate or pledge as collateral security for a loan, belongs to the pledgee as against the trustee in bankruptcy. The pledge is no doubt good as between the pledgor and pledgee in Pennsylvania as against creditors who have never levied, but as the title still remained in the pledgor, who is the bankrupt when it is so adjudged, its title passed to the trustees. It is property, the title to which passes to the trustees under subdivision 5, § 70a of the act, as property 'which might have been levied upon and sold under judicial proceedings against him.' * * * The facts in this case are nearly similar to those under consideration by the Supreme Court in the case of *Security Warehousing Co. v. Hand* [19 A. B. R. 291, 206 U. S. 415], and there the trustee held the property for the general creditors. In that case it was in effect held that where there was no delivery or change of possession, such certificates as those given did not operate as a delivery of the property mentioned therein. It was also held that the general law of pledge requires possession, and it cannot exist without it."

However, it is to be observed that if, under the law of the State, such certificates or receipts were sufficient to pass title to the property itself, they would doubtless be likewise sufficient in bankruptcy. Indeed, such seems to be the qualification imposed by the Supreme Court in the case of *Security Warehousing Co. v. Hand*, 19 A. B. R. 291, 206 U. S. 415.

§ 967. Thus, Memberships in Stock Exchanges, Clubs, etc., Licenses and Personal Privileges, Pass.

Page 540, note 16. See, in addition, *In re Gregory*, 23 A. B. R. 270, 174 Fed. 629 (C. C. A. N. Y.).

But the proceeds of a sale of the seat will not be ordered paid to the trustee

where supplementary proceedings had been instituted prior to four months. *Wrede, receiver, v. Clook, trustee*, 21 A. B. R. 821 (N. Y. Sup. Ct. App. Div.).

Lien of Correspondent of Bankrupt Stockbroker on Stock Exchange Seat.

—Where a customer has paid the bankrupt for stock purchased through a correspondent, but the bankrupt fails to remit purchase price, see post, § 1882; also, see *In re Meadows, Williams & Co.*, 23 A. B. R. 124, 177 Fed. 1004 (D. C. N. Y.).

Page 541. Subject however to liens of creditor members, under the rules of the stock exchange.

In re Gregory, 23 A. B. R. 270, 174 Fed. 629 (C. C. A. N. Y.).

A liquor license will pass, or not pass, according to local law.

Instance where benefits of license held to pass. *In re Baumblott*, 18 A. B. R. 496, 156 Fed. 422 (D. C. Pa.).

Page 541. **License to Sell Patented Article.**—Will pass subject to the conditions of the license, *In re Spitzel & Co.*, 21 A. B. R. 729, 168 Fed. 156 (D. C. N. Y.); see ante, § 958.

Page 541. But a liquor license will not pass in Georgia, because it is not a contract nor a property right. And it has been variously held in Pennsylvania; one case holding that a liquor license will not pass since it is peculiarly a personal privilege, whilst other cases hold that it will pass.

In re Becker, 3 A. B. R. 412, 98 Fed. 407 (D. C. Pa.): "No doubt there is a clearly visible distinction between a right to property and a mere personal privilege; but I see no abstract reason why some personal privileges may not also come to have qualities belonging usually to property rights alone—such, for example, as capacity to be transferred, and sufficient attractiveness to make other persons willing to pay money for the opportunity to acquire them. Where, as in the case of a license to sell liquor, these qualities are found to exist in fact, it seems to me that the privilege has ceased to be a privilege merely, and has become, in some sense and in some degree, property also. It can hardly be correct to hold that a bankrupt's creditors may not avail themselves of the fact that money can be had for the chance of stepping into the licensee's place, but that the bankrupt himself may make the same bargain, and put the money safely into his pocket. The license court may or may not accept the buyer as the bankrupt's successor. That is the buyer's affair, and it is not decisive upon the point now being considered. He buys a contingency, and buys it with his eyes open; but, in my opinion, the trustee has the contingency to sell, and the bankrupt is bound to execute the issuance necessary to carry out the sale." Instance, *In re Comer & Co.*, 22 A. B. R. 558, 171 Fed. 261 (D. C. Pa.); instance, *In re Miller*, 22 A. B. R. 580, 171 Fed. 263 (D. C. Pa.); *In re Wiesel & Knaup*, 23 A. B. R. 59, 173 Fed. 718 (D. C. Pa.).

Page 542. And the right of a bankrupt to apply for a renewal of a liquor license has been held to pass to the trustee and the bankrupt has been required to make application therefor.

In re Wiesel & Knaup, 23 A. B. R. 59, 173 Fed. 718 (D. C. Pa.).

§ 968. Though Subject to Contingency of Election or of Approval of Public Authorities.

Page 542, note 23. But compare, *In re Ghazal*, 22 A. B. R. 119, 169 Fed. 147 (D. C. N. Y.).

§ 969. And Though "Transferable" Only by Peculiar and Unusual Means.

And this is so, also, though the privilege is transferable only by peculiar and unusual means.

Compare principles enunciated in *In re Wright*, 19 A. B. R. 454, 157 Fed. 544 (C. C. A. N. Y.), quoted post, § 994.

Page 542, note 24. Ante, § 460; post, §§ 1009, 1115, 1835.

Page 542, note 26. See, in addition, *In re Wiesel & Knaup*, 23 A. B. R. 59, 173 Fed. 718 (D. C. Pa.); similarly as to insurance policies, post, § 1009.

Page 543. And the bankrupt has also been compelled to aid in effecting a sale of a renewal of a liquor license applied for.

In re Wiesel & Knaup, 23 A. B. R. 59, 173 Fed. 718 (D. C. Pa.).

§ 969½. Rewards.

It has been held that government rewards earned before bankruptcy but not awarded until afterward, do not pass to the trustee.

In re Ghazal, 20 A. B. R. 807, 163 Fed. 602 (D. C. N. Y.).

But do pass if both earned and awarded before bankruptcy.

In re Ghazal, 22 A. B. R. 119, 169 Fed. 147 (D. C. N. Y.).

§ 970. Property Rights Must Exist in Bankrupt.

Page 543. Thus, where a father died before his son's adjudication and the mother died afterward, it was held there was no vested interest to pass to the trustee of the son, notwithstanding the wish and confidence expressed in the father's will that his widow, to whom he had left everything, would make a bequest to the son, among others.

In re Harper, 18 A. B. R. 741, 155 Fed. 105 (C. C. A. N. Y.).

Page 544. Thus, government rewards for the detection of smugglers, which have not been awarded by the Secretary of the Treasury until after the informer's adjudication, will not pass to the informer's trustee in bankruptcy, even though the services were performed before the filing of the petition in bankruptcy.

In re Ghazal, 23 A. B. R. 178, 169 Fed. 147 (C. C. A. N. Y.): "Until he (Secretary of the United States Treasury) acts, the informer has merely an expectation of reward."

But, of course, such rewards as have been awarded before the bankruptcy will pass to the trustee.

In re Ghazal, 22 A. B. R. 119, 169 Fed. 147 (D. C. N. Y.).

§ 972. Vested Interests Pass.

Page 545, note 37. See, in addition, *In re Kane*, 20 A. B. R. 66, 161 Fed. 633 (D. C. N. Y.).

Page 545. And fire insurance money will pass where the fire occurs after adjudication and settlement is made without disclosure of the trustee's rights in the decedent's estate.

In re Kane, 20 A. B. R. 616, 161 Fed. 633 (D. C. N. Y.).

It has been held, in accordance with State law, that when an insolvent contests his father's last will, he may abandon or settle the contest at any stage of the litigation upon any terms he pleases, and his creditors have no cause of complaint, and that his subsequent adjudication in bankruptcy will not give the trustee any cause of action growing out of such settlement or abandonment, unless it be to recover some consideration which the bankrupt may have received and afterwards may have transferred in derogation of the bankruptcy law.

Edington v. Masson, 24 A. B. R. 183, 177 Fed. 209 (C. C. A. Ala.).

§ 973. Property Held in Trust for Bankrupt Passes.

Page 546, note 44. Also compare, where resulting trust held not to exist in favor of wife, *In re Teter*, 23 A. B. R. 223, 173 Fed. 798 (D. C. W. Va.).

§ 976. Unpaid Stock Subscriptions Pass.

Page 547, note 47. Compare ante, § 709; *In re Remington Automobile Co.*, 18 A. B. R. 389, 153 Fed. 345 (C. C. A. N. Y., affirming 15 A. B. R. 214); *In re Beachy & Co.*, 22 A. B. R. 538, 170 Fed. 825 (D. C. Wis.); *In re Automobile & Motor Co.*, 15 A. B. R. 214 (D. C. N. Y., affirmed *In re Remington Automobile Co.*, 18 A. B. R. 389, 153 Fed. 345 C. C. A. N. Y.); inferentially, *In re Morris Arc Lamp Co.*, 10 A. B. R. 569 (D. C. Pa.). Compare, *Firestone Co. v. Agnew*, 21 A. B. R. 292 (N. Y.); compare, *In re Flood-Pratt Dairy Co.*, 23 A. B. R. 148 (Ref. Ohio), as to corporation selling its stock at less than par. See, in addition, *Babbitt v. Read*, 23 A. B. R. 254, 173 Fed. 712 (U. S. C. C. N. Y.).

But, under the New York statute, if the stock has not been formally subscribed, an issue of it as paid up, at inadequate prices, gives no right of action to the corporation itself, but only to certain classes of persons, to whose rights it has been held the trustee in bankruptcy of the corporation does not succeed. *In re Jassoy Co.*, 23 A. B. R. 622, 178 Fed. 515 (C. C. A. N. Y.). And, from a reading of the decision it would not appear that the Amendment of 1910, giving the trustee the rights and remedies of creditors holding execution, etc., would affect the holding.

Impliedly, *In re Alleman Hardware Co.*, 22 A. B. R. 871, 172 Fed. 611 (D. C.

Pa.): "The capital stock of a corporation, as has been many times declared, is a trust fund for the benefit of creditors, which cannot be juggled with. *Handley v. Stutz*, 139 U. S. 417, 427. A stock subscription is primarily payable in money, but by arrangement may also be paid in property, contributed and accepted in good faith, at a fair valuation. This is expressly allowed by statute in Pennsylvania (Act of April 29, 1874, § 17, P. L. 81), but would be good without that (*Coit v. Gold Amalgamating Co.*, 119 U. S. 343), and is not open to objection, unless there is such a discrepancy as to be practically fraudulent (*American Tube Co. v. Baden Gas Co.*, 165 Pa. 489; *Pennsylvania Tack Works v. Sowers*, 2 Walk. (Pa.) 416; *Coit v. Gold Amalgamating Co.*, 119 U. S. 343). Nor does the holder become liable, as for unpaid stock, because the statutory formalities have not been complied with. *Sternburgh v. Duryea Power Co.*, 20 A. B. R. 219. It is not open to creditors to take advantage of this, whatever may be said as to the State, or other stockholders. As between corporation and stockholder, also, a valuation, however extravagant, all parties consenting, is binding. But not as to creditors, who have the right to assume that the capital stock stands for property of a substantial value, and who presumptively deal with it on the strength of that. The corporation has no right to give away stock, without getting a fair equivalent, and where creditors are concerned an agreement that it should be treated as fully paid or non-assessable, or otherwise limiting liability thereon, is invalid. *Handley v. Stutz*, 139 U. S. 417; *Camden v. Stuart*, 144 U. S. 104. The Constitution of Pennsylvania expressly prohibits a fictitious issue of stock (Art. XVI, § 7), as does the General Corporation Act following it (Act April 29, 1874, P. L. 81). And it offends against the law, where everything is problematical and prospective, and there is nothing to sustain the stock but an extravagant estimate of benefits to come. In *re Wyoming Valley Ice Co.*, 153 Fed. 187, 158 Fed. 608. A formal subscription is not necessary to create a liability for stock. Whoever accepts shares allotted to him undertakes to pay for them, if necessary, to meet the demands of creditors, and when the only payment that can be shown, is by properly fraudulently over-valued, it is the same as no payment whatever. *Handley v. Stutz*, 139 U. S. 417; *Camden v. Stuart*, 144 U. S. 104; *Elyton Land Co. v. Birmingham Warehouse Co.*, 92 Ala. 407. And this is true, because of the fraud, in bankruptcy, as well as elsewhere. Applying these principles, which are well settled, the liability of Gitt for the \$25,000 of stock which he got without paying for it, is not open to question. The hollowness of the transaction, by which there was an apparent payment, appears upon the most casual consideration. It was not merely a case of excessive valuation, in which the parties were led away by an oversanguine view of the situation, if this would excuse it. * * * Here the transaction was not fair. There was no value contributed for the stock received and the parties knew it, there being a mere shuffling off of the affairs of an insolvent concern to escape further individual responsibility."

Page 547. *Babbitt v. Read*, 23 A. B. R. 254, 173 Fed. 712 (U. S. C. C. N. Y.): "This right of the corporation to enforce the liability of stockholders for the purpose of paying its debts passed to the trustee, under § 70 a (6) of the Bankruptcy Act, and while he is ready to enforce it, no one else can."

And its trustee in bankruptcy may maintain suit for the same in the State court; and the petition of a creditor in a similar action is demurrable.

Thrall v. Union Maid Tobacco Co., 22 A. B. R. 288, 54 O. Law Bull. 732 (Com. Pleas Court).

But where the corporation had no right to enforce the liability, its trustee in bankruptcy has none; as, for instance, where it had, in good faith, issued the stock in payment for a patent or for a building site in a State where such consideration is sufficient, although the actual value thereof might be less than the par value of the stock.

Sternbergh v. Power Co., 20 A. B. R. 625, 161 Fed. 540 (C. C. A. Pa.): "On this company becoming bankrupt its trustee acquired no higher rights than the bankrupt possessed * * *, and it is clear that company had no right of action against *Sternbergh*. * * * Having taken these patents at a valuation to which every person in interest agreed, and having enjoyed them for all these years while they were running, it is clear this company cannot question nor repudiate the transaction, and assess or collect on the full-paid stock which it issued for them. This is not the case of an uncollected or unpaid assessment or of a subscription. It is an indirect attempt to invalidate an executed transaction, which has stood unchallenged and ratified by six years' acquiescence and enjoyment of the consideration paid therefor."

Also compare, *In re Remington Automobile Co.*, 18 A. B. R. 389, 153 Fed. 345 (C. C. A. N. Y.); similarly, *In re Beachy & Co.*, 22 A. B. R. 538, 170 Fed. 825 (D. C. Wis.); *In re Alleman Hardware Co.*, 22 A. B. R. 871, 172 Fed. 611 (D. C. Pa.).

§ 977. Bankruptcy Court May Make "Call."

Page 547, note 48. Impliedly, *In re Hutchinson Co.*, 20 A. B. R. 307 (Ref. Mich.); *In re Eureka Furniture Co.*, 22 A. B. R. 395, 170 Fed. 485 (D. C. Pa.); (1867) *Wilbur v. Stockholders of the Corporation*, 18 Nat. Bankr. Reg. 179.

Page 548. *In re Remington Automobile Co.*, 18 A. B. R. 389, 153 Fed. 345 (C. C. A. N. Y.): "Had the corporation not become bankrupt, it could have laid an assessment upon such of its stockholders as were liable for further calls to make up full payment, and the right to make an assessment and call passed by the bankruptcy to the trustee. The Supreme Court, in *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968, holds that the proper practice in such cases is for the trustee to file petition in the bankruptcy court for an order directing him to make an assessment and call upon the unpaid stock of the corporation for the purpose of paying its debts. In order to determine whether such an order should be made, it is necessary for the court to examine into and decide certain questions of fact, e. g., whether at the time of the issue of any particular share the full value was or was not paid in, whether any subsequent payments were made on account of it, whether the corporation was indebted in excess of assets, and what is the amount of its indebtedness. We are unanimously of the opinion that the practice followed in this case was correct, and that the decision of the District Court as to any question the decision of which was necessary to the making of the order will be res adjudicata in any subsequent proceeding between the trustee and any stockholder who received notice of the proceeding. Thus, in a plenary action against a stockholder to enforce assessment, he cannot be heard to question the findings made in this proceeding as to the amount paid for the stock, as to the indebtedness of the corporation, or as to the amount of the assessment, but he may present and make proof of any individual defense which he may have to such action. In

this connection it may be noted that the phraseology of the order is such that it might be contended that execution for the respective amounts might be issued against the individuals named. This should be corrected. The writer is further of the opinion that, inasmuch as the stockholder is to be concluded as to the amount of corporation indebtedness by the finding in the bankruptcy court, he is entitled to have that amount proved by the best evidence, if he appears and asks for it. In the case at bar the indebtedness was proved merely by presentation of the proofs of claim. To this counsel for stockholders objected, and claimed the right to cross-examine whoever might swear to the debt. His contention was overruled and exception reserved. The writer is of the opinion that this was reversible error, but the majority does not think so."

No personal judgment, however, can be entered against the stockholder in the proceedings on the assessment in the bankruptcy court.

In *re* Remington Automobile Co., 18 A. B. R. 389, 153 Fed. 345 (C. C. A. N. Y.), quoted *supra*.

Much less any order on him to pay.

But compare, In *re* Eureka Furn. Co., 22 A. B. R. 395, 170 Fed. 485 (D. C. Pa.).

Judgment against the stockholder is to be had later, in plenary action.

In *re* Remington Automobile Co., 18 A. B. R. 389, 153 Fed. 345 (C. C. A. N. Y.), quoted *supra*.

The findings in the bankruptcy court, at any rate if made upon due notice to the stockholder, are conclusive upon him in the later plenary action to recover the personal judgment, upon the questions of the amount of debts, the amount of deficit of the corporate assets and the necessity for the call, and, also, upon the question as to the actual amount paid in by other stockholders. It has also apparently been held binding upon each particular stockholder as to the amount and validity of the claim against himself.

In *re* Remington Automobile Co., 18 A. B. R. 389, 153 Fed. 345 (C. C. A. N. Y.), quoted *supra*. Compare, In *re* Eureka Furn. Co., 22 A. B. R. 395, 170 Fed. 485 (D. C. Pa.). Also, see post, "Res Judicata in Actions by and against Trustees," § 1777 3-7.

But such last mentioned rule is doubtful, for each stockholder is entitled to his day in court in a plenary action.

Compare, In *re* Hutchinson & Wilmoth, 19 A. B. R. 313, 158 Fed. 74 (C. C. A. Mich.).

Compare, In *re* Munger Vehicle Tire Co., 21 A. B. R. 395, 168 Fed. 910 (C. C. A. N. Y.): "We are of the opinion that the District Court had jurisdiction to make a call upon the stockholders of the Munger Vehicle Tire Company if the facts warranted the court in taking such action. We think, however, that the hearing before the referee should be expressly limited to the determination of this issue alone. It being conceded at the argument that the

prayer of the petition is too broad, it follows that the reference to determine whether the relief prayed for in the petition should be granted, is also too broad and opens a field of inquiry which may possibly be prejudicial to the interests of the Rubber Company. The issue before the referee should be confined solely to the question, should there be a call upon the shareholders of unpaid stock, and if so, to what amount? With the controversy thus narrowed, we fail to see how the Rubber Company will be prevented from making any defense it may have to an action brought against it as a stockholder, whether it appears before the special master or fails to do so."

Babbitt v. Read, 23 A. B. R. 254, 173 Fed. 712 (U. S. C. C. N. Y.): "It will be noticed that the referee in bankruptcy has not found the amount due by the stockholders, or even expressly that there is any amount due. The defendants contend that such a finding is a necessary preliminary to a plenary suit against stockholders, and cite *In re Remington* (C. C. A.), 18 Am. B. R. 389, 153 Fed. 345, to that effect. All the proceedings in that case were in the bankruptcy court, and the stockholders were apparently residents and parties. This court held the proceedings there taken to be regular, and referred to *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968. But, where plenary proceedings are necessary against stockholders, I see no reason why the bankruptcy court may not leave the question of the amount due by them to the courts in which the plenary proceedings are instituted. The authority given by the referee in bankruptcy to the trustee to collect such amount as may be owing from stockholders seems to me an authorized demand for payment within the language of Mr. Justice Woods in *Scovill v. Thayer*, at page 155 of 105 U. S., 26 L. Ed. 968: 'But under such circumstances, before there is any obligation upon a stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or at the very least some authorized demand upon him for payment.' The stockholders would certainly have no reason to complain of such a course. Be this as it may, the stockholders have the right to set up in a plenary suit such personal defenses as are now to be considered."

Page 548. Some cases hold, but erroneously, that the Bankruptcy Court has jurisdiction to entertain such suits.

Skillen v. Magnus, 19 A. B. R. 397, 162 Fed. 689 (D. C. N. Y.). Also, see § 1692.

This is clearly contrary to the law, even as it stands since the Amendment of 1903.

Page 548, note 49. Also compare (1867) *Wilbur v. Stockholders of the Corporation*, 18 Nat. Bankr. Reg. 179.

Page 548. *In re Hutchinson & Wilmoth*, 19 A. B. R. 313, 158 Fed. 74 (C. C. A. Mich.): "It will be observed that it was not a petition which simply demands an assessment and call upon the stock of the bankrupt corporation, as in the case of *Scovill v. Thayer*, 105 U. S. 143. It is clear from a reading of the petition that *Hutchinson and Wilmoth*, who organized the corporation and held all the stock except one share, are bankrupts, and that the attempt of the trustee is to bring in *Carrie W. Haley*, a non-resident, the mother-in-law of *Wilmoth*, who it seems paid substantially all of the money which went into the concern, as a defendant and compel her to answer averments which charge her with being a party to certain fraudulent acts which it is alleged, subjected her to liability for the debts of the corporation. We do not think

this can be done without serving her personally and giving her the opportunity of defending herself in the forum where she is subject to suit. *Toland v. Sprague*, 12 Pet. 300, 328. In the ordinary case, where an assessment and call is made on the stock of a bankrupt corporation, the order to show cause demands an investigation by the court in charge of the bankrupt, into the necessity and propriety of making the assessment and call; and afterwards, when a suit is brought to collect the assessment, the stockholder has the opportunity of presenting his defense in the court in which it is necessary, in order to obtain jurisdiction, to serve him personally. But in the present case, as we have suggested, and as the abstract we have made of the petition shows, there is presented against *Carrie W. Haley*, a suit in equity which she ought not to be compelled to answer, except in the proper forum and after that personal service which the law accords her as a means of protecting her rights. A court of bankruptcy has no jurisdiction of a suit at law or in equity brought by a trustee to recover property or collect debts, or to set aside transfers of property alleged to be fraudulent, except by consent of the defendant. * * * By the Amendment of February 5, 1903, such court was given jurisdiction of suits for the recovery of property under § 60b, § 67c and § 70e. * * * But this is not a case of a preferential or fraudulent transfer under those sections. The suit outlined in the bill is therefore one of a plenary nature of which the bankruptcy court has no jurisdiction except by consent of the defendant, of which there is no pretense here."

§ 978. Statutory Secondary Liability of Stockholders Not an Asset.

Page 548, note 50. See, in addition, *In re Beachy & Co.*, 22 A. B. R. 538, 170 Fed. 825 (D. C. Wis.). Compare, also, ante, § 709.

Offsetting stockholder's claim against unpaid stock subscription, see post, § 1185.

And such liability is not enforceable by the trustee in bankruptcy of the corporation.

In re Beachy & Co., 22 A. B. R. 538, 170 Fed. 825 (D. C. Wis.): "It seems clear, therefore, that this statutory cause of action belongs exclusively to creditors. It is a secondary security which is not an asset of the estate and does not pass to the trustee. Such a claim may be enforced by the creditor in any court having jurisdiction quite independently of the bankruptcy proceedings."

§ 979. Bankruptcy as Landlord.

Of course, leaseholds where the bankrupt is the lessor pass to his trustee.

Instance, *In re Fulton*, 18 A. B. R. 591, 153 Fed. 664 (D. C. N. Y.).

§ 980. Bankrupt as Tenant.

Leaseholds owned by the bankrupt as tenant at the time of the filing of the petition, and which contain no express prohibition upon the transfer of the title, pass to the trustee.

Instance (oral, indefinite term is lease for year in South Carolina), *In re Schwartzman*, 21 A. B. R. 885, 167 Fed. 399 (D. C. S. C.).

§ 982. Trustee Not Bound to Accept Lease as Asset.

Page 548, note 53. See, in addition, *Atchison, etc., R. Co. v. Hurley*, 18 A. B. R. 396, 153 Fed. 503 (C. C. A. Kans.), quoted at §§ 1144, 1144½, 1145, 1150½; *In re Roth & Appel*, 22 A. B. R. 504, 174 Fed. 64 (D. C. N. Y.); *In re Frazin & Oppenheim*, 23 A. B. R. 289, 174 Fed. 713 (D. C. N. Y.).

Page 549. But, if he accepts it, he is bound by its terms.

Atchison, etc., R. Co. v. Hurley, 18 A. B. R. 396, 153 Fed. 503 (C. C. A. Kans.).

The title to the lease vests as of the date of the adjudication but is subject to divestiture by the trustee's subsequent rejection. The title it has been held, vests at once on the trustee's appointment and qualification, and does not hang in suspense, but vests subject to divestiture by the trustee's subsequent action in rejecting it.

In re Frazin & Oppenheim, 23 A. B. R. 289, 174 Fed. 713 (D. C. N. Y.): " * * * but, in my opinion, the title to the lease does not remain in the air until the trustee affirmatively takes action to assume the lease. The true view, in my opinion, is that the trustee, upon his appointment, is vested with the lease, subject to the right to decline to accept it, within a reasonable time, if his acceptance of it will not be advantageous to the estate."

§ 983. Entitled to Time to Accept or Reject.

Page 549, note 54. See, in addition, *In re Rubel*, 21 A. B. R. 566, 166 Fed. 131 (D. C. Wis.), quoted on other points at § 656; *In re Schwartzman*, 21 A. B. R. 885, 167 Fed. 399 (D. C. S. C.), quoted on other points at § 984; *In re Frazin & Oppenheim*, 23 A. B. R. 289, 174 Fed. 713 (D. C. N. Y.), quoted at § 982.

Value of Lease, the Difference between Rent Obtainable and Rent Reserved.—*In re Ketterer Mfg. Co.*, 20 A. B. R. 694, 156 Fed. 638 (D. C. Pa.).

Page 549, note 56. And where the trustee rejects the lease, the landlord's claim for the expense of changing the premises back to their original use cannot be charged against the bankrupt's estate under a clause merely covenanting that the tenant shall restore the premises "in good condition." *In re International Mailing Co.*, 23 A. B. R. 664, 175 Fed. 308 (D. C. N. Y.).

§ 984. Trustee's Right to Occupy Premises for Reasonable Period.

The trustee may stay there long enough to remove the property by selling it, if thereby the landlord is not unduly prejudiced.

Impliedly, *In re Stanton Co.*, 20 A. B. R. 549, 162 Fed. 169 (D. C. Conn.). Compare, inferentially to this effect, *In re Rubel*, 21 A. B. R. 566, 166 Fed. 131 (D. C. Wis.).

In re Schwartzman, 21 A. B. R. 885, 167 Fed. 399 (D. C. S. C.); " * * * there can be no doubt that it was the right and duty of the court to grant the restraining order prayed for. The petitioner, but a few days before had been selected by the creditors as trustee of an estate consisting of a stock of merchandise valued at \$25,000, stored in a building specially built for the bankrupt with fittings especially adapted, at considerable expense, for their proper display and he was notified that the owner of the building would require him

to remove the same within two or three days. It was obvious that great loss and damage would follow precipitate removal. In these circumstances it was the duty of this court as a court of equity, while giving full recognition to the legal right to the landlord to so regulate the time and manner of its enforcement as not to cause unnecessary loss to others. Immediate ejection from the premises would have entailed great depreciation of the value of the bankrupt's estate, and, if the bankrupt had a lease of the premises for twelve months, as averred in the petition, it was the duty of the trustee to determine whether or not it was for the benefit of the creditors to assume said lease. If a sale upon the premises was necessary to avoid great loss, it was obviously the duty of the trustee to conduct the sale there, and it seems equally clear that it was the duty of the court to relieve him from the coercion of a situation where precipitate action might have resulted in irreparable damage, and such delay as might be reasonably necessary seems clearly within the power of a court of equity to grant. The bond of a \$1,000 [restraining order bonds] etc."

§ 985. Whether Bound to Pay Rent Stipulated, or Only for Use and Occupation.

Page 549, note 57. See, in addition, *In re Stanton Co.*, 20 A. B. R. 549, 162 Fed. 169 (D. C. Conn.); *In re Foundry Co.*, 21 A. B. R. 509, 166 Fed. 381 (D. C. N. Y.), although in this case the court expressly dissents from the proposition contained in § 992.

Page 549. *In re Foundry Co.*, 21 A. B. R. 509, 166 Fed. 381 (D. C. N. Y.), the court, however, in this case dissenting from the proposition enunciated at § 992: "This court has held in a number of instances that if a receiver is actually in possession, for the purpose of preserving his estate, during a certain number of days, he should pay as part of the expenses of maintaining the estate, the pro rata rents, at a reasonable value, for that time, and in the same way this court has held in a number of instances that the receiver is entitled to the benefit of being compelled to pay only a reasonable value for the property, if the rental value happens to be greater because of some contract liability which will result in a claim against the estate in the hands of the trustee, or against the bankrupt himself if he should subsequently continue the lease."

Page 550. And the trustee may perhaps be bound to make good, as part of the rent for the use and occupation, damage accruing to the landlord through loss of prospective tenants, etc.

Compare, impliedly to this effect, *In re Hunter*, 18 A. B. R. 477, 151 Fed. 904 (D. C. Pa.).

§ 986. Previous Forfeiture Not Nullified by Tenant's Bankruptcy.

Nor, on principle would any right of forfeiture after bankruptcy be taken away from the landlord; so, that, if such right of forfeiture was given in the lease and was exercised after the bankruptcy by the landlord, the trustee would become a mere trespasser thereafter.

Post, § 992½.

But compare inferentially contra, *In re Rubel*, 21 A. B. R. 566, 166 Fed. 131 (D. C. Wis.).

These rights of forfeiture are subject, however, always to the usual allowance of a reasonable time for effecting a removal, under the doctrine of the preceding paragraph, § 985.

In *re Hunter*, 18 A. B. R. 477, 151 Fed. 904 (D. C. Pa.): "It is conceded that the claim is not provable against the estate under the provisions of § 63 of the Bankrupt Act, but it is contended that a wrong was done by the refusal to yield possession of the premises upon April 1, for which an action would lie against the trustee personally; and further, that, as the wrong was done in the interest of the bankrupt estate, and to its actual profit, by saving the cost of removing the goods and by obtaining better prices at the sale upon the bankrupt's premises, the trustee would have a valid claim against the estate to be reimbursed whatever damages it might be compelled to pay in an action by the landlord, and therefore to prevent circuity of action, the damages may be allowed in the first instance against the estate. I believe this position to be sustained by the authorities. Undoubtedly the trustee was a trespasser after April 1. It was bound to know that it had no right to remain on the premises after that date, except by agreement with the landlord; and especially is this true, after the landlord had given express notice that possession was desired on April 1, and that he had secured a tenant for a term beginning on that day. The fact that the notice was not given until March 24 is of little or no importance. The trustee knew exactly when the bankrupt's lease expired, and it was bound to know that, if it continued to occupy the premises after April 1, without the landlord's express agreement, it would do so at its own risk. If, therefore, it made arrangements to hold a sale on the premises upon April 4, it did so with constructive knowledge that such an arrangement was subject to be defeated by notice to vacate, and when the notice was received its duty was to give up the premises before April 1. Six days afforded ample time to remove the goods, and, if an adjournment of the sale or a new order to sell was thereby rendered necessary, the delay was of slight consequence, and no one was to blame except the trustee. The landlord having, therefore, been entitled to the possession of his property on April 1, and the trustee having refused to surrender, the latter became a trespasser and was liable in damages. The direct and immediate consequence of its refusal was that the new tenant threw up the lease, and, as the landlord was not able to find another tenant within the term, he lost the rent for three months. For this sum I think the trustee would be directly and personally liable to be sued."

But the forum for enforcing the landlord's rights of ejectment after the forfeiture would be the bankruptcy court, probably by petition for an order upon the trustee to quit the premises; certainly not by ejectment or forcible detainer proceedings in the State court. [See post, § 1799.] But doubtless he may sue the trustee personally for damages.

In *re Hunter*, 18 A. B. R. 477, 151 Fed. 904 (D. C. Pa.). See post, § 1780.

In the event the trustee be thus sued personally, the bankrupt estate would be bound to indemnify the trustee, if it had benefitted by the detention.

In *re Hunter*, 18 A. B. R. 477, 151 Fed. 904 (D. C. Pa.).

And notice to quit, served upon the receiver, has been held insufficient in one case.

In re Rubel, 21 A. B. R. 566, 166 Fed. 131 (D. C. Wis.).

§ 987. Covenants of Forfeiture for Assigning or Subletting, Not Violated by Bankruptcy.

Page 550, note 59. See, in addition, In re Frazin & Oppenheim, 23 A. B. R. 289, 174 Fed. 713 (D. C. N. Y.), quoted at § 989; *Gazley v. Williams*, 17 A. B. R. 253 (C. C. A. Ohio), affirmed in 20 A. B. R. 18, 210 U. S. 41.

Page 550. *Gazlay v. Williams*, 20 A. B. R. 18, 210 U. S. 41: "The passage of the lessees' estate from Brown, the bankrupt, to Williams, the trustee, as of date of the adjudication, was by operation of law and not by the act of the bankrupt, nor was it by sale. The condition imposed forfeiture if the lessee assigned the lease or the lessees' interest should be sold under execution or other legal process without lessors' written consent. A sale by the trustee for the benefit of Brown's creditors was not forbidden by the condition and would not be in breach thereof. It would not be a voluntary assignment by the lessee, nor a sale of the lessee's interest, but of the trustees' interest held under the bankruptcy proceedings for the benefit of creditors. Jones in his work on Landlord and Tenant lays it down (§ 466) that 'an ordinary covenant against subletting and assignment is not broken by a transfer of the leased premises by operation of law, but the covenant may be so drawn as to expressly prohibit such a transfer, and in that case the lease would be forfeited by an assignment by operation of law.'"

§ 988. Leasehold Liberated from Forfeiture Clause.

Page 551, note 60. Obiter, inferentially, In re Frazin & Oppenheimer, 23 A. B. R. 289, 174 Fed. 713 (D. C. N. Y.).

Arrears of Rent—Rights of Purchaser and Landlord.—In re Ketterer, 20 A. B. R. 694, 155 Fed. 638 (D. C. Pa.).

§ 989. Bankruptcy Works Forfeiture, if Specifically Provided.

A distinct and unequivocal condition of the lease forfeiting the residue of the term, in case the lessee become a bankrupt, will cause a forfeiture, provided steps be taken to declare the forfeiture.

Impliedly, *Gazlay v. Williams*, 20 A. B. R. 18, 210 U. S. 41. Instance, but forfeiture waived by acceptance of rent, In re Montello Brick Wks., 20 A. B. R. 859, 163 Fed. 624 (D. C. Pa.).

Obiter, In re Frazin & Oppenheim, 23 A. B. R. 289, 174 Fed. 713 (D. C. N. Y.): "There can be no doubt, under the authorities, that a covenant by the lessee, in a lease not to assign, mortgage or pledge the lease or underlet without the lessor's consent, is not violated by the lessee's bankruptcy. * * * The covenant, however, providing that, in the case of the lessee's insolvency, or the institution of bankruptcy proceedings by or against him or the appointment of a receiver or trustee of the lessee's property or the devolution upon any person, by operation of law, or the lessee's occupancy, the lessor may re-enter, is violated by the occurrence of any of the acts specified. The rule is well stated in Jones on Landlord and Tenant, § 466, cited with approval in *Gazlay v. Williams*, 210 U. S. 41, 20 Am. B. R. 18, where it is said that 'an ordinary

covenant against subletting and assigning is not broken by a transfer of the leased premises by operation of law, but the covenant may be so drawn as to expressly prohibit such a transfer, and in that case the lease would be forfeited by an assignment by operation of law.' "

But such forfeiture may be waived; as, for instance, by the acceptance of rent under the lease from the trustee.

In re Montello Brick Wks., 20 A. B. R. 859, 163 Fed. 624 (D. C. Pa.).

In re Frazin & Oppenheim, 23 A. B. R. 289, 174 Fed. 713 (D. C. N. Y.): "It is equally well settled that the acceptance of rent by a landlord, after a breach of a covenant in a lease authorizing re-entry, waives the right of re-entry, and the right thus waived is dispensed with forever. * * * The landlord, in this case, by accepting rent from the trustee, waived all the provisions in the lease authorizing re-entry, and the result is, in my opinion, that the trustee can sell this lease and give a perfect title to it, and the purchaser can take the premises for the term of the lease, not subject to re-entry so long as the purchaser complies with the provisions of the lease."

§ 992. Receiver or Trustee Occupy Free, for Any Period for Which Landlord Holds Provable Claim.

Page 553, note 64. *Contra*, *In re Foundry Co.*, 21 A. B. R. 509, 166 Fed. 381 (D. C. N. Y.).

Landlord's Claim under Covenant to Restore Premises in "Good Condition."—*In re International Mailing Co.*, 23 A. B. R. 664, 175 Fed. 308 (D. C. N. Y.).

§ 992½. Forfeiture While in Custody of Bankruptcy Court.

Neither the landlord nor the trustee gain or lose any rights by the bankruptcy; the trustee succeeds merely to the bankrupt's rights. If the lease contains a forfeiture clause, it may, in proper cases, be forfeited after bankruptcy, as well as before, though the forum for the assertion of rights consequent thereon will be the bankruptcy court and not the State court. In the event of forfeiture after the trustee has assumed possession, the bankruptcy court will permit the trustee to continue to occupy the premises only on equitable conditions, such as that of payment of rent for the period after the forfeiture; for, from that time, the trustee is no longer occupying under the lease, for the lease has been forfeited. If there be no forfeiture clause or right of re-entry, the trustee succeeds of course to whatever right of continued possession the bankrupt himself would have possessed.

Ante, § 986.

Raising Rent and Making Tenant's Repairs Evidence of Landlord's Acceptance of Surrender of Lease.—*In re Piano Forte Manf'g Co.*, 20 A. B. R. 899, 163 Fed. 413 (D. C. Pa.).

§ 993. Rents of Mortgaged Premises, Uncollected or Accruing after Bankruptcy.

Page 553, note 65. Fraudulent transferee's claim for rent, on setting aside fraudulent transfer. *In re Hurst*, 23 A. B. R. 554 (Ref. W. Va.).

§ 994. Uncompleted Contracts Involving Personal Skill or Confidence.

Page 555. In re Wright, 19 A. B. R. 454, 157 Fed. 544 (C. C. A. N. Y., affirming 18 A. B. R. 199): "It may be conceded that this contract, as a whole, is based upon personal trust and confidence and is not assignable. Arkansas Valley Smelting Co. v. Belden Mining Co. (127 U. S. 379). But there is a difference between an absolute assignment of a contract and an assignment of rights under a contract. The personal confidence which precludes the transfer of rights arising out of a contract must be involved in the nature of rights themselves. Hearst v. Roehm (84 Fed. 569). It is not ordinarily involved in the right to receive moneys due or to grow due under a contract and this right is generally assignable without the consent of the other party. Fortunato v. Patten (147 N. Y. 277); Knevals v. Blauvelt (82 Me. 458). The right to receive the renewal commissions under the present contract which is the right involved in the question certified, seems not to involve personal confidence. The contracts of insurance have already been obtained. The collection of renewal premiums is largely a ministerial act. The contract provides that the insurance company shall appoint a cashier to receive such moneys. Even the bankrupt testified that seventy-five per cent. of the renewal premiums are paid upon mere notice. The collection charge made by the company against an agent's estate is only two and one-half per cent. It is possible that if the interests under the contract are transferred to the trustee the insurance company may defeat the object of the transfer by withholding its consent. It does not appear that it has refused its consent and there is no presumption that it will do so. But the fact that the interest is defeasible does not prevent its transfer. Defeasible and contingent interests of this nature are assignable. In re Becker, 3 Am. B. R. 412, 98 Fed. 407; Fortunato v. Patten, supra. It is urged in the second place that the collection of renewal premiums requires continued service on the part of the bankrupt and that his creditors are not entitled to his future services. This contention may be agreed to without affecting the question whether the renewal interests are assignable. It is true that in case they are transferred, the bankrupt cannot be compelled to render any future services. Collection by means of the cashier alone might or might not prove effective. Some arrangement for procuring the bankrupt's services might be desirable. If no arrangement could be made the insurance company might refuse its consent to the transfer. So it is possible that the bankrupt might cause the forfeiture of the renewal interests by leaving the employment of the company. These contingencies might render the interest to be transferred to the trustee of little value. But they would not render such interest unassignable."

And contracts for future deliveries of personal property, wherein there is no express prohibition of assignment, will pass, if they are not dependent upon future personal dealings between the original parties and if the trustee or receiver in bankruptcy of the vendee stands ready to pay on delivery and relieve the vendor from his obligation to make deliveries on credit.

In re Niagara Radiator Co., 21 A. B. R. 55, 164 Fed. 102 (D. C. N. Y.).

Exempt wages or salary, if not claimed as exempt, will pass to the

trustee, though earned under the contract involving personal skill or confidence.

In re Driggs, 22 A. B. R. 621, 171 Fed. 897 (D. C. N. Y.).

§ 996. **Property Not Scheduled, or Concealed Otherwise, Passes.**

Property belonging to the estate but not scheduled by the bankrupt will nevertheless pass.

See, in addition, Ruhl-Koblegard Co. v. Gillespie, 22 A. B. R. 643, 61 W. Va. 554.

Thus in one case, where the death of a child before the bankruptcy threw upon the bankrupt an undivided interest which he failed to disclose to his trustee, and, subsequent to the bankruptcy, a fire occurred and the insurance money for the decedent's share was settled for and paid over to one creditor, without notice to the trustee, the trustee, on discovery of the facts, was held entitled to recover the money.

In re Kane, 20 A. B. R. 616, 152 Fed. 587 (D. C. N. Y.).

§ 996½. **Trustee's Failure to Sue, Gives No Right to Individual Creditor to Sue.**

The trustee's failure to sue for the recovery of property gives no right to an individual creditor to sue.

Ruhl-Koblegard Co. v. Gillespie, 22 A. B. R. 643, 61 W. Va. 554. See ante, § 824.

§ 1000. **Fixtures May Pass.**

Page 556, note 76. See post, § 1152.

And it is held that a covenant restricting a tenant's ordinary right to remove a trade fixture, is to be strictly construed and will not be extended by implication.

Montello Brick Co. v. Trexler, 21 A. B. R. 896, 163 Fed. 624 (C. C. A. Pa., affirming 20 A. B. R. 859).

§ 1001. **Stocks, Bonds, Commercial Paper, Mortgages, Merchandise, etc., Pass.**

Stocks pass to the trustee.

French v. White, 18 A. B. R. 905, 78 Vt. 89, wherein an ineffective attempt had been made by the bankrupt to pledge the stock.

§ 1001½. **Claims against the Government.**

Claims against the United States government may pass.

Nat. B'k of Seattle v. Downie, 20 A. B. R. 531, 161 Fed. 839 (C. C. A. Wash.).

Assignments of such claims by the bankrupt will be ineffectual to pass title to the assignee, unless duly witnessed, acknowledged, etc., with all the formalities required by the United States statutes.

Nat. B'k of Seattle *v.* Downie, 20 A. B. R. 531, 161 Fed. 839 (C. C. A. Wash.). As to government rewards, see ante, § 970.

§ 1003. Policies Exempt by State Law Do Not Pass.

Page 557, note 78. See, in addition, *In re Booss*, 18 A. B. R. 658, 154 Fed. 494 (D. C. Pa.), an endowment policy; *In re Pfaffinger*, 21 A. B. R. 255, 164 Fed. 526 (D. C. Ky.), policy payable to wife but with change of beneficiary clause; *In re Whelpley*, 22 A. B. R. 433, 169 Fed. 1019 (D. C. N. H.); obiter, *In re Moore*, 23 A. B. R. 109, 173 Fed. 679 (D. C. Tenn.). Instance not exempt, semi-tontine policy, *In re Wolff*, 21 A. B. R. 452, 165 Fed. 984 (D. C. N. Y.), quoted at § 1007, instance held not exempt, *In re White*, 23 A. B. R. 90, 174 Fed. 333 (C. C. A. N. Y.).

Page 558. The exemption of the proceeds of a life insurance policy upon death, does not exempt the policy itself during the bankrupt's life.

In re Moore, 23 A. B. R. 109, 173 Fed. 679 (D. C. Tenn.): "Section 2478 * * * provides that: 'Any life insurance effected by a husband on his own life shall, in case of his death, inure to the benefit of his widow and children; and the money thence arising shall be divided between them according to the law of distribution, without being in any manner subject to the debts of the husband, whether by attachment, execution or otherwise.' * * * After careful consideration of the Tennessee statutes and the decisions of the Supreme Court of Tennessee in reference thereto, I am of the opinion that these statutes do not exempt, in favor of the husband, during his life, policies of insurance upon his life, payable either to himself or to his estate, but merely exempt the proceeds of such policies, after his death, for the benefit of his widow and children or next of kin, free from the claims of his creditors. It is apparent from the face of these statutes that they create no exemption in favor of the husband himself, a construction which is emphasized by the fact that the Tennessee statute creating exemptions in favor of the heads of families does not include policies of insurance upon their own lives. Code Tenn., 1858, § 2391 (Shannon's Code, § 3794). Nor is there anything in either of these statutes indicating that it was intended to create any exemption, even in favor of the wife and children, during the life of the husband. On the contrary, § 2478 (Shannon's Code, §. 4231) by its terms applies only in case of death of the husband, and provides for the division of the proceeds according to the law of distributions. And while § 2294 (Shannon's Code, § 4030) does not in terms refer to the husband's death, the fact that it was intended to apply only after his death is shown, not merely by its being found in the chapter relating to the administration of estates, but also by the provision that the insurance 'shall inure to the benefit of the widow and next of kin, to be distributed as personal property;' such provision being manifestly applicable only after the husband's death."

Correspondingly, where the wife is in partnership with her husband, and the husband dies and the partnership becomes bankrupt, the proceeds of insurance policies, taken out by the husband in favor of his wife, are

not, in general, exempt from the claims of partnership creditors, since the statute does not attempt to exempt such proceeds from the beneficiary's own debts, but only from the debts of the deceased.

In re Day, 23 A. B. R. 785, 175 Fed. 1022 (D. C. Tenn.).

Married Woman's Separate Estate.—As to the bearing of the Tennessee statutes upon the married woman's separate estate, where she has embarked it in partnership enterprise, see In re Day, 23 A. B. R. 785 (D. C. Tenn.).

§ 1004. **Payable Absolutely to Third Person Do Not Pass.**

Page 558, note 79. Obiter, In re White, 23 A. B. R. 90, 174 Fed. 333 (C. C. A. N. Y.), quoted at § 1006.

§ 1005. **Payable to Bankrupt, His Estate or Personal Representatives, Pass.**

Page 558, note 81. See, in addition, In re Moore, 23 A. B. R. 109, 173 Fed. 679 (D. C. Tenn.).

§ 1006. **If Payable Conditionally, Contingently or Partly to Bankrupt's Estate, as "Endowment" and "Tontine" Policies; Policies Assigned as Security, etc.**

Page 559. Thus, as to policies payable to the wife or if the wife dies first, then to the bankrupt's estate, the bankrupt's contingent interest passes to the trustee; likewise where the policy contains the added proviso that the bankrupt himself may at any time surrender the policy for "paid up" insurance or other value.

In re White, 23 A. B. R. 90, 174 Fed. 333 (C. C. A. N. Y.): "The district judge was of opinion that the wife of the bankrupt was the legal owner of the policy; that it was her property, and if the insured had the option of terminating her ownership he had not exercised it. But we think the policy is the property of the husband; that the contract is made with him and that the wife's interest depends on the contingency of her surviving him. If the property in the policy were absolutely the wife's, the insurance would be payable upon her death to her estate. Certainly the bankrupt has an interest in the policy. If he survive his wife the insurance will be payable not to her estate, but to him or to his estate or to a beneficiary designated by him. This is a vested future interest. Besides this, though not obliged by the contract to do so, the company is willing, apparently under the option given the insured to surrender the policy for paid-up insurance or other value, to pay the sum of \$1,804.23 upon its surrender. The situation is exactly the same as if the policy contained a stipulation for a cash surrender value. *Hiscock v. Mertens*, 205 U. S. 202, 17 Am. B. R. 483, affirming this court in 15 Am. B. R. 701, 142 Fed. 445. These are clearly interests of the bankrupt which go to the trustee under § 70a (5) of the Bankruptcy Act, subject, of course, to the privilege therein reserved to the bankrupt to keep the policy free from the claims of his creditors participating in the distribution of his estate by paying its value, \$1,804.23, to the trustee."

Or may change the beneficiary.

In re Hettling, 23 A. B. R. 161, 175 Fed. 65 (C. C. A. N. Y.).

Page 559, note 84. See, in addition, *In re Wolff*, 21 A. B. R. 452, 165 Fed. 984 (D. C. N. Y.), quoted at § 1007.

Page 560, note 86. See, in addition, *In re Wolff*, 21 A. B. R. 452, 165 Fed. 984 (D. C. N. Y.), quoted at § 1007.

Page 560, note 87. See, in addition, *In re Wolff*, 21 A. B. R. 452, 165 Fed. 984 (D. C. N. Y.), quoted at § 1007.

§ 1007. Change of Beneficiary.

Page 560, note 88. Apparently, but obiter, *In re Whelpley*, 22 A. B. R. 433, 169 Fed. 1019 (D. C. N. H.); apparently contra, but obiter because exempt, *In re Pfaffinger*, 21 A. B. R. 255, 161 Fed. 526 (D. C. Ky.); compare, partially pro, though not squarely on the point, *In re Hetting*, 23 A. B. R. 161, 175 Fed. 65 (C. C. A. N. Y.).

Page 560. Compare, though not placed squarely on the ground, *In re Wolff*, 21 A. B. R. 452, 165 Fed. 984 (D. C. N. Y.): "The policy was made payable to the wife of the bankrupt, 'if living, if not, then to the assured's executors, administrators or assigns, subject to the right of the assured to change the beneficiary.' * * * The provision for the changing of beneficiaries is as follows: 'This policy is issued with the express understanding that the assured may, provided this policy has not been assigned, change the beneficiary, or beneficiaries, at any time during the continuance of this policy, by filing with the society a written request, duly acknowledged, accompanied by said policy.' It will be seen by this that the consent of the wife was not necessary to a change of beneficiary. Further, an option was given to the assured, if living at the time of the payment of the last premium, to receive a cash dividend, and to draw the entire cash value of the policy according to a certain table, together with this dividend, or to choose any one of several other plans which have nothing to do with this particular case. * * * In the present case, the policy is payable to the wife, if living at the time of the death of the bankrupt. This in terms makes her estate contingent upon survivorship, and the insured, as has been stated above, was given the privilege of changing the beneficiary, or, if he survived the full period, of diverting the payment from the wife by acceptance of certain of the conditions. The policy was therefore in the nature of what is sometimes called a semitontine policy, payable to the bankrupt at a certain date, or, if he should die before that time, to the wife if living. The latter form was passed upon in the case of *In re Diack*, 3 Am. B. R. 723 (D. C.), 100 Fed. 770, and the wife was there held to be entitled only to the proportionate part of the policy represented by the premiums which she had actually paid. The same idea has been expressed in a number of cases (*In re Boardman* [D. C.] 4 Am. B. R. 620, 103 Fed. 783; *In re Phelps*, 15 Am. B. R. 170; *In re Coleman*, 14 Am. B. R. 461, 136 Fed. 818, 69 C. C. A. 496), and has been followed in the courts of the state of New York in *Waldron v. Becker*, 33 Misc. 182, 68 N. Y. Supp. 402. In those cases it has been stated that the only policies which are entirely exempt under the state statutes, such as the New York domestic relations law above mentioned, are those in which the wife is the sole beneficiary. The result of this would seem to be that the trustee in bankruptcy was entitled to claim as of the date of adjudication the surrender value of whatever portion of the policy in question had been obtained or had accrued from the premiums paid by the bankrupt himself. A loan having been made by the Equitable Life Assurance Society, and the policy assigned as security, it makes no difference

whether this loan was procured for the benefit of Mr. or Mrs. Wolff, inasmuch as they both joined therein. Inasmuch as the surrender value was at all times security for the loan, the surrender value was thereby reduced to the extent of the principal of the loan with interest, and this should be deducted at the outset. The premiums from the date of the loan to the time of adjudication were all paid by Mrs. Wolff, and she has therefore in equity become entitled to whatever proportion of the surrender value has been acquired through the payment of these premiums."

§ 1008. All Such Pass, Provided Interest of Bankruptcy Have Actual Value.

Page 561. All such policies pass even though no cash surrender value be provided for by the terms of the policy.

In re White, 23 A. B. R. 90, 174 Fed. 333 (C. C. A.), quoted ante, § 1006; In re Hettling, 23 A. B. R. 161, 175 Fed. 65 (C. C. A. N. Y.).

§ 1009. Bankrupt Required to Execute Assignment to Effect Transfer.

Page 561, note 90. Post, §§ 1115, 1835; ante, § 460; In re Wolff, 21 A. B. R. 452, 165 Fed. 984 (D. C. N. Y.), quoted on other points at § 1007. Compare same rule as to licenses, In re Wiesel & Knaup, 23 A. B. R. 59, 173 Fed. 718 (D. C. Pa.), and ante, § 969.

§ 1016. Cash Surrender Value Not Expressly Provided for in Policy.

Page 566, note 102. See, in addition, In re White, 23 A. B. R. 90, 174 Fed. 333 (C. C. A. N. Y.), quoted at § 1006.

§ 1018½. Procuring Insurance in Fraud of Creditors.

Under what circumstances the buying of insurance or the payment of premiums is a fraud on creditors, is in general a question of State law and comes more appropriately under the subject of fraudulent transfers voidable by the trustee.

See, for general subject of fraudulent transfers, § 1216, et seq.

It has been held that the trustee may recover from an insurance company money paid by the bankrupt while insolvent, as the purchase price of an annuity on his own life not to begin until a future time not yet arrived, notwithstanding the bona fides of the insurance company; this being held on the doctrine that the good faith of the transferee is an insufficient defense where the consideration moving from him is wholly executory.

Smith v. Mut. Life Ins. Co., 19 A. B. R. 707, 158 Fed. 365 (D. C. Mass.), also, see post, § 1219½.

§ 1019. Rights of Action on Contracts and for Injury, etc., to Property Pass.

Page 568, note 106. For the general subject of rights of action on contracts passing and not passing to the trustee, see post, § 1144, et seq.

Page 569, note 107. Instance, judgment for damages notwithstanding claim that such judgment had passed to creditor of bankrupt by levy under statutory provision, prior to bankruptcy, *Mining Co. v. R. R. Co.*, 18 A. B. R. 492.

Malicious attachment of corporate property is not a personal tort, but is an injury to property passing to the trustee in bankruptcy of the corporation. *Hansen Mercantile Co. v. Wyman, Partridge & Co.*, 22 A. B. R. 877, 105 Minn. 491, 117 N. W. 926.

Page 569. And contracts to buy on future delivery pass, where the trustee stands ready to pay cash on delivery, and the contract is not dependent upon future dealings between the vendor and the original vendee.

In re Niagara Radiator Co., 21 A. B. R. 55, 164 Fed. 102 (D. C. N. Y.).

A contract of settlement by a debtor with the trustee in bankruptcy of a creditor passes to and binds the trustee in bankruptcy of the debtor.

In re Baumblatt, 18 A. B. R. 496, 156 Fed. 422 (D. C. Pa.).

A right of action for wrongful attachment arising prior to bankruptcy passes to the trustee.

Hansen v. Wyman, 21 A. B. R. 398, 105 Minn. 491, 117 N. W. 926.

It has been held to be a "right of action for injury to property," passing to the trustee, that a bankrupt has lost money in carrying out a contract induced by false representations.

In re Harper, 23 A. B. R. 918, 175 Fed. 412 (D. C. N. Y.).

§ 1020. But Not Torts for Injury to Person.

A right of action for slander will not pass to the trustee.

Dillard v. Collins, 25 Gratt. 343.

Nor for libel or malicious prosecution.

In re Haensell, 1 A. B. R. 286, 91 Fed. 355 (D. C. Calif.); *Noonan v. Orton*, 34 Wis. 259, 17 Am. Rep. 441; *Francis v. Burnett*, 84 Ky. 223.

Nor will a right of action for personal injury to the bankrupt, caused by a street car accident, pass to the trustee.

Sibley v. Nason, 22 A. B. R. 712, 196 Mass. 125.

Nor, in general, for malicious attachment.

Brewer v. Dew, 11 M. & W. 625.

Nor for negligence of an attorney.

(Eng.) *Wetherell v. Julius*, 10 C. B. 267.

Nor for malicious trespass.

Rogers v. Spence, 12 Cl. & Finn. 700; *Rose v. Buckett*, 2 K. B. D. 449.

Thus, it has been held that the purely personal tort of fraudulently recommending a person as trustworthy or solvent does not pass to the trustee.

(1867) *In re Crockett*, 2 Ben. 514, Fed. Cas. No. 3402; obiter, *Hansen Mercantile Co. v. Wyman, Partridge & Co.*, 22 A. B. R. 877, 105 Minn. 491, 177 N. W. 926; *Zabriskie v. Smith*, 13 N. Y. 322.

Such rights of action will not pass to the trustee, for they do not come under class 6 nor do they come under the general rule, namely, property which was capable of being transferred by the bankrupt. Such rights of action are not assignable nor can they be subjected by legal process.

It has been held that a corporation cannot bring an action *ex delicto* for a purely personal tort, nor can it be awarded purely personal damages, but that malicious attachment of corporate property is not a personal tort, but gives rise to a cause of action for injury to property, which passes to the trustee in bankruptcy of the corporation.

Hansen Mercantile Co. v. Wyman, Partridge Co., 22 A. B. R. 877, 105 Minn. 491, 117 N. W. 926. But, compare, *Noonan v. Orton*, 34 Wis. 259. Compare, *Francis v. Burnett*, 84 Ky. 23; *Slauson v. Schwabacher*, 4 Wash. 783, 31 Pacific 329.

§ 1022. Exempt Property Does Not Pass.

Page 570, note 115. *In re Goodman* (*Goodman v. Curtis*), 23 A. B. R. 504, 174 Fed. 644 (C. C. A. Ala.).

Page 571. First Nat'l Bk. of *Sayre v. Bartlett*, 21 A. B. R. 88, 35 Pa. Super. Ct. 593: "We think it very clear that the language 'estate of the bankrupt' as used in the Act of 1898 does not include the exempted property, but only such as passes to the trustee."

But if not claimed as exempt, it will pass.

In re Driggs, 22 A. B. R. 621, 171 Fed. 897 (D. C. N. Y.).

§ 1023. Not Unconstitutional for Lack of "Uniformity" as to Exemptions.

Page 572. One of the cardinal principles of the Bankruptcy Act is to grant to creditors only those rights which would have been theirs had bankruptcy not supervened, saving to the bankrupt and his family every right and exemption which would have been theirs as against creditors enforcing their claims by ordinary judicial process.

In re Cohn, 22 A. B. R. 761, 171 Fed. 586 (D. C. N. Dak.).

§ 1024. No Title to Exempt Property Passes.

Page 572, note 116. See, in addition, *Paramore & Ricks*, 19 A. B. R. 130, 156 Fed. 211 (D. C. N. Car.); *In re Edwards*, 19 A. B. R. 632, 156 Fed. 794 (D. C. Ala.); *Zumpfe v. Schultz*, 20 A. B. R. 916, 35 Pa. Super. Ct. 106, quoted at § 1107; *Snyder v. Guthrie*, 24 A. B. R. 58 (Pa. Court of Common Pleas).

Page 573. *In re Bailey*, 24 A. B. R. 201, 176 Fed. 990 (D. C. Utah): "The title to the homestead property did not pass to the trustee. The fact that it was mortgaged to certain creditors did not make it assets to be administered in bankruptcy."

Page 575, note 118. *In re Mayer*, 6 A. B. R. 117, 108 Fed. 599 (C. C. A. Wis.); *Finley v. Poor*, 10 A. B. R. 378, 121 Fed. 739 (C. C. A. Ky.).

§ 1025. Date of Adjudication Fixes Right to Exemptions.

Page 575, note 119. *In re Goodman*, 23 A. B. R. 504, 174 Fed. 644 (C. C. A. Ala.).

Some decisions say that the right of a bankrupt to his exemption is to be determined as of the date when it is claimed. *In re O'Hara*, 20 A. B. R. 714, 162 Fed. 325 (D. C. Pa.); also, *In re Donahey*, 23 A. B. R. 795, 176 Fed. 458 (D. C. Pa.). These cases thus, apparently, attempt to create a new date of cleavage, that is, the date when the exemption is claimed. Inasmuch as the situation in most of the decided cases has been the same at the time of the filing of the schedules as at the date of the adjudication, these decisions must be taken as obiter dicta so far as concerns the validity of this new date of cleavage. That the mere date of filing a schedule, should be a determining fact for the establishment of rights of property is not to be conceded. A more certain and logical date would be the date of adjudication, as above enunciated. A new date of cleavage should not be thus introduced into bankruptcy law.

Page 575. Obiter, *In re Youngstrom*, 18 A. B. R. 572, 153 Fed. 97 (C. C. A. Colo.): "The present case, however, presents the question: At what point of time must the bankrupt be entitled to a particular exemption under the State laws to have it allowed and set apart under the saving and protecting provisions of the Bankruptcy Act? The answer must, of course, be found in that act. Naturally, it would be expected that this point of time would not be later than the date as of which the general estate of the bankrupt is wrested from his dominion and vested in his trustee for the benefit of the creditors. And such, we think, is actually and plainly the effect of the provisions before set forth. Thus it is declared, in § 6, that the exemptions to be allowed are those prescribed by the State laws in force 'at the time of the filing of the petition,' and, in § 70a, that, upon his appointment and qualification, the trustee shall be vested, by operation of law, with the title of the bankrupt, 'as of the date he was adjudged a bankrupt,' to all property, not exempt, which 'prior to the filing of the petition' he could by any means have transferred, or which might have been levied upon and sold under judicial process against him. Other provisions strengthen this view, notably the requirement of § 7, cl. 8, that a voluntary bankrupt shall claim his exemptions at the time of filing his petition, and that an involuntary bankrupt shall claim them within ten days after the adjudication, unless further time is granted. Indeed, we think the statute admits of doubt only in respect of whether the right to any claimed exemption is to be determined as of the time of the

filing of the petition or as of the time when the debtor was adjudged a bankrupt. That it is to be determined as of the earlier date is suggested by those provisions of § 6, § 7, cl. 8, and § 70a, cl. 5, which make the time of the filing of the petition of special significance, and that it is to be determined as of the later date is suggested by the provision in § 70a that the trustee shall be vested with the title of the bankrupt as of the date he was adjudged a bankrupt. But, as the facts of the present case do not require that we determine this matter, we pass it, observing, first, that the present act differs from that of 1867 in that by § 14 of the latter the trustee became vested with the title of the bankrupt as of the date of the commencement of the proceedings; and, second, that the Circuit Court of Appeals of the Seventh Circuit seems to regard the date when the debtor was adjudged a bankrupt as controlling, as is shown *In re Mayer*, 6 Am. B. R. 117, 108 Fed. 599, 608."

Suggestively, *In re Mayer*, 6 A. B. R. 117, 108 Fed. 599 (C. C. A. Wis.): "The intention of this statute is, without doubt, that the creditors shall have all of the estate of a bankrupt which is not exempt, and that the bankrupt shall have the exemptions allowed by the law of his domicile determined by relation to the date of adjudication."

Page 575, note 120. Compare post, § 1166½.

Page 576. However, the mere perfecting of homestead exemption rights by filing a statutory "designation of homestead" may be done after the bankruptcy.

In re Culwell, 21 A. B. R. 614, 165 Fed. 828 (D. C. Mont.): "Yet the act does not make it a precedent to having a homestead allowed to the bankrupt claiming the same in the bankruptcy court, that the homestead shall have been designated pursuant to the State statute, prior to the date of adjudication in bankruptcy. * * * If the bankrupt has expeditiously and in good faith made his declaration, following the claim in the schedule, the property is exempt and cannot be retained for administration."

§ 1026. Bankruptcy Court's Jurisdiction over Exemptions Exclusive.

Page 577, note 123. See, in addition, *In re McCrary Bros.*, 22 A. B. R. 160, 169 Fed. 485 (D. C. Ala.).

§ 1027. Trustee Entitled to Possession Long Enough to Set Apart.

Page 577, note 124. Obiter, *First Nat'l Bk. of Sayre v. Bartlett*, 21 A. B. R. 88, 35 Pa. Super. Ct. 593. But no longer, *In re Soper*, 22 A. B. R. 868, 173 Fed. 116 (D. C. Neb.).

§ 1031. After Obtaining Possession, No Amendment of Claim of Exemptions to Defeat Lienholders as to Whom Property Not Exempt.

Page 578, note 128. But compare contra, in principle, *In re Soper*, 22 A. B. R. 868, 173 Fed. 116 (D. C. Neb.), wherein the court held that, after setting aside a chattel mortgage as a preference the mortgagor bankrupt could claim his exemptions freed from the mortgage lien! Also, compare § 1061, note.

§ 1032. Bankruptcy Court May Not Administer, but Only Determine and Set Apart Exemptions.

Page 579, note 129. See, in addition, *In re Blanchard*, 20 A. B. R. 417, 161 Fed. 739 (D. C. N. Car.); *In re Paramore & Ricks*, 19 A. B. R. 130, 156 Fed. 211 (D. C. N. Car.); *In re Blanchard & Howard*, 20 A. B. R. 422, 161 Fed. 797 (D. C. N. Car.); *In re Edwards*, 19 A. B. R. 632, 156 Fed. 794 (D. C. Ala.); *In re Maxson*, 22 A. B. R. 424, 170 Fed. 356 (D. C. Iowa); *In re MacKissic*, 22 A. B. R. 817, 171 Fed. 259 (D. C. Pa.); *In re Soper*, 22 A. B. R. 868, 173 Fed. 116 (D. C. Neb.).

Compare, limitations of rule where exemptions involved in marshalling of liens, *First Nat'l Bk. of Sayre v. Bartlett*, 21 A. B. R. 88, 35 Pa. Super. Ct. 593.

Compare, analogous rule where property found to belong to adverse claimants, *In re Smyth*, 21 A. B. R. 853 (D. C. Pa.). Also, see post, § 1797.

Page 580. *Nat'l Bk. of Sayre v. Bartlett*, 21 A. B. R. 88, 35 Pa. Super. Ct. 593: "It does not seem that the District Court has any control over it, except such as may be necessary to aid in having it appraised and set apart under the State laws. * * * We think it very clear that the language 'estate of the bankrupt' as used in the Act of 1898 does not include the exempted property, but only such as passes to the trustee."

In re Culwell, 21 A. B. R. 614, 165 Fed. 828 (D. C. Mont.): "The authority to control property in order to set it aside, if exempt, and to exclude it from the assets of the bankrupt estate, which are to be administered upon, does not in any way extend authority to the trustee to administer upon exempt property as though it were an asset of the estate."

Page 584, note 132. See, in addition, *In re Maxson*, 22 A. B. R. 424, 170 Fed. 356 (D. C. Iowa).

§ 1033½. And May Determine Priority Where Involved in Marshaling of Liens.

And, unquestionably, where the claim of exemptions is involved with conflicting claims of lienholders, the bankruptcy court must have jurisdiction to determine the priority and extent of such exemption right as against the lienholders and the trustee, although as to the liens on the exempted property itself, after determination of the question as to whether or not it is exempt, the bankruptcy court might not retain jurisdiction.

Liens on Exempt and Non-Exempt Property Set Aside as Preferences, Whether Revived as to Exempt Property.—It has been held that where a chattel mortgage covering both exempt and non-exempt property is set aside or surrendered as a preference, it does not retain its validity as against the exempt property but that the bankrupt is entitled to have the exempt property set off to him free therefrom. *In re Soper*, 22 A. B. R. 868, 173 Fed. 116 (D. C. Neb.). But see contra principle, that preferences have to do simply with property which otherwise would go into the estate, post, § 1292.

Page 585. *In re Highfield*, 21 A. B. R. 92, 163 Fed. 924 (D. C. Pa.): "But the referee also holds that the court has no authority over property claimed as

exempt except to appraise and set it off, leaving it to the State courts to work out and enforce conflicting claims with regard to it. This is no doubt true so far as concerns specific goods or property sought to be retained as exempt by the bankrupt. * * * But even here the court will undertake to inquire and decide whether by reason of fraud he has not forfeited his rights. And if so it is difficult to see why it may not do so, also, where the question is whether for any reason he has not waived or lost them. The distinction would seem to be that while the bankruptcy court has no jurisdiction over the property claimed as exempt once the right to it has been established, it may, preliminary to that, determine whether for any reason the right cannot be asserted."

§ 1034. Waiver of Exemptions in Notes.

Page 585, note 136. See, in addition, First Nat'l Bk. of Sayre *v.* Bartlett, 21 A. B. R. 88, 35 Pa. Super. Ct. 593, quoted on other points at §§ 1022, 1032, 1100. Contra, *In re Renda*, 17 A. B. R. 522, 149 Fed. 614 (D. C. Pa., distinguished in *Zumpfe v. Schultz*, 20 A. B. R. 916, 35 Pa. Super. Ct. 106).

Page 586, note 137. Instance, First Natl. Bk. of Sayre *v.* Bartlett, 21 A. B. R. 88, 35 Pa. Super. Ct. 593. But the bankruptcy court may not refuse to set apart homestead exemption because of an apparent scheme to prefer certain creditors on the eve of bankruptcy by confessing judgment on some of such waiver notes, *In re Batten*, 22 A. B. R. 270, 170 Fed. 688 (D. C. Va.).

Page 587, note 137. Instance of waiver of exemptions in lease, *In re Highfield*, 21 A. B. R. 92, 163 Fed. 924 (D. C. Pa.).

Amendment of 1910.—What effect the Amendment of 1910 to § 47, by which the trustee is to be deemed vested with all the rights, powers and remedies of a creditor holding a lien by legal or equitable process on property in his custody, will have in this regard has not yet been determined. There is strong reason for believing that the trustee's custody will be held a sufficient levy in behalf of creditors holding exemption waiver notes and other similar rights, to establish for them their special rights.

§ 1035. Property Not Exempt as to "Necessaries," "Manual Work and Labor," "Unpaid Purchase Price" or Judgments for Torts.

As, for instance, wages in States where wages are exempt as to all creditors, except that a certain per cent thereof are not exempt as to creditors for necessities.

Maas v. Kuhn, 22 A. B. R. 91 (N. Y. Sup. Ct. App. Div.).

Ten Per Cent. of Salary until Entire Judgment Paid, Whether Effective Levy or Wages Earned after Adjudication.—The New York law providing that ten per cent. of the debtor's salary shall not be exempt from levy upon certain judgments, and that the lien of the levy shall continue until the entire judgment is paid, has been held not to cover wages earned after adjudication, though under one continuous employment. See ante, § 451; post, § 2678½. Also see *In re Sims*, 23 A. B. R. 899, 176 Fed. 645 (D. C. N. Y.), quoted post, § 2678½.

Page 587, note 138. Compare peculiar and apparently erroneous ruling, *In re Strickland*, 20 A. B. R. 923 (Ref. Ga.), allowing a claim for wages precedence over homestead as a matter of priority in bankruptcy!

"No Exemption against Purchase Price" Does Not Include Lender of Money to Make Purchase.—Where the statute provides that there shall be no exemption against the purchase price, such non-exemptability refers only to the claim of the seller himself and cannot be extended to cover that of one who has made a loan by which the property has been purchased. *In re Bailes*, 23 A. B. R. 789, 176 Fed. 460 (D. C. S. C.). See post, § 1107.

Page 589, note 142. Inferentially, *Maas v. Kuhn*, 22 A. B. R. 91 (N. Y. Sup. Ct. App. Div.).

Page 590. *In re Maxson*, 22 A. B. R. 424, 170 Fed. 356 (D. C. Iowa): "But this does not destroy its character as a homestead nor defeat the general exemption thereof, and whether or not it may be subjected to certain specified debts will not be determined by the court of bankruptcy, for its jurisdiction over exempt property when it determines it to be such is to set it apart to the bankrupt, and, if it is liable for specific debts, the creditor to whom it is so liable must proceed to subject it to the payment thereof by proper proceedings in the State court."

Amendment of 1910.—What effect the Amendment of 1910 to § 47 (b) (2), by which the trustee is to be deemed vested with all the rights, powers and remedies of a creditor holding a lien by legal or equitable process on property in his custody, will have in this regard has not yet been determined. There is strong reason for holding that such custody may sufficiently operate as a levy in behalf of creditors holding labor claims or claims for unpaid purchase price or claims of similar character.

§ 1037. Exempt Property Not in Possession or Already Set Off Not to Be Retaken, for Benefit of Parties as to Whom Not Exempt, nor of Lienholders.

Page 591, note 146. A fortiori, on principle, *In re Soper*, 22 A. B. R. 868, 173 Fed. 116 (D. C. Neb.).

§ 1038. State Law of Domicile Governs.

Page 592, note 147. *In re Irwin*, 23 A. B. R. 487, 177 Fed. 284 (C. C. A. Pa.).

It is the law of the State of his domicile alone that fixes his exemption rights.

Page 592. Obiter, *In re Philip Brady*, 21 A. B. R. 364, 169 Fed. 152 (D. C. Ky.): "If the bankrupt resides in Tennessee (which by the way was well enough shown to be the fact and so stated in our former opinion) his exemptions, as his response insists should be the case, will most probably be governed by the law of that State, and all questions in that connection can be easily presented and determined when the schedules are filed and exemptions claimed. He was adjudicated a bankrupt in Kentucky because his principal place of business had been in that State and not because of residence here."

§ 1040. State Law Governs Kind and Amount and Person Entitled.

The State law governs the kind and the amount of property allowed as exempt, etc.

Or the federal homestead law in cases involving federal homestead, of course. *In re Cohn*, 22 A. B. R. 761, 171 Fed. 368 (D. C. N. Dak.).

§ 1041. State Law Governs.

Page 593. *In re McCrary Bros.*, 22 A. B. R. 161, 169 Fed. 485 (D. C. Ala.): "In determining what exemptions a person is entitled to, the United States courts will follow the rule as laid down by the State statute and as interpreted by the Supreme Court of the State."

Page 593, note 150. See, in addition, *In re Youngstrom*, 18 A. B. R. 572, 153 Fed. 97 (C. C. A. Colo.); *In re Pfeiffer*, 19 A. B. R. 230, 155 Fed. 592 (D. C. Pa.); *In re Giles*, 19 A. B. R. 306, 158 Fed. 596 (C. C. A. Ohio); impliedly, *In re Letson*, 19 A. B. R. 506, 157 Fed. 78 (C. C. A. Okla.).

Page 593, note 150. **Federal Homesteads.**—Of course, by "State law" is meant law other than the Bankruptcy Act itself. Federal homesteads are, of course, governed by the federal law. *In re Cohn*, 22 A. B. R. 761, 171 Fed. 568 (D. C. N. Dak.).

§ 1042. As Construed by Highest State Tribunal.

Page 593, note 151. See, in addition, *In re Pfeiffer*, 19 A. B. R. 230, 155 Fed. 892 (D. C. Pa.); *In re Giles*, 19 A. B. R. 306, 158 Fed. 596 (C. C. A. Ohio); *In re McCrary Bros.*, 22 A. B. R. 161, 169 Fed. 485 (D. C. Ala.), quoted at § 1041; *In re Youngstrom*, 18 A. B. R. 572, 153 Fed. 97 (C. C. A. Colo.).

§ 1045. Whether Wife May Claim Exemptions Where Bankrupt Husband Neglects.

The State law determines what bankrupts may claim exemptions, and in States where the wife may claim exemptions on failure of the husband to do so, she may claim exemptions in bankruptcy under the same circumstances.

Page 594, note 155. Also, *In re Youngstrom*, 18 A. B. R. 572, 153 Fed. 97 (C. C. A. Colo.); compare, instance, *In re Jennings & Co.*, 22 A. B. R. 160, 166 Fed. 639 (D. C. Ga.).

§ 1046. Converting Nonexempt Property into Exempt, on Eve of Bankruptcy.

Page 594. *In re Letson*, 19 A. B. R. 506, 157 Fed. 78 (C. C. A. Okla.): "In the absence of a local rule to the contrary, and there is none in Oklahoma, the mere use by an insolvent of nonexempt funds or assets in acquiring a homestead does not make it subject to the claims of creditors."

Page 594, note 156. **Converting Nonexempt Property into Exempt Property on Eve of Bankruptcy to Give Preference to Certain Creditors Holding Notes Wherein Exemptions Waived.**—*In re Batten*, 22 A. B. R. 270, 170 Fed. 688 (D. C. Va.).

§ 1047. Instances of Exemptions Allowed and Disallowed in Bankruptcy in Accordance with State Law.

Page 594, note 157. **Failure "to Act in Perfect Good Faith" in Georgia.**—In re Cotton & Preston, 23 A. B. R. 586 (Ref. Ga.).

The making of a materially false statement in writing to obtain credit, whilst a bar to the bankrupt's discharge, is not, in and of itself, a valid objection to the allowance of the homestead exemption in Georgia. In re Cotton & Preston, 23 A. B. R. 586 (Ref. Ga.).

Failure to make "full and fair disclosure" in Georgia refers only to personal property, not to real estate. In re Cotton & Preston, 23 A. B. R. 586 (Ref. Ga.).

Page 595, note 157. **Iowa.**—Exemptions to bankrupt heir out of decedent's estate. In re Eash, 19 A. B. R. 738, 157 Fed. 996 (D. C. Iowa).

Delaware—Wearing Apparel Exempt to Partners.—In re Evans & Co., 19 A. B. R. 752, 158 Fed. 153 (D. C. Del.).

Page 595, note 157. **North Carolina.**—In addition, see In re Gartner Hancock Lumber Co., 22 A. B. R. 898, 173 Fed. 153 (D. C. N. C.).

Page 596, note 157. And consent of the other partners must be shown. In re Monroe & Co., 19 A. B. R. 255, 156 Fed. 216 (D. C. N. Car.).

The selection from the firm assets must be in kind; allowance of the exemption out of the proceeds of sale is not proper. In re Blanchard, 20 A. B. R. 417, 161 Fed. 793 (D. C. N. Car.).

An infant who, although he contributed to the capital stock of a partnership, assented to being ignored in all firm transactions, is not entitled to a personal property exemption out of the assets of the firm. In re Floyd & Co., 18 A. B. R. 827, 154 Fed. 757 (D. C. N. C.).

Vermont, etc.—See, in addition, In re Golden Rule Mercantile Co., 21 A. B. R. 397 (Ref. Okla.).

Exemptions from Partnership Assets.—In Georgia. In re Jennings & Co., 22 A. B. R. 160, 166 Fed. 639 (D. C. Ga.).

In Alabama. In re McCrary Bros., 22 A. B. R. 161, 169 Fed. 485 (D. C. Ala.).

Oklahoma.—No exemptions out of partnership assets as against partnership debts. In re Rushmore, 24 A. B. R. 55 (Ref. Okla.).

No Exemption against Purchase Price.—Refers only to original sellers, not to one who has loaned the money to make the purchase. In re Bailes, 23 A. B. R. 789, 176 Fed. 460 (D. C. S. C.). See, also, ante, § 1035.

Pension Money.—Pension money still in bankrupt's hands at time of adjudication, exempt in Vermont. In re Bean, 4 A. B. R. 53, 100 Fed. 262 (D. C. Vt.). Not exempt in Maine. In re Jones, 21 A. B. R. 536, 166 Fed. 337 (D. C. Me.).

Life Insurance Policies.—See ante, § 1003.

Page 597, note 157. **Ohio.**—Divorced woman having care of children entitled to homestead exemption. In re Giles, 19 A. B. R. 306, 158 Fed. 596 (C. A. Ohio).

Vermont and Maine.—In Vermont pension money in bankrupt's hands at time of filing petition, not changed in its nature in any way, is exempt. In re Bean, 4 A. B. R. 53, 100 Fed. 262 (D. C. Vt.). In Maine, it is not exempt. In re Jones, 21 A. B. R. 536, 166 Fed. 337 (D. C. Me.).

Colorado.—Wife claiming where bankrupt has absconded. In re Youngstrom, 18 A. B. R. 572, 153 Fed. 97 (C. C. A. Colo.).

Page 598, note 157. **Georgia.**—Compare, *In re Hargraves*, 20 A. B. R. 186, 160 Fed. 758 (D. C. Ga.); *Citizens Bk. v. Hargraves*, 21 A. B. R. 323, 164 Fed. 613 (C. C. A. Ga.).

Allowance from Proceeds of Sale.—*In re Hargraves*, 20 A. B. R. 186, 160 Fed. 758 (D. C. Ga.); *In re Hargraves*, 19 A. B. R. 238 (Ref. Ga.); *Citizens Bk. of Douglas v. Hargraves*, 21 A. B. R. 323, 164 Fed. 613 (C. C. A. Ga., reversing District Court and affirming referee, *In re Hargraves*).

Oklahoma.—Particular description of property claimed requisite. *In re Mathews*, 20 A. B. R. 369 (Ref. Okla.).

Abandonment of Business Homestead in Texas.—See, in addition, *In re Presnall*, 21 A. B. R. 905, 167 Fed. 406 (D. C. Tex.).

Federal Homestead—When Title Thereto Is Acquired, etc.—*In re Cohn*, 22 A. B. R. 761, 171 Fed. 568 (D. C. N. Dak.).

Change of Homestead—Designation of Homestead on Margin of Records.—*In Colorado. In re Youngstrom*, 18 A. B. R. 572, 153 Fed. 97 (C. C. A. Colo.).

Failure to Plat Homestead.—*In re Eash*, 19 A. B. R. 738, 157 Fed. 996 (D. C. Iowa).

Exemptions May Be Waived but Not Assigned.—*In Pennsylvania. In re Pfeiffer*, 19 A. B. R. 230, 155 Fed. 892 (D. C. Pa.).

Page 599, note 157. **"Head of Family."**—Wife, is, when bankrupt has absconded, in Colorado. *In re Youngstrom*, 18 A. B. R. 572, 153 Fed. 97 (C. C. A. Colo.).

Husband, living separate from wife by mutual consent, and wife getting property from him for separate support, husband no longer "head of family" in South Carolina. *In re Finklea*, 18 A. B. R. 738, 153 Fed. 492 (D. C. S. Car.).

Unmarried man paying board and tuition of sister at school, is not. *In re McGowan*, 22 A. B. R. 469, 170 Fed. 493 (D. C. S. C.).

Divorced man with minor son entitled to homestead in Ohio. *In re Rhodes*, 6 A. B. R. 173, 109 Fed. 117 (D. C. Ohio); likewise, divorced woman, *In re Giles*, 19 A. B. R. 306, 158 Fed. 596 (C. C. A. Ohio).

Wearing Apparel.—In cases of partners in Delaware. *In re Evans & Co.*, 19 A. B. R. 752, 158 Fed. 153 (D. C. Del.).

"Wearing Apparel."—Ring as wearing apparel. *In re Leach*, 22 A. B. R. 599, 171 Fed. 622 (C. C. A. Ky.).

Professional Tools.—"Tools of business," poultry dealer, entitled in Nebraska to horse and wagon, office furniture, scales, etc. *In re Conley*, 19 A. B. R. 200, 162 Fed. 806 (D. C. Neb.).

Failure "to Act in Perfect Good Faith" in Georgia.—See, in addition, *In re Dobbs*, 22 A. B. R. 801, 172 Fed. 682 (D. C. Ga.); *In re Dobbs*, 23 A. B. R. 569, 175 Fed. 319 (D. C. Ga.).

Household Goods Purchased with Wife's and Children's Earnings.—*In re Diamond*, 19 A. B. R. 811, 158 Fed. 370 (D. C. Ala.).

Mortgage Waiving Exemptions, Lien Not Lost by Selling Free from Liens by Consent, Rights Being Transferred to Proceeds.—*Citizens Bk. v. Hargraves*, 21 A. B. R. 323, 164 Fed. 613 (C. C. A. Ga.).

Land used for burial purposes. *Burdette v. Jackson*, 24 A. B. R. 127, 179 Fed. 229 (C. C. A. Md.).

§ 1048. But Time and Manner of Claiming and Setting Apart Exemptions Fixed by Act Itself.

Page 599, note 158. See, in addition, *In re Jennings & Co.*, 22 A. B. R. 160, 166 Fed. 639 (D. C. Ga.).

But statutory regulations of a State requisite to perfect the claim of exemption, such as the filing of declaration of homestead with some officer, must also be complied with.

In re Youngstrom, 18 A. B. R. 572, 153 Fed. 97 (C. C. A. Colo.): "The premises in controversy were not so designated until after the time of the filing of the petition and after the time when the owner was adjudged a bankrupt, so neither he nor his family was entitled to a homestead exemption therein at either of these times."

Page 600, note 159. Compare analogous, rule post, § 2199.

Page 600. Likewise, where the State statute requires itemization of the articles demanded as exempt, they must also be itemized in the bankrupt's schedules.

In re Mathews, 20 A. B. R. 369 (Ref. Okla.).

But this rule is simply confirmatory of the provisions of the Bankruptcy Act requiring such particular description. Were general description sufficient in State practice it would not necessarily be sufficient in bankruptcy, for the Bankruptcy Act controls the manner of claiming exemptions.

But probably, in most States, such regulations may be complied with after the bankruptcy.

In re Culwell, 21 A. B. R. 614, 165 Fed. 828 (D. C. Mont.): "I do not construe the Bankrupt Act as meaning that upon the trustee's qualifying, the bankrupt is deprived of all right to perfect his homestead exemption, provided in his schedules he claims a designated piece of realty as a homestead and as exempt, and provided he proceeds, under the State statutes, without delay, and provided always there is no fraud involved in the matter of the claim. * * * Yet the act does not make it a precedent to having a homestead allowed to the bankrupt claiming the same in the bankruptcy court, that the homestead shall have been designated pursuant to the State statute, prior to the date of adjudication."

Page 600, note 161. See post, § 1064, et seq.

§ 1051. Second Requirement—To Be Filed with Schedules.

But an extension of time for filing schedules, of course extends the time for filing the claim for exemptions.

In re O'Hara, 20 A. B. R. 714, 162 Fed. 325 (D. C. Pa.).

§ 1052. Third Requirement—Property to Be Particularly Described.

Page 603, note 169. See, in addition, In re Mathews, 20 A. B. R. 369 (Ref. Okla.).

§ 1053. Fourth Requirement—Description to Be as of Date of Adjudication, etc.

Page 604, note 172. Compare, impliedly, ante, § 1025; also, see impliedly contra, obiter, *In re O'Hara*, 20 A. B. R. 714, 162 Fed. 325 (D. C. Pa.).

§ 1054. Claiming Money When No Actual Money, but Only Goods in Estate.

Page 604, note 173. *In re Donahey*, 23 A. B. R. 796, 176 Fed. 458 (D. C. Pa.).

§ 1055. Claiming So Much Worth Out of Mass.

Page 605, note 174. See, in addition, *In re Mathews*, 20 A. B. R. 369 (Ref. Okla.).

§ 1056. Where Exemption Claimed in Mortgaged Property.

Page 605, note 175. Failure to note the distinction made in this paragraph was the evident origin of the decision in *In re Luby*, 18 A. B. R. 801, 155 Fed. 659 (D. C. Ohio).

And the bankruptcy court may sell the property clear and free from encumbrances and give the bankrupt his exemptions after payment of the prior mortgage.

In re Paramour & Ricks, 19 A. B. R. 126, 156 Fed. 208 (D. C. N. Car.); compare, also, *In re Paramour & Ricks*, 19 A. B. R. 130, 156 Fed. 211 (D. C. N. Car.).

§ 1057. Claiming "Proceeds" Where Property Still in Specie.

Page 605, note 176. See, in addition, *In re Pfeiffer*, 19 A. B. R. 230, 155 Fed. 892 (D. C. Pa.). But compare, contra, *In re Luby*, 18 A. B. R. 801, 155 Fed. 659 (D. C. Ohio), but in this case the bankrupt [or rather his wife] might have claimed as exempt the equity of redemption, describing the property and claiming merely the equity therein.

Page 65. *In re Donahey*, 23 A. B. R. 796, 176 Fed. 458 (D. C. Pa.): "It is further objected, however, that the exemption was not properly claimed, money and not property having been asked for. As it appears in the schedules, the claim is in terms 'for the proceeds of personal property, \$300;' which does not conform to the requirement of the statute. The debtor is called upon to designate the particular property which he desires to retain, which he has the right to do to the value of \$300, as determined by a due appraisal. But it is goods and not the proceeds of them that he is entitled to, and it is these, therefore, that he must specify and demand. *Hammer v. Freeze*, 19 Pa. 257; *In re Haskins* (D. C.), 6 Am. B. R. 485; *In re Wunder*, 13 Am. B. R. 701; *In re Pfeiffer*, 18 Am. B. R. 230; *In re Blanchard*, 20 Am. B. R. 417. He cannot, as here, claim money resulting from a sale. The case is not like *In re Renda*, 17 Am. B. R. 521, where, after the bankrupt had designated the goods which he desired to have set aside, they were sold by arrangement with the trustee, which, it was held, did not prevent him from coming in on the fund. Neither is it like *Burke v. Guarantee Title and Trust Co.*, 14 Am. B. R. 31, where specified property was claimed, the only objection to it being that it was not properly itemized."

§ 1061. Seventh Requirement—Claim to Be Made by Bankrupt, Not by Mortgagee, Assignee nor Other Third Person.

Page 606, note 181. **Whether Claim of Exemptions May Validate Fraudulent or Preferential Transfers.**—It has been held that a fraudulent transferee may not validate the transfer by setting up that the property was exempt, anyway. *Mitchell v. Mitchell*, 17 A. B. R. 389 (D. C. N. Car.); [1867] *Edmondson v. Hyde*, Fed. Cas. No. 4,285. And the same ruling has been made with reference to a preferential transfer, *In re Soper*, 22 A. B. R. 868, 173 Fed. 116 (D. C. Neb.). But it is possible under state rulings, that such claims, if made by the bankrupt himself may be effectual to validate the transfer. Compare ante, § 1031.

§ 1062. Wife Claiming Where Bankrupt Fails or Refuses to Claim.

Failure of the bankrupt to claim exemptions may, in States where a wife or child is entitled to make the claim in the event of the debtor's failure to do so, entitle the wife or child to make the claim in the bankruptcy court.

In re Luby, 18 A. B. R. 801, 155 Fed. 659 (D. C. Ohio).

Page 607. *In re Youngstrom*, 18 A. B. R. 572, 153 Fed. 97 (C. C. A. Colo.): "The bankrupt had been a merchant and part of his estate consisted of a stock in trade used and kept for the purpose of carrying on his business, the stock exceeding \$200 in value. As before stated, the referee found that shortly before the filing of the petition the bankrupt suddenly left the State with the apparent intention of never returning and of deserting his wife, who with him had constituted the family. The only reason assigned or advanced for the denial of this exemption is that one person, such as the wife here, could not be 'the said family' within the meaning of § 2563. It is quite true that a person residing alone is not, generally speaking, a family, but that does not answer the question here presented. Without doubt, there was a family prior to the husband's desertion. Of that family he was the head and so was entitled, under § 2562, to an exemption of \$200 in his stock in trade. We think the other section in providing that, whenever the head of a family shall die, desert, or cease to reside with the same, 'the said family' shall succeed to the right of exemption, plainly means that this right shall pass to the remaining portion of the family; that is, to the family as it was before, but minus the head, whether what remains be one or several persons. In this view the wife, as the remaining portion of the family, was entitled to this exemption."

In re Maxson, 22 A. B. R. 424, 170 Fed. 356 (D. C. Iowa): "It seems clear, therefore, that under the Iowa statute, the homestead right of the husband or wife in property occupied by either as a home cannot be defeated by any act of the other in whose name the legal title may be held. If the bankrupt in this case, therefore, had declared in her petition that she expressly waived the right to the homestead in the property scheduled by her, and thereafter made no effort to have the property set apart to her as exempt, this would not defeat the right of the husband to have the homestead set apart to him, so long as he continued to occupy the same as such. If this be not so, then the spouse who happens to hold the legal title to the home may deprive the

other, and other members of the family, thereof by proceedings in bankruptcy, and thus directly evade the provisions of the Iowa statute. Surely it was not intended that the Bankruptcy Act should have any such effect."

Compare, inferentially, *In re Seabolt*, 8 A. B. R. 62, 63 (D. C. N. Car.): "The law is well settled, therefore, that, although the owner of a homestead or a person entitled thereto die without having the same allotted in his lifetime, the same can be allotted at the instance of his minor child or children, if he leave such, or in the absence of minor children, at the instance of his widow."

There being no form prescribed for such an exigency, any reasonable manner would probably suffice, so it would seem. It has been held proper to make the claim by way of an intervening petition.

In re Maxson, 22 A. B. R. 424, 170 Fed. 356 (D. C. Iowa): "But if it should be held that the bankrupt has thus waived her right to the homestead, does this prevent the husband, who was one of the family occupying the homestead with her, from claiming it? On October 24th he also filed with the referee a petition in which he set forth that he was the husband of the bankrupt, a resident of Iowa, and as such was entitled to a homestead under the laws of that state in the real estate scheduled by the bankrupt. This was in effect an intervening petition by him claiming an interest in property in the custody of the court of bankruptcy, and is the proper method of making such claim."

Yet this claim must be made promptly, at any rate.

§ 1062½. Non-Bankrupt Partner in Partnership Bankruptcy.

Where the firm alone had been adjudicated bankrupt, it has been held that the bankruptcy court has no jurisdiction to set apart exemptions to an individual partner, who has not been adjudged bankrupt individually, out of his individual estate; that "the bankrupt" in such instances is the partnership, and that the sole power of the bankruptcy court to set apart exemptions is to set them apart to "the bankrupt."

In re Blanchard & Howard, 20 A. B. R. 422, 161 Fed. 797 (D. C. N. Car.).

But this seems an unnecessarily narrow construction.

§ 1064. Failure to Claim, or to Describe Particularly, Not Necessarily Fatal.

Thus, where failure to claim exemptions has been through advice of counsel, under a mistaken notion of the law, it will not be fatal.

. *In re Goodman*, 23 A. B. R. 504, 174 Fed. 644 (C. C. A. Ala.), quoted at § 1070½.

§ 1066. Claim May Be Inserted or Corrected by Amendment.

Page 608, note 187. See, in addition, *In re Maxson*, 22 A. B. R. 424, 170 Fed. 356 (D. C. Iowa); General Order No. 11: obiter, *In re Donahey*, 23 A. B. R. 796, 176 Fed. 453 (D. C. Pa.); impliedly, *In re Goodman*, 23 A. B. R. 504, 174 Fed. 644 (C. C. A. Ala.), quoted post, § 1070½.

Amendment may even be allowed where an estate has been reopened on the discovery of more assets, provided the bankrupt has not been guilty of bad faith.

In re Irwin, 22 A. B. R. 165, 177 Fed. 284 (D. C. Pa.).

But the court will not permit a waiver to be withdrawn and a claim for exemptions to be reasserted repeatedly; the bankrupt must not play battledore and shuttlecock with the exemption claim.

In re Pfeiffer, 19 A. B. R. 230, 155 Fed. 892 (D. C. Pa.).

§ 1069. Leave Liberally Granted.

Page 609, note 190. See, in addition, In re Irwin, 22 A. B. R. 165, 177 Fed. 284 (D. C. Pa.); In re Maxson, 22 A. B. R. 424, 170 Fed. 356 (D. C. Iowa); obiter (leave refused, In re Irwin, 23 A. B. R. 487, 174 Fed. 642 (C. C. A. Pa.), quoted at § 1070½.

Thus, even after an estate has been reopened on the discovery of more assets, the bankrupt may amend to claim exemptions therefrom, if he is not guilty of bad faith.

In re Irwin, 22 A. B. R. 165, 177 Fed. 284 (D. C. Pa.).

§ 1070½. Whether for Mere Laches.

It has been held that leave to amend may be refused for laches of the bankrupt.

In re Irwin, 23 A. B. R. 487, 174 Fed. 642 (C. C. A. Pa.): "While the rule allowing claims for exemptions to be amended is a liberal one, we think it ought not to be allowed after discharge in bankruptcy has been granted. In re Kean, 2 Hughes, 322 Fed. Cas. No. 7,630. In any event, an application to amend a claim for exemption should be made within a reasonable time after discovering the facts which will justify the amendment. The record of this case fails to show why the bankrupts, who discovered their additional assets in June, 1908, waited until the following December before applying for leave to amend their schedules."

But, it would seem, on principle, that such laches must involve more than mere delay; that there should be either fraud or third parties' rights involved.

Compare, In re Goodman, 23 A. B. R. 504, 174 Fed. 644 (C. C. A. Ala.): "In this case the bankrupt did not waive his exemptions, and he had notwithstanding his omission to set forth his claim in the schedules a clear legal right to the exemptions allowed by the laws of the State of Alabama; and we think he had a legal right to prefer his claim in the bankruptcy proceedings at any seasonable time while the property remained in the hands of the trustee unaffected by adverse rights. * * * There is no contention, aside from the omission in the schedules, that the claim was not asserted seasonably; in fact, reservation in the original petition suggested the right. * * * The mere failure to claim them in the schedules, which are amendable by the equity prac-

tice in General Order No. 11, ought not to be treated either as a legal or equitable estoppel. See *Burke v. Title & Trust Co.* (C. C. A.), 14 Am. B. R. 31, 134 Fed. 562, and *Remington on Bankruptcy*, §§ 1063-1070, inclusive. In this particular case it seems that the failure to specifically claim the exemptions in the schedules arose from the fact that the attorney who prepared the schedules for the bankrupt was ill informed as to the textual provisions of § 70 of the bankruptcy law, and advised his client that the claim for exemptions should be made later when the trustee should be appointed."

§ 1074. Must Set Aside "Soon as Practicable," and within Twenty Days.

Page 611, note 21. In *re Goodman*, 23 A. B. R. 504, 174 Fed. 644 (C. C. A. Ala.).

Page 611. General Order XVII follows up the statutory provision of § 47 (11) by laying down the rule that "the trustee shall make report to the court," etc.

In *re Soper*, 22 A. B. R. 863, 173 Fed. 116 (D. C. Neb.).

Page 612. The trustee is not only to file the report of exempted property, but is also under duty to give possession, as much as he himself has at any rate, to the bankrupt.

In *re Soper*, 22 A. B. R. 863, 173 Fed. 116 (D. C. Neb.).

But he is under no obligation to proceed against third parties in behalf of the bankrupt to gain possession of exempt property from them; unless perchance, such possession were obtained from the trustee himself.

§ 1079. Not Bound to Set Aside, if Bankrupt Not Entitled.

Page 612, note 207. But compare, In *re Rice*, 21 A. B. R. 202, 164 Fed. 509 (D. C. Pa.).

§ 1081. Who May Except to Trustee's Report of Exempted Property—Bankrupt and Creditors.

Page 613, note 209. In one case, In *re Rice*, 21 A. B. R. 202, 164 Fed. 509 (D. C. Pa.), it was held that the trustee must set apart the exemptions as claimed but might except—except to his own report! This would seem a violation of the maxim that the law does not require the doing of a vain thing.

§ 1082. Creditor Must File Exceptions within Twenty Days.

Page 613, note 211. See, in addition, In *re Amos*, 19 A. B. R. 804 (Ref. Ga.); In *re Cotton & Preston*, 23 A. B. R. 586 (Ref. Ga.).

Filing Additional Grounds of Objection after Twenty Days.—It has been held, also, that a creditor may not come in after the expiration of the twenty days and file additional objections. In *re Cotton & Preston*, 23 A. B. R. 586. But this holding should be carefully scrutinized.

Page 613. And exceptions filed afterward will be dismissed.

In re Amos, 19 A. B. R. 804 (Ref. Ga.).

§ 1084. Whether Exceptions to Be Verified.

Certainly, unless allegations or denials of facts are made in the exceptions there would be no sense in requiring verification—verification of legal conclusions.

Page 614, note 213. Compare rule that exceptions to receiver's accounts are to be verified. In re Ketterer Mfg. Co., 19 A. B. R. 646, 156 Fed. 719 (D. C. Pa.).

§ 1087. Conversely, Judgment of State Court as to Exemptions in Same Fund, Res Judicata.

Page 615, note 216. In re Eash, 19 A. B. R. 738, 157 Fed. 996 (D. C. Iowa), administration of decedent's estate where heirs entitled to exemptions.

§ 1089. Selling Exemptions with Other Assets as Entirety and Allowance Out of Proceeds.

Page 616, note 218. See, in addition, In re Ansley Bros., 18 A. B. R. 457, 153 Fed. 983 (D. C. N. Car.); In re Arnold, 22 A. B. R. 392, 169 Fed. 1000 (D. C. Ga.); obiter, In re Donahey, 23 A. B. R. 796, 176 Fed. 458 (D. C. Pa.).

Page 616, note 219. See, in addition, In re Ansley Bros., 18 A. B. R. 457, 153 Fed. 983 (D. C. N. Car.); In re Donahey, 23 A. B. R. 796, 176 Fed. 458 (D. C. Pa.).

Page 616, note 220. Compare, In re Donahey, 23 A. B. R. 796, 176 Fed. 458 (D. C. Pa.).

And it has been held, in some cases, that where the exempt property is sold at the bankrupt's request or consent along with the remainder of the assets, in bulk, he will be charged his percentage of the difference between the appraised value of the property and what it actually brought at the sale.

In re Arnold, 22 A. B. R. 392, 169 Fed. 1000 (D. C. Ga.): "What the bankrupt would have received if he had not consented to the sale of the stock of merchandise as a whole would have been the particular articles designated and set apart for him by the trustee. On account of the expected benefit he would receive from the sale of the stock as a whole, he agreed to it, and I do not think he can now, as against the creditors of the estate, claim anything more than the proportion that the purchase price bears to the inventory value of the stock. To hold otherwise would be to allow the bankrupt to take several hundred dollars from the proceeds of that portion of the stock of goods which was left in the hands of the trustee for the benefit of creditors after the goods allowed the bankrupt as an exemption had been separated therefrom. I do not think this would be right."

Also, see In re Ansley, 18 A. B. R. 457, 153 Fed. 983 (D. C. N. Car.).

On the other hand it has been held that where, with a bankrupt's consent, his entire estate is converted into cash after notice to the creditors and without objection on their part, they cannot be heard to complain of an allowance to him of a homestead exemption from the proceeds of the sale without deduction of the costs of administration.

Hardw. Co. v. Huddleston, 21 A. B. R. 731, 167 Fed. 433 (C. C. A. Ga.).

§ 1091. Nor to Refuse to Set Apart until Costs Paid.

The trustee must not refuse to set apart exemptions until costs or expenses of administration are paid.

Hardware Co. v. Huddleston, 21 A. B. R. 731, 167 Fed. 433 (C. C. A. Ga.): "It is contended in the petition for revision that the costs of the administration should be deducted from the allowance to the bankrupt. This contention cannot be sustained, for the reason that the homestead exemption is not subject to tax or charge of any character and to the extent of the burden which may be imposed in the way of costs in bankruptcy proceedings would be a diminution of the constitutional provision relating to homestead exemptions."

§ 1093. Rent, Storage and Other Charges Pending Setting Off.

Page 618, note 230. **Bankrupt Selling Goods after Filing of Bankruptcy Petition—Amounts Received Deducted from Exemptions.**—It has been held in one case that, where a bankrupt, after the filing of the petition against him and before seizure by the marshal, has continued selling in the due course of trade, the amounts received by him are to be deducted from his exemptions. In *re Ansley Bros.*, 18 A. B. R. 457, 153 Fed. 983 (D. C. N. Car.). But this is doubtful law; for the mere filing of the petition against him does not convert him into a trustee for creditors, nor prevent him from doing business, under the present law [see § 1119, et seq.]. If creditors desire to protect themselves from waste they may impound the assets by some one of the provisional remedies open to them. See ante, § 335.

§ 1093½. Whether Commissions on Exempt Property.

The Amendment of 1910 to § 48 of the act provides for commissions of the trustee and receiver upon moneys "turned over" to "any person." It is doubtful whether "any person" should be construed to include the bankrupt, since this amendment is to be read in connection with other sections of the act in *pari materia*; for example, in conjunction with § 6 providing that "This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws," etc., as well as in the light of the decisions and of the well-known policy of the law prescribing liberality towards the bankrupt in the matter of exemptions. The words "any person" are to be construed in the light of the doctrine "*noscitur a sociis*," as referring to parties similar to "lienholders," as, for instance, adverse

claimants to money or to the proceeds of property in the trustee's hands who are not lienholders but yet receive the aid of the court in tracing and preserving their property, converting it into money, etc.

See post, § 2111.

§ 1094. Exemptions, on Recovery of Preferences and Fraudulent Transfers; and in Cases of Assignment, etc.

Page 618, note 231. **Laches Barring Additional Exemptions Out of Newly-Discovered Assets.**—Bankrupts have been refused leave to amend their schedules to claim additional exemptions sufficient to make up what they might have been entitled to originally, out of newly-discovered assets, where guilty of laches. In re Irwin, 23 A. B. R. 487, 174 Fed. 642 (C. C. A. Pa.), quoted at § 1070½.

§ 1095. On Recovery of Preferences.

Page 619, note 232. Even freed from the preferential lien itself. In re Soper, 22 A. B. R. 868, 172 Fed. 116 (D. C. Neb.), quoted at § 1292.

§ 1098. Forfeiting Exemptions by Fraudulent Concealments or Removals.

Page 623, note 240. In re Schafer, 18 A. B. R. 361, 151 Fed. 505 (D. C. Pa.); instance, In re O'Hara, 20 A. B. R. 714, 162 Fed. 325 (D. C. Pa.); In re Leverton, 19 A. B. R. 426, 155 Fed. 925 (D. C. Pa.). Compare, In re Ansley Bros., 18 A. B. R. 457, 153 Fed. 983 (D. C. N. Car.).

Page 623, note 241. See, in addition, In re Dobbs, 22 A. B. R. 801, 172 Fed. 682 (D. C. Ga.).

But a failure to schedule household goods purchased with the proceeds of the labor of the wife and children has been held not to be such a concealment as will forfeit exemptions, even if such goods belong to the bankrupt.

In re Diamond, 19 A. B. R. 811, 158 Fed. 370 (D. C. Ala.).

And the bankruptcy court may not refuse to set apart a homestead exemption because the homestead deed was filed on the eve of bankruptcy with the evident purpose of preferring certain creditors by confessing judgment on "waiver notes" held by them.

In re Batten, 22 A. B. R. 270, 170 Fed. 688 (D. C. Va.).

§ 1099. Whether Concealing Other Assets Presumed Selection as Exempt, Warranting Refusal of Exemptions Claimed in Schedules.

Page 624, note 243. And In re Leverton, 19 A. B. R. 426, 155 Fed. 925 (D. C. Pa.).

§ 1100. Whether Liens by Legal Proceedings on Exempt Property within Four Months, Nullified.

Page 624, note 245. Thus, as to exempt wages, whether earned or not. Impliedly, *In re Driggs*, 22 A. B. R. 621, 171 Fed. 897 (D. C. N. Y.). Compare, analogously, post, § 1292.

Page 625. First Nat'l Bk. of Sayre *v. Bartlett*, 21 A. B. R. 88, 35 Pa. Super. Ct. 593: "Now, if this ruling is sound, subsection 67 of the Bankruptcy Act should be construed to mean that all levies shall be deemed null and void, only, as to the property which passes to the trustee for the benefit of the creditors of the bankrupt, but remain valid for enforcement under the State laws as to the bankrupt's exempted property. This construction seems to be in accordance with the real meaning of said section. No good reason is apparent for holding the judgment, execution and levy, void as to the bankrupt's exempted property."

Nor will the discharge in bankruptcy discharge the otherwise valid lien on the exempt property.

In re Driggs, 22 A. B. R. 621, 171 Fed. 897 (D. C. N. Y.): "The question is, therefore, squarely presented as to whether the bankrupt should be protected from garnishment, complete before petition filed, levied as execution upon exempt property. If the garnishment be no more than an attachment, and if the attachment be valid, it is no answer to say that the debt will be discharged." Although, of course, the pending suit in personam to which the garnishment may be incident may be stayed to permit the interposition of the discharge by the bankrupt, and thus, ultimately, the attachment or garnishment lien be defeated.

Page 625, note 246. Impliedly, *Maas v. Kuhn*, 22 A. B. R. 91 (N. Y. Sup. Ct. App. Div.), quoted at § 1102.

Page 627. But where property is first claimed in the schedules as exempt, a subsequent waiver of the exemptions by the bankrupt will be too late where the sheriff has meanwhile sold the property and paid over the proceeds to the judgment creditor, though the levy was made within the four months period.

In re Edwards, 19 A. B. R. 632, 156 Fed. 794 (D. C. Ala.): "The bankrupt's general waiver of exemption on July 19, 1907, subsequent to his claim of exemption made when his schedule was filed, as required by the Bankruptcy Act, and subsequent to the special waiver of exemption in favor of Kohlman Company, which had been made effective by a judgment, valid at the time rendered, and under which the \$90 now claimed by the trustee was paid over to them, would not and ought not in any way affect the right of Kohlman Company thus secured and obtained. If before the money had been paid over to Kohlman Company and the property or proceeds of its sale were in the hands of the constable, the bankrupt or any of his creditors, in the absence of a trustee, may have enjoined the constable from disposing of the property, or, having done so, from paying over the proceeds until the rights of Kohlman Company could have been ascertained and adjudicated. This was not done, but subsequent to the sale of the property and the pay-

ing over the net proceeds thereof, the bankrupt attempts to waive generally his claim of exemptions to specific property, some of which—that in question—had passed beyond his possession and control.”

§ 1102. Levying on Exempt Property before and after Discharge, and Withholding Discharge to Permit Levy.

Page 628. Thus, as to claims against which there are no exemptions; for example, where the statute permits collection of ten per cent. of wages.

Page 628. In *re Van Buren*, 20 A. B. R. 896, 21 A. B. R. 338, 164 Fed. 883 (D. C. N. Y.): “The judgment creditor moves to vacate the stay on the ground that the present salary of the bankrupt is the property of the bankrupt, that the trustee in bankruptcy has no interest in it, and that this court, therefore, cannot enjoin the collection of one-tenth of the salary under the provisions of the recent amendments of the law. But the judgment was recovered before the adjudication in bankruptcy. All the bankrupt’s property down to the time of the adjudication is applicable to the payment of that judgment ratably with the bankrupt’s other debts, but the discharge of the bankrupt, if it shall be granted, is a bar to the enforcement of that judgment against any property subsequently acquired. Under these circumstances I think that the enforcement of the judgment against any portion of the bankrupt’s present salary should be enjoined until the question is determined whether he shall receive a discharge. But as, if the entire salary were paid to the bankrupt, the probability is that the judgment creditor would never collect the tenth to which he is entitled if a discharge is refused, an order will be made directing the bankrupt’s employers to withhold a tenth of the salary until that question is determined.”

Compare, *Maas v. Kuhn*, 22 A. B. R. 91 (N. Y. Sup. Ct. App. Div.): “Until such stay is obtained, however, parties have the right to prosecute action or enforce collection of judgments. Especially is this so where, as in the present case, the property levied upon is a portion of the current salary of the bankrupt which could not be applied to the payment of his general debts, and which would not pass to his trustee in bankruptcy.”

Amendment of 1910.—What effect the Amendment of 1910 to § 47, by which the trustee is to be deemed vested with all the rights, powers and remedies of a creditor holding a lien by legal or equitable process on property in his custody, will have in this regard has not yet been determined. But there is strong reason for the view that such custody will be a sufficient levy in behalf of the creditors holding special rights upon exempt property.

§ 1103. Bankrupt Staying Creditor Pending Hearing on Discharge.

Page 628, note 252. Also, see § 1105; instance, *First Nat’l Bk. of Sayre v. Bartlett*, 21 A. B. R. 88, 35 Pa. Super. Ct. 593; instance, *In re Van Buren*, 21 A. B. R. 338, 20 A. B. R. 896, 164 Fed. 883 (D. C. N. Y.). Compare, *Maas v. Kuhn*, 22 A. B. R. 91 (N. Y. Sup. Ct. App. Div.), quoted at § 1102.

§ 1104. Withholding Discharge to Permit Creditor to Levy, Where Property Not Exempt as to Him.

Page 628, note 253. Obiter, *Bowen & Thomas v. Keller*, 22 A. B. R. 727, 130 Ga. 31. Compare, *Maas v. Kuhn*, 22 A. B. R. 91 (N. Y. Sup. Ct. App. Div.), quoted at § 1102; *In re Mitchell*, 23 A. B. R. 707, 175 Fed. 877 (D. C. Ga.). Compare, analogous doctrine "Qualified Stay to Permit Creditors to Perfect Rights against Third Parties," §§ 1524, 1914, 2711, 2712.

Page 632. But the creditor must obtain a stay of the discharge, otherwise the proceedings in rem to fasten a lien on the exempt property will be barred.

Bowen & Thomas v. Keller, 22 A. B. R. 727, 130 Ga. 31: "But, if the debtor succeeds in obtaining his discharge and pleads it prior to the fastening of a specific lien on such property, the effect is to release the debtor from the payment of the debt upon which the proceedings are based, and the creditor's right of action is destroyed." Quoted further at § 1106.

Groves v. Osburn, 46 Oregon 173, 79 Pac. 500: "After a debtor has been discharged in bankruptcy, a debt cannot be enforced in equity by a proceedings in rem against the homestead set apart in the proceedings in bankruptcy."

§ 1106. Subjecting Exempt Property While in Trustee's Hands, by Equitable Action in State Court.

Page 632, note 257. See, in addition, *In re Strickland*, 21 A. B. R. 734, 167 Fed. 867 (D. C. Ga.); *Bowen & Thomas v. Keller*, 22 A. B. R. 727, 130 Ga. 31; *Brooks v. Britt-Carson Shoe Co.*, 133 Ga. 191, 65 Southeastern 411. Compare, *In re Mitchell*, 23 A. B. R. 707, 175 Fed. 877 (D. C. Ga.).

Page 633. *Bowen & Thomas v. Keller*, 22 A. B. R. 727, 130 Ga. 31: "Whenever creditors of a bankrupt seek, by action in a State court, to subject the exempted property to the payment of debts for which they claim it is liable, the bankruptcy court will withhold the granting of a discharge for the purpose of enabling such creditors to enforce their rights in the State court, when the discharge of the debtor would be a bar to such enforcement. * * * Pending the bankruptcy proceedings, a creditor cannot maintain a suit at law against the debtor to obtain a judgment against him in personam, and the plaintiffs in this case properly brought their action on the equity side of the court for the purpose of obtaining a decree in rem subjecting the property to their debt." Quoted further at § 1104.

Amendment of 1910.—What effect the Amendment of 1910 to § 47, by which the trustee is to be deemed vested with all the rights, powers and remedies of a creditor holding a lien by legal or equitable process on property in his custody will have in this regard, has not yet been determined. But there is strong reason for the view that such custody will be a sufficient levy in behalf of the creditors holding special rights upon exempt property.

§ 1107. Levying Attachment or Ordering Surrender to Sheriff Holding Writ.

Page 633, note 258. Compare, obiter, *In re MacKissac*, 22 A. B. R. 817, 171

Fed. 259 (D. C. Pa.); *Snyder v. Guthrie*, 24 A. B. R. 58 (Pa. Court of Common Pleas). Compare, post, "Dividends Not to Be Subjected by Garnishment," § 2224.

Page 633. *Zumpfe v. Schultz*, 20 A. B. R. 916, 35 Pa. Super. Ct. 106: "If the title to the bankrupt's exemption does not pass to the trustee in bankruptcy but remains in the bankrupt and if for this reason, as is pointed out * * * in *Sharp v. Woolslare*, * * * the trustee is not entitled to the \$300 exemption which has been attached within four months preceding bankruptcy, on the ground that the trustee is not entitled thereto, it would seem to follow necessarily that the \$300 exemption in the hands of the trustee in bankruptcy, although, as he declares in his answers to interrogatories, it is deposited to the credit of his account as trustee, does not belong to the creditors but is still the property of the bankrupt. If this be so, and we think a consideration of the authorities referred to in the case last cited leads to such a conclusion, we are unable to see why the attachment execution attaching the money in the hands of the trustee in bankruptcy, as garnishee, upon a judgment in which the bankrupt waived the benefit of the exemption, is not good and, if so, why the entry of judgment in favor of the plaintiff, against the garnishee, upon his answers admitting that the money was in his hands allowed the defendant in lieu of his exemption was deposited to his credit as trustee, was not proper and legal."

Page 633, note 259. See ante, § 1035.

Amendment of 1910.—However, the Amendment of 1910 to § 47, whereby the trustee is to be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings upon property in his custody, or coming into his custody, may sufficiently operate as a levy in behalf of the creditors holding waiver claims or claims for unpaid purchase price.

§ 1108. Levying Direct Execution, after Exempt Property Set Apart.

Page 633. *First Nat'l Bk. v. Bartlett*, 21 A. B. R. 88, 35 Pa. Super. Ct. 393: "After such appraisal and setting apart, it is very clear that the execution issued like the one in the present case is under the control of the State court, and we cannot see that it is material whether such execution issued before or after the proceedings in bankruptcy."

But if the judgment were obtained before the adjudication of bankruptcy it is difficult to see why the bankrupt could not interpose his discharge.

§ 1109. "Appeal" Not Proper in Exemption Matters.

Page 634, note 259. Also, §§ 2906, 2930.

§ 1110. But "Review" under § 24 (b) Proper.

Page 634, note 263. See §§ 2866, 2906, 2930. Instance, *Citizens Bk. of Douglas v. Hargraves*, 21 A. B. R. 323, 164 Fed. 613 (C. C. A. Ga.); In re *Goodman*, 23 A. B. R. 504, 174 Fed. 644 (C. C. A. Ala.).

§ 1111½. Miscellaneous Rulings on Review of Exemption Matters.

A bankrupt will not be heard on review of an order disallowing exemptions where he himself takes no exceptions but a creditor takes exception as to the distribution of the abandoned exemptions between prior and subsequent creditors; for review by one party upon one point does not necessarily bring up the entire case as to all parties.

In re Cohn, 22 A. B. R. 761, 171 Fed. 568 (D. C. N. Dak.). Compare also, post, § 2834, "Appeal by One Party Does Not Necessarily Bring Up Case as to All."

§ 1112. Title Vests in Trustee by Operation of Law.

Page 635, note 1. See, in addition, In re Wiseman & Wallace, 20 A. B. R. 293, 159 Fed. 236 (D. C. Pa.): Fourth St. Nat. Bk. v. Millbourne Mills Co., 22 A. B. R. 442, 172 Fed. 177 (C. C. A. Pa.), quoted at § 1253½; In re Frazin & Oppenheim, 23 A. B. R. 289, 174 Fed. 713 (D. C. N. Y.), quoted at § 1120.

§ 1113. Scheduling by Bankrupt Not Essential to Passing of Title.

Page 635, note 3. Instance, In re Kranich, 23 A. B. R. 550, 174 Fed. 908 (D. C. Pa.).

Page 636, note 4. See, in addition, First Nat'l Bk. v. Lasater, 13 A. B. R. 698, 196 U. S. 115, quoted at § 935.

§ 1115. Bankrupt Compelled to Execute Assignments and Other Papers to Aid Passing of Title.

Page 636, note 6. See §§ 969, 1009; and post, § 1835.

Page 636, note 6 (3). See, in addition, In re Diack, 3 A. B. R. 723, 100 Fed. 770 (D. C. N. Y.); In re Wolff, 21 A. B. R. 452, 165 Fed. 984 (D. C. N. Y.).

Page 637, note 6 (7). See, in addition, In re Wiesel & Knaup, 23 A. B. R. 59, 173 Fed. 718 (D. C. Pa.).

Page 637, note 6 (10). Requiring individual partner not adjudicated bankrupt to transfer his individual interest in real estate of bankrupt firm to firm trustee. In re Latimer, 23 A. B. R. 388, 174 Fed. 824 (D. C. Pa.).

§ 1116. Title Vests in Trustee upon Appointment, etc., but Relates Back to Adjudication.

Page 639, note 1. See, in addition, In re Letson, 19 A. B. R. 506, 157 Fed. 78 (C. C. A. Okla.); In re Frazin & Oppenheim, 23 A. B. R. 289, 174 Fed. 713 (D. C. N. Y.), quoted at § 1120.

§ 1117. Date of Cleavage of Title, Date of Adjudication.

Page 639, note 2. Impliedly, Atchison, etc., R. Co. v. Hurley, 18 A. B. R. 396, 153 Fed. 503 (C. C. A. Kans.), quoted at § 1144.

§ 1118½. Disregarding Fractions of Day.

It has been held that fractions of a day are not to be disregarded when it comes to the acquisition of property; thus, not to be disregarded but to reserve to the bankrupt property acquired by him on the day he filed his voluntary petition, but before the hour of filing; as, for example, legacies.

See ante, analogously, § 188; also, see *In re Stoner*, 5 A. B. R. 402, 105 Fed. 752 (D. C. Pa.).

In re McKenna, 15 A. B. R. 4, 137 Fed. 611 (D. C. N. Y.): in which case the bankrupt's father died at 8:45 A. M. and the bankrupt filed his petition at 10:00 A. M. of the same day, although the petition had been sworn to several days prior thereto.

§ 1120. But Title Does Not Vest until Trustee's Qualification, Title Meanwhile in Bankrupt.

Page 640. *Gordon v. Mech. & Traders Ins. Co.*, 22 A. B. R. 649, 120 La. Ann. 441, 45 So. 384: "Under the bankruptcy law there is no change of title until the trustee is actually appointed and qualified, whatever may be its retroactive effect when it is actually accomplished."

Page 640. Compare, *In re Frazin & Oppenheim*, 23 A. B. R. 289, 174 Fed. 713 (D. C. N. Y.): "I think that the correct view in this matter is that the condition of a bankrupt's property, after the adjudication and before the appointment of a trustee, is analogous to the condition of the personal property of a decedent before the appointment of an executor or administrator. Bankruptcy [adjudication] like death divests the owner of the title. It becomes thereupon in custodia legis. Upon the appointment of a trustee he takes title by relation back, as of the date of the adjudication."

§ 1121. Bankrupt Quasi Trustee until Receiver or Trustee Appointed.

Page 641. But the bankrupt certainly is not a quasi-trustee nor bailee for creditors before the filing of the petition, even within the four months period.

In re Letson, 19 A. B. R. 506, 157 Fed. 78 (C. C. A. Okla.).

Nor is he such before adjudication; and creditors must protect themselves by resort to some one or more of the provisional remedies available.

§ 1122. Destruction of Property Meanwhile.

So that if the property is destroyed meanwhile by fire, the insurance company may not raise the defense that the title has been transferred.

Gordon v. Mech. & Traders Ins. Co., 22 A. B. R. 649, 120 La. Ann. 441, 45 So. 384: "A fire insurance policy contained the following stipulation: 'The entire policy, unless otherwise provided by agreement herein indorsed or added hereto, shall be void * * * if the interest of the insured be other than

unconditional and sole ownership * * * or if any change other than death of an assured takes place in the interest, title or possession of the subject of insurance whether by legal process or judgment, or by voluntary act of the assured, or otherwise, or if this policy be assigned before a loss.' On February 1, 1905, the assured filed a petition in the United States District Court for the Eastern District of Kentucky in voluntary bankruptcy, and on the same day he was adjudged a bankrupt. On February 2d the stock of merchandise insured was (at Ruston, La.) destroyed by fire. On February 3d a receiver was appointed, and on February 13th the same person was appointed as trustee and qualified as such. On May 13th the District Court confirmed a composition which had been entered into between the bankrupt and his creditors. The assured thereafter sued the insurance company, pleading that the policy had become void by reason of the proceedings in bankruptcy. The court rendered judgment in favor of the plaintiff, and the correctness of that judgment has been brought up for review. Held, the judgment is correct and is affirmed. The property insured was destroyed before either a receiver or a trustee was appointed. In the interim between the adjudication in bankruptcy and the appointment and qualification of the trustee, the title to the property, with the incidents of interest and possession, continued in the bankrupt. When the trustee was appointed, there was no property in existence to which the title in the trustee could vest. The trustee of a bankrupt is not obliged to accept title to the property surrendered by the bankrupt, if to do so would not benefit the creditors, or would prejudice them. The creditors deemed it to their interest to make a composition with the bankrupt, and depend upon his personal obligation to them, and did so. The court confirmed the composition. The composition did away with the effect of the bankruptcy proceedings, and the assured had the right to sue on the policy with his rights intact."

§ 1126. As to Legal Liens between Filing of Petition and Adjudication.

However, it is perhaps the correct rule that suits being ipso facto stayed until the date of the adjudication (see post, § 2695) such stay would prevent any lien being acquired meantime by legal proceedings.

§ 1130. Property Acquired after Adjudication Does Not Pass.

Page 643, note 24. See, in addition, Whitlock's License, 22 A. B. R. 262, 39 Pa. Super. Ct. Rep. 34, liquor license granted to bankrupt after adjudication.

§ 1135. First, Property Acquired Meantime by Gift or Inheritance or Bought on Credit.

Page 648. Similarly, it is a question whether the right to a government reward for information leading to the detection of smugglers will pass to the trustee where the award has not been made by the Secretary of the Treasury until after the filing of the bankruptcy petition, even though the services were performed beforehand, the question being

whether there existed an assignable right or merely an inchoate right in the nature of a prospective gift.

Obiter, *In re Ghazal*, 20 A. B. R. 807, 163 Fed. 602 (D. C. N. Y.), reversed in 23 A. B. R. 178, 174 Fed. 809 (C. C. A.).

Nor would wages earned in the meantime pass.

Obiter, *Sibley v. Nason*, 22 A. B. R. 712, 196 Mass. 125.

§ 1137. General Discussion and Complete Statement of Trustee's Title.

Page 662, note 1. **Trustee's Title under Present Act [before Amendment of 1910] Much as under Massachusetts State Insolvency Law.**—*In re Littlefield*, 19 A. B. R. 18, 155 Fed. 838 (C. C. A. Mass.).

Page 663. *Warehousing Co. (Security Warehousing Co.) v. Hand*, 19 A. B. R. 291, 206 U. S. 415: "It is no new doctrine that the assignee or trustee in bankruptcy stands in the shoes of the bankrupt, and that the property in his hands, unless otherwise provided in the Bankrupt Act, is subject to all of the equities impressed upon it in the hands of the bankrupt. This has been the rule under former acts and is now the rule. *Hewitt v. Berlin Mach. Works*, 194 U. S. 296, 11 Am. B. R. 709, * * * *Thompson v. Fairbanks*, 196 U. S. 516, 526, 13 Am. B. R. 437, * * * *Humphrey v. Tatman*, 198 U. S. 91, 14 Am. B. R. 74. * * * *York Mfg. Co. v. Cassell*, 201 U. S. 344, 352, 15 Am. B. R. 633. * * * In the *Hewitt* case, there was a sale of property to the bankrupt upon condition that the title should not pass until the property was paid for. Such a conditional sale was good in New York State, where the contract was made, and it was held good as against the trustee in bankruptcy, because it was good against the bankrupt. It was further held that the property was not, under the facts and the law of New York, such as might have been levied upon and sold under judicial process against the bankrupt, nor could she have transferred it, within the meaning of § 70 of the Bankrupt Act. It was a clear case for the application of the doctrine that the trustee stands in the shoes of the bankrupt, and there was nothing in the act which made any inconsistent provision. In *Thompson v. Fairbanks*, the question arose as to the validity of a chattel mortgage (which had been duly filed) upon after-acquired property as against the trustee in bankruptcy of the mortgagor. The mortgagee took possession of the mortgaged property before the filing of the petition in bankruptcy, and the question raised was whether there was a violation of any provision of the Bankruptcy Act. It was held that the validity of such a mortgage was a local, and not a Federal, question, and that in such case this court would follow the decisions of the State court; and as in Vermont such a mortgage was good, and the taking possession of the property related back to the date of the mortgage, even as against an assignee in insolvency, it was good as against the trustee in bankruptcy. It was said: 'Under the present Bankrupt Act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or encumbrance of the property which is void as against the trustee by some positive provision of the act.' As there was no provision therein making such a mortgage void, the mortgagee was permitted to en-

force his mortgage as a valid instrument, and to retain possession of the property. There was no fraud in fact and no transfer of any property in fraud of creditors, and the property was not, at the time of the filing of the petition in bankruptcy, or at the time of the adjudication, liable to levy and sale under judicial process against the bankrupt. It had already been taken possession of by the mortgagee under a valid mortgage, and was not subject to any other liability of the mortgagor. *Humphrey v. Tatman* reiterates the principle that whether such a mortgage as is referred to in the *Fairbanks* case is good or bad depends upon the State law. In *York Mfg. Co. v. Cassell*, the same question arose as in the *Hewit* case. There was a sale of property to one who thereafter became bankrupt, with a condition that no title to the property should pass until it was paid for. Such a conditional sale was good under the Ohio law, where the instrument was executed, except as to those creditors who, between the time of the execution of the instrument and the filing thereof, had obtained some specific lien upon the property. There were no such creditors, and hence there was no one who could question the validity of the instrument at the time the trustee's title would have accrued, unless it was the trustee in bankruptcy. He made the claim that the adjudication in bankruptcy was equivalent to a judgment or an attachment or other specific lien on the property, so as to prevent the vendor from asserting its title and its legal right to remove the property on account of the non-payment of the purchase price. We held that, as the conditional sale was valid by the law of Ohio, except as to a certain class of creditors, if there were no such creditors there was no one who could question the validity of the instrument; that the adjudication in bankruptcy did not give the trustee the right to do so, because in that case the adjudication did not operate as the equivalent of a judgment or attachment or other specific lien on the property. The trustee represented no one who had that right as there were no creditors who had liens on the property when the title of the trustee to the property of the bankrupt accrued. Section 70 of the Bankrupt Act had no application. There was no property within either the fourth or fifth subdivision of that section. The fact that if there had been a creditor of the bankrupt of the class mentioned who had obtained a specific lien on the property prior to the adjudication in bankruptcy, the trustee could in that case have enforced the same, did not make any difference, because no such thing had been done when the adjudication in bankruptcy was made. This court had theretofore approved the remark in *re New York Economical Printing Co.*, 6 Am. B. R. 615, 49 C. C. A. 133, 110 Fed. 514, 518, that the present Bankrupt Act contemplates that a lien good as against the bankrupt and all of his creditors at the time of the filing of the petition in bankruptcy should remain undisturbed. *Hewit* case, *supra*. Upon these facts it was reiterated that the trustee takes the property as the bankrupt held it. The case at bar bears no resemblance in its facts to the cases just cited. There was no valid disposition of the property in the case before us, or any valid lien. The so-called warehouse receipts issued by the warehousing company to the knitting company, upon the facts of this case, gave no lien under the law in Wisconsin, in which State they were issued. In such case this court follows the State court. *Etheridge v. Sperry*, 139 U. S. 266; *Dooley v. Pease*, 180 U. S. 126. By § 70a, the trustee in bankruptcy is vested, by operation of law, with the title of the bankrupt to all property transferred by him in fraud of his creditors, and to all property which, prior to the filing of the petition, might have been levied upon and sold by judicial process against him; and,

by subdivision (e) of the same section, the trustee in bankruptcy may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might avoid, and may recover the property so transferred, or its value. Here are special provisions placing the title to the property transferred by fraud or otherwise, as mentioned, in the trustee in bankruptcy, and giving him the power to avoid the same. The title to this property was in the knitting company. There had been no valid pledge of it, because the possession had been, at all times, in the knitting company, and it could have been levied upon and sold under judicial process against the knitting company at the time of the adjudication in bankruptcy. The security company had, of course, full knowledge that the knitting company in fact, at least, shared in the possession of the property. It was itself an actor, or it acquiesced in the arrangement under which it had, at most, but a partial, possession, and even that was subject to the control of the knitting company. The method taken to store the property was, as found by the District Court, a mere device or subterfuge to enable the bankrupt to hypothecate the receipts, and thus raise money upon secret liens on property in the possession of the pledgor and under its control; and such scheme, the court said, ought not to receive judicial sanction. Such a scheme, under the facts, and as carried out in this case, and with regard to Wisconsin, law, was a fraud in fact, and neither the receipts nor the so-called pledge could be asserted against any of the creditors. It was held by the Circuit Court of Appeals in a case arising in Wisconsin, relative to a chattel mortgage, which gave power to the mortgagor to make sales from the mortgaged property for his own use and benefit, that such a mortgage was fraudulent in fact, so it could not be asserted even against general creditors; citing Wisconsin cases. *Re Antigo Screen Door Co.*, 10 Am. B. R. 306, 59 C. C. A. 248, 123 Fed. 249, 254. A further question was ruled upon in the above-cited case. It was in respect to a second mortgage upon chattels, which had not been properly filed, but the mortgagee had taken possession of the mortgaged property prior to the filing of the petition in bankruptcy, although long subsequent to the giving of the mortgage, and it was held that the mortgagee might hold the property as against the trustee in bankruptcy representing general creditors. There was no fraud in fact alleged. It was said by Judge Jenkins, in delivering the opinion of the court: 'When the statute (Rev. Stat. Wis. 1898, § 2313) declares that a chattel mortgage shall be invalid against any other person than the parties thereto unless possession be delivered and retained, or the mortgage be filed,—there being no actual fraud and no collusive delay in the filing or the taking of possession,—we think the statute must be construed to mean that the omission to file or to take possession renders the mortgage invalid only as to the creditor who, by execution or attachment, has acquired a lien upon the property.' The case illustrates the distinction taken between fraud in fact and the mere failure to file a mortgage otherwise valid against the world. Under the circumstances of this case we are satisfied there was no valid pledge and no equitable lien in favor of the interveners which would take precedence of the title of the trustee by virtue of the special provisions of the Bankruptcy Act."

In *re Bailey & Son*, 21 A. B. R. 911, 166 Fed. 982 (D. C. Pa.): "The doctrine of *York Mfg. Co. v. Cassell*, 15 A. B. R. 633, 201 U. S. 344, that the trustee ordinarily takes no better title to the property than the bankrupt himself had, does not apply. It may be true that the present transaction was

good between the claimant and the bankrupt, but under the facts in proof the trustee's title is better than the bankrupt's because the Bankruptcy Act declares the attempted transfer to be a voidable preference and expressly authorizes the trustee to avoid it."

§ 1137½. **Amendment of 1910—Trustee No Longer "In Bankrupt's Shoes" But Stands as a Creditor "Armed with Process."**

As noted later in § 1208, et seq., the underlying theory of the Act of 1898, as well as of all former acts of the United States and also of those of England, denied to the trustee in bankruptcy any right which creditors merely *might* have exercised but had not already actually exercised, or placed themselves in position, under State law, to exercise, the idea being that the bankruptcy adjudication in no wise in and of itself affected the title, but merely transferred whatever rights the bankrupt or any of his creditors actually had acquired—save and except always, of course, as to preferences and liens by legal proceedings within the four months period, voidable by the peculiar provisions of Bankruptcy Law.

According, indeed, to some of the decisions before the Amendment of 1910, it was even doubtful whether, as to unrecorded liens, in States where void only as to creditors "armed with process," the trustee succeeded to the rights of all creditors who were thus "armed with process"—this subrogation to such rights being confined, by some of the decisions, merely to the rights of those creditors who had acquired liens by legal proceedings within the four months preceding the bankruptcy, void as to the trustee under § 67*f* but preservable for the benefit of the estate upon order duly made; indeed, such would seem to have been the logical result of the holding that the trustee succeeded to the rights only of such creditors who had been armed with process, for certainly he did not succeed to the rights of any creditor armed with process as to any levy *not* made within the four months preceding the bankruptcy, but rather took title subject thereto. Thus the ultimate logic of the holdings of the courts before the Amendment of 1910, must eventually have narrowed the trustee's title as successor to the creditors' rights, to a short range.

The idea of bankruptcy jurisprudence during its entire history, up until the Amendment of 1910, was that the bankruptcy picked up the estate precisely where it found it, giving the trustee thereby no additional rights save such as were conferred by the peculiar provisions of the act relative to preferences and legal liens acquired within the four months period, although giving to him all rights possessed by the bankrupt at the time of the bankruptcy, and all rights then asserted by any creditor or which any creditor had already placed himself in a position to assert.

No force nor effect was given to the seizure or possession of the bankruptcy court itself, although such seizure was as effectually a sequestration as could possibly be a seizure by the legal or equitable process of any other court; whereby, also, creditors' hands were tied from asserting rights against the property, and yet the selfsame creditors were bound by the bankrupt's own title. The effect of such construction of the act was to make unrecorded liens, in States where "creditor" was construed to mean a creditor who had fastened a lien by levy of process upon the property, perfectly valid in the bankruptcy court, although a similar sequestration in the State court might have nullified such unrecorded liens. In this way the object of the recording statutes in the prevention of secret liens was oftentimes quite defeated in bankruptcy. Indeed, in many States creditors came to find they had less rights in the bankruptcy court than in the State court, as to transfers or instruments voidable only as to creditors "armed with process." Such, indeed, was the effect of the noted case of *York Mfg. Co. v. Cassell*, in the State where the case arose.

As noted in § 1208, before the Amendment of 1910, the statute, in § 70 (e), as well as elsewhere, seemed to strive to give the trustee the same rights and remedies that any creditor "might" have exercised to avoid transfers, whether actually exercised or not, which provision might naturally have been construed to give him either the right to take all necessary steps that would have been required of such creditor, or, perhaps, even to have dispensed with such preliminary steps altogether; and certainly, even before the Amendment of 1910, the pendency of the bankruptcy proceedings themselves having tied the creditors' hands so that they could not help themselves with their ordinary remedies, it might have seemed not only natural, but, also, a correct construction of the law to have held that the trustee was subrogated not only to all rights and remedies for avoiding transfers which any creditor had already begun to assert, but also to all rights and remedies which any creditor "might" have asserted, as, indeed, the very wording of § 70 (e) would seem to have indicated.

However, the courts rejected such construction, as inapplicable except in cases of actual fraud and where State law did not require "arming with process;" and they relegated the trustee to the "shoes of the bankrupt," where he remained until the Amendment of 1910, which lifted him out of the shoes of the bankrupt and placed him in the position of a creditor "armed with process."

It is manifest that this amendment changes materially the title of the trustee, so that the rules enunciated in § 1137 must be qualified by the further proviso that the trustee is limited by the bankrupt's title, only in so far as a creditor under the State law would have been bound thereby had such creditor possessed a levy upon the property at the

time of its coming into the custody of the bankruptcy court, or had had an execution returned unsatisfied as to the property not in the custody of the bankruptcy court.

To the extent, then, that a creditor, were he a levying creditor or a creditor holding an unsatisfied execution, respectively, would be bound, the trustee is bound and limited by the bankrupt's rights, but only to such extent.

A better statement, then, of the trustee's title and rights, since the Amendment of 1910, would seem to be as follows:

The trustee's title and right to assets is a threefold subject; the trustee succeeds to the bankrupt's title and stands in his shoes and takes the property, in cases unaffected by any fraud of the bankrupt towards creditors, in the same plight and condition in which the bankrupt held it and subject to all equities and rights imposed upon it in the hands of the bankrupt, except where there has been some transfer or encumbrance of the property or seizure of it by legal process, void as against the trustee by some positive provision of the Bankrupt Act, but takes it in such plight and condition only to the extent that some existing creditor would have taken it had such creditor, as to the property coming into the custody of the bankruptcy court, held a lien by legal or equitable proceedings thereon, or, as to property not in the custody of the bankruptcy court, held an unsatisfied execution.

But in cases affected by the fraud of the bankrupt towards creditors, as also where there has been some transfer, encumbrance, or holding of the property void as to the bankrupt's creditors or inuring to their benefit by State law, for want of record or otherwise, the trustee succeeds to the rights of any existing creditor already qualified by State law or who would be qualified thereby had such existing creditor as to the property in the custody or coming into the custody of the bankruptcy court, held a lien by legal or equitable proceedings thereon, or, as to the property not in such custody, been a creditor holding an execution duly returned unsatisfied.

And in addition thereto the trustee has the peculiar rights conferred by the special provisions of the Bankrupt Act, to avoid preferential and fraudulent transfers and liens obtained by legal proceedings within the four months preceding the bankruptcy.

§ 1138. Section 70 (a) to Be Construed with Cognate Sections—
Trustee Gets More than Bankrupt's Title and Rights.

Page 663, note 2. Impliedly, *Fourth St. Nat. Bank v. Millbourne Mills*

Co., 22 A. B. R. 442, 172 Fed. 177 (C. C. A. Pa., affirming *In re Millbourne Mills Co.*, 20 A. B. R. 746, 162 Fed. 988).

Page 663. The trustee has, by the positive provisions of the act, the further rights which any creditor had, [or, since the Amendment of 1910, might have obtained by legal or equitable process,] by State law at the time of the bankruptcy, to set aside fraudulent transfers or liens and expose the resultant title of the bankrupt.

Thomas v. Sugarman, 19 A. B. R. 509, 157 Fed. 669 (C. C. A. N. Y.): "The complainant, as trustee, however, represents not only the bankrupt, alleged to be a party to the fraud, but his creditors, who are innocent, and he may assert on their account rights against Sugarman, which the bankrupt could not."

Page 664. Clause 70 (a) should be read in conjunction with clause (e) of § 70 and in conjunction with class (5) of § 70 (a) and in conjunction with clause (a) of § 67.

See *Fourth St. Nat. Bank v. Millbourne Mills Co.*, 22 A. B. R. 442, 172 Fed. 177 (C. C. A. Pa.); *In re McDonald*, 23 A. B. R. 51, 173 Fed. 99 (D. C. Mass.); *Crucible Steel Co. v. Holt*, 23 A. B. R. 302, 174 Fed. 127 (C. C. A. Ky.), quoted at § 1208. And the power with which §§ 67a and 70e vest the trustee are powers not given an assignee under the Act of 1867. *In re McDonald*, 23 A. B. R. 51, 173 Fed. 99 (D. C. Mass.).

And in conjunction with clause (b) of § 67, which reads:

" * * * whenever a creditor is prevented from enforcing his rights as against a lien created or attempted to be created by his debtor, who afterwards becomes bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of said creditor for the benefit of the estate."

See *Fourth St. Nat. Bank v. Millbourne Mills Co.*, 22 A. B. R. 442, 172 Fed. 177 (C. C. A. Pa.).

Page 665. And in conjunction with § 47 (a) (2), as amended in 1910.

"And such trustees, as to all property in the custody, or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied."

It is only creditors who can avoid fraudulent conveyances, although in a qualified sense the debtor still has the title.

Thomas v. Sugarman, 19 A. B. R. 509, 157 Fed. 669 (C. C. A. N. Y.), quoted *supra*.

Page 666. By § 47 (a) (2) as amended in 1910 by § 67 (a), the Bankruptcy Act gives the trustee the right to clear away from the bank-

rupt's title to property all liens that would for any reason not have been valid liens against the claims of creditors under State law had there been no bankruptcy; all which rights are in addition to the peculiar rights conferred on the trustee by the special provisions of the Bankruptcy Act relative to avoiding preferential transfers and liens obtained by legal proceedings within the four months preceding the bankruptcy.

§ 1139. Local Law Determines Effectiveness of Transaction to Accomplish Transfer of Title, Also Time Title Passes.

The State law determines the efficiency of acts and transactions to effect the transfer of title of the property involved and also the time of the passing of title.

In re Doran (*Moorman v. Beard*), 18 A. B. R. 760, 154 Fed. 467 (C. C. A. Ky.). Compare, instance, In re Reynolds, 18 A. B. R. 666, 153 Fed. 295 (D. D. Ark.); impliedly, *Goodwin v. Murchison Nat. Bank*, 22 A. B. R. 703, 145 N. Car. 320.

Page 666. Inferentially and suggestively In re Baxter & Co., 18 A. B. R. 450, 154 Fed. 22 (C. C. A. N. Y.): "All rules concerning the transfer of property are 'primarily at least, a matter of State regulation, and not one of purely commercial law' (*Etheridge v. Sperry*, 139 U. S. 276) and State laws, creating interests in or liens upon property without the State, control the federal courts whenever the question arises as to the validity, extent and all the conditions of such an interest or lien. Thus, the effect and validity of chattel mortgages and general assignments are determined by the law of the State in which they are made."

Page 667. In re Cohn, 22 A. B. R. 761, 171 Fed. 568 (D. C. N. Dak.): "The cardinal principle of the Bankruptcy Act is to grant to creditors only those rights which would have been theirs had bankruptcy not supervened."

Page 667. The nature of the transaction is to be determined by State law and the bankruptcy law will take it as so determined.

In re Morris, 19 A. B. R. 422, 156 Fed. 597 (D. C. Pa.), quoted at § 1228.

Thus, it has been held, in accordance with local law, that an equitable assignment of a debt, not requiring to be recorded, takes effect as consummated at the time of giving notice to the debtor.

In re Wilson, 23 A. B. R. 814 (D. C. Hawaii).

§ 1140. Also Governs Validity, Except Where Peculiar Rights as to Preferences, Liens by Legal Proceedings, etc.—Conferred by Act Itself, Involved.

Page 667. Where not affected by the peculiar provisions of the Bankruptcy Act, avoiding preferences and liens by legal proceedings within four months, the law of the State will control in bankruptcy as to the

validity of mortgages and other liens, and as to ownership and other interests in property.

Page 667, note 3. Also, compare similar proposition as to marshaling of liens, etc., post, § 1896. Impliedly, (*Security*) *Warehousing Co. v. Hand*, 19 A. B. R. 291, 206 U. S. 415, quoted at § 1137; *In re Pierce*, 19 A. B. R. 662, 157 Fed. 755 (C. C. A. N. Dak.); *Humphrey v. Tatman*, 14 A. B. R. 74, 198 U. S. 91; *York Mfg. Co. v. Cassell*, 15 A. B. R. 633, 201 U. S. 344; *Thomas v. Woods*, 23 A. B. R. 132, 173 Fed. 585 (C. C. A. Kans.), quoted at § 1208; *Godwin v. Murchison Nat. Bank*, 22 A. B. R. 703, 145 N. Car. 320.

Page 668. *Bryant v. Swofford Bros. Co.*, 22 A. B. R. 111, 214 U. S. 279: "There is nothing in the nature of this contract which would forbid the parties from entering into it if it is valid by the laws of the State where made, but in bankruptcy the construction, and validity of such a contract must be determined by the local laws of the State, * * * That such a contract is a conditional sale and is valid without record is the law of Arkansas. *Triplett v. Monsur & T. Imple. Co.*, 68 Ark. 230. The trustee has no higher rights in this regard than the bankrupt."

Page 668, note 3. See, in addition, *In re Standard Tel. Co.*, 19 A. B. R. 491, 157 Fed. 106 (D. C. Wis., affirmed sub nom. *Knapp v. Milw. Tr. Co.*, 20 A. B. R. 671, 162 Fed. 675 C. C. A.), quoted post, this same section; *In re Agnew*, 23 A. B. R. 360 (D. C. Miss.); *Mattley v. Wolfe*, 23 A. B. R. 673, 175 Fed. 619 (D. C. Neb.), quoted post, § 1209; *In re New England Breeders' Club*, 23 A. B. R. 689, 175 Fed. 501 (D. C. N. H.), a lien for materials and supplies.

Page 669. *Davis v. Crompton*, 20 A. B. R. 53, 158 Fed. 755 (C. C. A. Pa.): "The precise extent to which such a conditional sale as we have in the present case, must be held invalid as to creditors, whether general or subsequent, and as to bona fide purchasers, mortgagees and pledgees, without notice, must depend upon the law of the State in which delivery of possession under the conditional sale has been made."

In re Hickerson, 20 A. B. R. 682, 162 Fed. 345 (D. C. Idaho): "The validity of such a mortgage [mortgage withheld from record by agreement] is a local question, and the decisions of the State courts will control."

In re Chantler Suit & Cloak Co., 18 A. B. R. 498, 151 Fed. 952 (D. C. R. I.): "The latter case [*Thompson v. Fairbanks*, supra] also decides that, on the question of the validity of a mortgage upon after-acquired property, the federal court will follow the decisions of the State court."

In re Burke, 22 A. B. R. 69, 168 Fed. 994 (D. C. Ga.): "In the construction of State statutes defining property rights, the United States courts generally follow the rulings of the supreme appellate tribunal of the State. * * * This is peculiarly true as to real property, but it is also true as to other property rights. A clear statement of this doctrine may be found in *Bates' Federal Equity Procedure*, vol. 1, par. 9. The doctrine is particularly valuable in the administration of the bankruptcy law, for the reason that it conserves the liens which are created and recognized by the laws of the States. Statutes creating such liens, however, are in derogation of the rights of the general creditor, which are common rights, and under the well-known general principle such statutes must be strictly construed. Presumptively the possession of property by the bankrupt is vested by operation of law in the trustee, and when a claimant thereto insists upon a latent or undisclosed title he must

bear the burden of showing his superior right or privilege. It is then the duty of the court to regard critically the statutes of the State, as authoritatively construed by State courts, and determine each case accordingly."

In re Elletson Co., 23 A. B. R. 530, 174 Fed. 859 (D. C. W. Va.): "The Supreme Court has also determined that the question of whether such a deed of trust is valid or not is a local one and must be governed by the State court decisions which the Federal courts will follow."

In re Gilligan, 23 A. B. R. 668, 152 Fed. 605 (C. C. A. Ind.): "There being no creditors having special equities in the bankrupt estate, the sole question presented by this record is, whether, under the Indiana law, the conditional sale of personal property by a manufacturer to a retailer, for the purposes of resale, with an agreement to reserve title in the original vendor until paid for, is valid or not; and to determine such question we go to the Indiana law, in force at the time that the order appealed from was entered, as interpreted by her own courts." This case quoted further at § 1263.

Page 669, note 4. Inferentially, In re New England Breeders' Club, 23 A. B. R. 689, 175 Fed. 501 (D. C. N. H.).

Page 670. In re Standard Tel. Co., 19 A. B. R. 491, 157 Fed. 106 (D. C. Wis., affirmed sub nom. Knapp v. Milw. Tr. Co., 20 A. B. R. 671, 162 Fed. 675 C. C. A.): "The question of law arising in this case involves the construction of a Wisconsin statute. It is therefore a local question, as the Federal court in such a case adopts the ruling of the highest judicial tribunal of the State. This proposition is so familiar as to require the citation of no authorities."

In re Burke, 22 A. B. R. 69, 168 Fed. 994 (D. C. Ga.): "In the construction of State statutes defining property rights, the United States courts generally follow the rulings of the supreme appellate tribunal of the State."

Page 670. Or as decided by the highest court of the State which has passed upon the particular point, provided the same be not inconsistent with decisions of the highest court of the State.

In re Gilligan (Troy Wagon Works v. Hancock), 23 A. B. R. 668, 152 Fed. 605 (C. C. A. Ind.).

Page 670, note 7. Compare, Hanson v. Blake, 19 A. B. R. 325, 150 Fed. 342 (D. C. Me.).

Page 671, note 11. See, in addition, Mattley v. Wolfe, 23 A. B. R. 673, 175 Fed. 619 (D. C. Neb.).

Page 671, note 15. Thompson v. Fairbanks, 13 A. B. R. 437, 196 U. S. 516; In re Chantler Cloak & Suit Co., 18 A. B. R. 498, 151 Fed. 952 (D. C. R. I.), quoted supra.

Page 671, note 16. See, in addition, Mattley v. Wolfe, 23 A. B. R. 673, 175 Fed. 619 (D. C. Neb.).

Page 671, note 17. See, in addition, Mattley v. Wolfe, 23 A. B. R. 673, 175 Fed. 619 (D. C. Neb.).

Page 671, note 18. See, in addition, Mattley v. Wolfe, 23 A. B. R. 673, 175 Fed. 619 (D. C. Neb.).

Also, see, in addition, *In re Grainer*, 20 A. B. R. 166, 160 Fed. 69 (C. C. A. Calif.), chattel mortgage on property not enumerated in statute as being capable of being mortgaged as against creditors, though good between the parties, is good against the trustee.

Page 671. Local law governs in conditional sales contracts.

In re Gilligan (*Troy Wagon Works Co. v. Hancock*), 23 A. B. R. 668, 152 Fed. 605 (C. C. A. Ind.), quoted *supra*.

Likewise, as to the sufficiency of a transaction to effect an equitable assignment.

Godwin v. Murchison Nat. Bank, 22 A. B. R. 703, 145 N. Car. 320.

Likewise, as to whether all creditors in bankruptcy may participate in the proceeds, upon recovery of fraudulently conveyed property, or only those existing at the time of the transfer.

See post, §§ 1225½, 1738. *In re Kohler*, 20 A. B. R. 89, 159 Fed. 871 (C. C. A. Ohio), quoted at § 1225½.

Likewise as to exemptions.

See ante, § 1041.

And as to dower.

See post, §§ 1166, 1166½.

§ 1141. Intervention of Creditors' Rights Causing Modification of Rule That Bankrupt's Title Taken.

Page 672. Again, what would amount to sufficiently clear proof of a resulting trust in favor of a wife, may be different where the rights of creditors become involved, as, for instance, where the husband becomes bankrupt.

Compare, apparent instance, *Teter v. Viquesney*, trustee, 24 A. B. R. 242, 179 Fed. 655 (C. C. A. W. Va.).

§ 1144. First, Trustee's Title and Rights as Successor to Bankrupt's Title.

Page 673. *Zartman, Trustee, v. Nat. Bank*, 216 U. S. 134, 23 A. B. R. 635 (affirming 139 N. Y. 133): "The trustee claims that he takes the same kind of title as a bona fide purchaser for value; but the rule applicable to this and all similar cases is that the trustee takes the property of the bankrupt, not as an innocent purchaser, but as the debtor had it at the time of the petition, subject to all valid claims, liens, and equities. *Tompson v. Fairbanks*, 196 U. S. 516, 13 Am. B. R. 437, * * * and cases cited. And this is so well settled that our jurisdiction of the writ of error is exceedingly doubtful."

Page 673. *Davis v. Crompton*, 20 A. B. R. 53, 158 Fed. 735 (C. C. A. Pa.): "It has been often declared by the Supreme Court of the United States, that under the present Bankrupt Act, the trustee takes the property of the bank-

rupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt. It would seem that no other interpretation of § 70 of the act * * * consistent with the rights and vested interests of third parties, could be maintained. The trustee in a certain sense is the bankrupt. The bankrupt's title is his title, whether it be to things in possession or to choses in action. His title cannot rise higher than that of the bankrupt, so as to impinge upon or destroy the interest in or title to property, good as against the bankrupt himself. It is true, that, by the language of § 70, the trustee of the estate of the bankrupt is 'vested, by operation of law, with the title of the bankrupt, as of the date he was adjudged a bankrupt, * * * to all * * * (5) property which, prior to the filing of the petition, he could, by any means, have transferred, or which might have been levied upon and sold under judicial process against him.' But, taking the title of the bankrupt as it existed in him at the time of the adjudication, the trustee takes it subject to the superior title of the vendor. Otherwise, the title of the trustee would be superior to the title held by the bankrupt, and therefore not the title of the bankrupt to the property described in clause 5 of § 70, but one entirely different therefrom. It is this precise title, and no other, which is vested by operation of law in the trustee."

Canning Machinery Co. v. Fuller, 20 A. B. R. 157, 158 Fed. 588 (C. C. A. Ala.): "In considering these propositions, we have to bear in mind that the respondent has no other title than the title the bankrupt had."

Atchison, etc., Ry. Co. v. Hurley, 18 A. B. R. 396, 153 Fed. 503 (C. C. A. Kans.): "The trustee stands in the shoes of the bankrupt. Whatever rights a third party had against the property of a bankrupt before adjudication, that party, in the absence of fraud or fixed liens created by State statutes in favor of others, has against his estate in bankruptcy." Quoted further at § 932.

In re Chantler Cloak & Suit Co., 18 A. B. R. 498, 151 Fed. 952 (D. C. R. I.): "The trustee in bankruptcy takes the property subject to all the equities imposed upon it in the hands of the bankrupt which are not invalid as to creditors."

In re Mertens, 15 A. B. R. 369, 142 Fed. 445 (C. C. A. N. Y.): "Now the trustee takes the property of the bankrupt in the condition in which he finds it at the date of the adjudication, unless it has been incumbered fraudulently or in contravention of some of the provisions of the act."

Wood Co. v. Eubanks, 22 A. B. R. 307, 169 Fed. 929 (C. C. A. N. C.): "It is well settled that the trustee of a bankrupt stands in the shoes of the bankrupt and occupies the same relation to the creditors that the bankrupt sustained prior to the date on which he was adjudged bankrupt."

Page 673, note 20. See, in addition, *In re Lange Co.*, 20 A. B. R. 478, 159 Fed. 586 (D. C. Iowa); *Clay v. Waters*, 20 A. B. R. 560, 161 Fed. 815 (C. C. A. Mo.); *In re Grainer*, 20 A. B. R. 166, 160 Fed. 69 (C. C. A. Calif.); *Batchelder v. Wedge*, 19 A. B. R. 268, — Vt. —; (*Security*) *Warehousing Co. v. Hand*, 19 A. B. R. 291, 206 U. S. 415, quoted at § 1137; partially, *Richardson v. Shaw*, 19 A. B. R. 717, 209 U. S. 365; *Hurley v. Atchison R. Co.*, 22 A. B. R. 17, 213 U. S. 126, affirming 18 A. B. R. 396; impliedly, *In re (Columbia) Fire proof Door & Trim. Co.*, 21 A. B. R. 714 (D. C. N. Y.); partially, *In re Greek Mfg. Co.*, 21 A. B. R. 714, 164 Fed. 211 (D. C. Pa.); *Bryant v. Swafford Bros. Co.*, 22 A. B. R. 111, 214 U. S. 279, quoted at § 1140; *Corbitt Buggy Co.*

v. Ricand, 22 A. B. R. 316, 169 Fed. 935 (C. C. A. N. C.); rule partly enunciated, *In re Proudfoot*, 23 A. B. R. 106, 173 Fed. 733 (D. C. W. Va.); *In re Meadows, Williams & Co.*, 23 A. B. R. 124, 173 Fed. 694 (D. C. N. Y.); *Godwin v. Murchison National Bank*, 22 A. B. R. 703, 145 N. Car. 320, 59 S. E. 154; *In re Clark Coal & Coke Co.*, 23 A. B. R. 273, 173 Fed. 658; 176 Fed. 955 (D. C. Pa.); *Crucible Steel Co. v. Hand*, 23 A. B. R. 302, 174 Fed. 127 (C. C. A. Ky.), quoted at § 1208. Compare *In re Fish Bros. Wagon Co.*, 21 A. B. R. 147, 164 Fed. 553 (C. C. A. Kans.). See, in addition, *In re MacDougall*, 23 A. B. R. 762, 175 Fed. 400 (D. C. N. Y.); *In re Automobile Livery Service Co.*, 23 A. B. R. 799, 176 Fed. 792 (D. C. Ala.); *In re Beihl*, 23 A. B. R. 905, 176 Fed. 583 (D. C. Pa.); *York Mfg. Co. v. Brewster*, 23 A. B. R. 474, 174 Fed. 566 (C. C. A. Tex.); *In re Bailey*, 23 A. B. R. 876, 176 Fed. 628, 176 Fed. 990 (D. C. S. Car.); *Mattley v. Wolfe*, 23 A. B. R. 673, 175 Fed. 619 (D. C. Neb.), quoted at § 1209; *In re Peacock*, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.).

Page 676. But the bankrupt's title which is taken is subject, however, always to the qualification "except in cases where there has been a conveyance or encumbrance of the property which is void as against the trustee by some positive provision of the act."

In re McDonald, 23 A. B. R. 51, 173 Fed. 99 (D. C. Mass.): "But all this is always subject to the qualification expressly stated in *Thompson v. Fairbanks*, 196 U. S. 526, 'except in cases where there has been a conveyance or encumbrance of the property which is void as against the trustee by some positive provision of the act.'"

§ 1144¼. But Trustee May Abandon Burdensome Property or Contracts.

While it is true that the trustee is bound in his rights to property by the bankrupt's acts and contracts, he is not bound to accept burdensome property nor contracts that would entail his performance of duties that would be burdensome to the estate; but he may refuse to accept or assume the same, leaving the other party to his remedy for the breach.

Atchison, etc., Ry. Co. v. Hurley, 18 A. B. R. 396, 153 Fed. 503 (C. C. A. Kans.): "It is well settled that trustees in bankruptcy are not bound to accept property or take over contracts which are onerous and unprofitable, and which would burden, rather than benefit, the estate. In the execution of their trust they are confronted at the outset with the duty of electing whether to assume an existing executory contract, continue its performance, and ultimately dispose of it for the benefit of the estate or to renounce it and leave the injured party to such legal remedies for the breach, as the case affords." Quoted further at § 1150½.

See ante, § 932; post, § 1150½. Also, see *Watson v. Merrill*, 14 A. B. R. 454, 136 Fed. 359 (C. C. A. Kans.), quoted at § 982.

§ 1144½. Amendment of 1910—Trustee No Longer in Bankrupt's Shoes.

The Amendment of 1910 to § 47 (a) (2), whereby the trustee no

longer merely "stands in the bankrupt's shoes," confined to the mere rights which the bankrupt might have asserted, but stands as a creditor "armed with process," makes such a radical change in the theory of the trustee's title, and is such a departure in bankruptcy jurisprudence, that the mass of decisions, both under the present act and under former acts, many of which are cited in § 1144, are quite thrown out of place as authorities, though they still are to be looked to as stating the true rule except in so far as the Amendment of 1910 may have changed it.

In accordance with the changes made by the Amendment of 1910, as previously noted in the discussion of § 1137½, the more correct statement of the rights and title which the trustee takes as successor of the bankrupt's rights and title, now would be as follows:

The trustee succeeds to the bankrupt's title and stands in his shoes and takes the property, in cases unaffected by any fraud of the bankrupt towards creditors, in the same plight and condition in which the bankrupt held it and subject to all equities and rights imposed upon it in the hands of the bankrupt, except where there has been some transfer or encumbrance of the property or seizure of it by legal process, void as against the trustee by some positive provision of the Bankruptcy Act, but takes it in such plight and condition only to the extent that some existing creditor would have taken it had such creditor, as to the property coming into the custody of the bankruptcy court, held a lien by legal or equitable proceedings thereon, or, as to property not in the custody of the bankruptcy court, held an unsatisfied execution.

§ 1145. Bound by Bankrupt's Sales, Mortgages, Deliveries, Bailments, Contracts and Equitable Liens.

Page 676. *Atchison, etc., Ry. Co. v. Hurley*, 18 A. B. R. 396, 153 Fed. 503 (C. C. A. Kans.): "Another and conclusive answer to the trustees' contention in this case is found in their conduct on assuming the duties of their trust. They found an assignable executory contract in force between the bankrupt and the railway company—one that might be advantageous or disadvantageous to the estate. It was evidenced by writing, but the parties had changed its mode of performance as already pointed out, so that as between them it consisted of the original instrument and the agreed modification. It is well settled that trustees in bankruptcy are not bound to accept property or take over contracts which are onerous and unprofitable, and which would burden, rather than benefit, the estate. In the execution of their trust they are confronted at the outset with the duty of electing whether to assume an existing executory contract, continue its performance, and ultimately dispose of it for the benefit of the estate or to renounce it and leave the injured party to such legal remedies for the breach, as the case affords. *American File Co. v. Garrett*, 110 U. S. 288, 295, * * * *Sparhawk v. Yerkes*, 142 U. S. 1, 13, * * * *Sessions v. Romadka*, 145 U. S. 29, * * * *Dushane v. Beall*, 161 U. S. 515, * * * *Watson v. Merrill*, 14 Am. B. R. 453, 136 Fed. 359, 363; In re

Chambers, *Calder & Co. (D. C.)*, 6 Am. B. R. 709, 98 Fed. 865; *Mercantile Trust Co. v. Farmers' Loan & Trust Co.*, 26 C. C. A. 383, 81 Fed. 254; *Central Trust Co. v. Continental Trust Co.*, 30 C. C. A. 235, 86 Fed. 517. If they elect to assume such a contract, they are required to take it cum onere, as the bankrupt enjoyed it, subject to all its provisions and conditions, 'in the same plight and condition that the bankrupt held it.' "

Page 676, note 21. See post, §§ 1509, 1228; compare, § 1229.

Acts of Parties as Evidence of Meaning of Contracts.—The acts of parties in interest when they anticipate no trouble, are among the best criteria for interpreting the contracts they make. In *re Kessler & Co.*, 21 A. B. R. 583, 165 Fed. 508 (D. C. N. Y.).

§ 1145½. In So Far as Creditor under State Law Bound Thereby.

Amendment of 1910.—Since the passage of the Amendment of 1910, to the Bankruptcy Act, § 47 (a) (2), discussed heretofore in § 1137½, and hereafter in § 1207½, it is necessary to add the qualification, always, that the trustee, as thus bound by the bankrupt's sales, contracts, etc., is only bound thereby to the same extent that a creditor would be bound thereby under State law who had levied legal or equitable process, at the time the custody of the bankruptcy court arose over the property involved, or had had an execution returned unsatisfied. So that, in considering all of the following paragraphs under this division, such qualification must always be borne in mind. Thus, in a State where a creditor of the bankrupt, had he been a levying creditor (as to property in the custody of the bankruptcy court) or a creditor holding an execution returned unsatisfied (as to property not in its custody), would have better rights than the bankrupt himself possessed, then, in that State, the trustee would also possess such creditor's rights rather than be limited to those merely of the bankrupt.

§ 1146. Thus, as to Setting Apart or Delivery Sufficient to Pass Title to Goods Sold, Pledged or in Process of Manufacture; and "Warehousing."

Thus, the trustee is bound by the sufficiency or insufficiency under State law of a setting apart or delivery by the bankrupt.

In *re Kingston Realty Co.*, 19 A. B. R. 703, 157 Fed. 303 (D. C. N. Y.); delivery of key to mortgagee sufficient though mortgagor also retaining another key, In *re Cole*, 22 A. B. R. 611, 171 Fed. 297 (D. C. R. I.).

Or of other acts, to pass title to goods pledged.

Instance, In *re Arkansas Fabric Mfg. Co.*, 18 A. B. R. 467, 151 Fed. 914 (D. C. Pa.); instance not sufficient to constitute pledge of corporate stock, *French v. White*, 18 A. B. R. 905, 78 Vt. 89; instance not sufficient to constitute a second pledge by the pledgor of goods already pledged and in warehouse, In *re Roberts*, 21 A. B. R. 573, 166 Fed. 96 (C. C. A. Ills.); instance sufficient, *Sexton v. Kessler*, 21 A. B. R. 807, 172 Fed. 535 (C. C. A. N. Y.),

quoted post, § 1370; instance, attempted pledging of warehouse certificates where warehouse on debtor's own premises, *Fourth St. Nat. Bank v. Millbourne Mills Co.*, 22 A. B. R. 442, 172 Fed. 177 (C. C. A. Pa.).

Or to goods sold or manufactured.

See, in addition, *McDonald v. Clearwater Ry. Co.*, 21 A. B. R. 182, 164 Fed. 1007 (U. S. C. C. Idaho).

Page 676. *Manufacturing Co. v. Lumber Co.*, 23 A. B. R. 595, 175 Fed. 335 (C. C. A. Mich.): "First, that the contract was for the sale of 'all of our cut 1907 of hemlock lumber at Ely, Mich.,' at the prices mentioned. Second, it was a sale upon credit of 60 days, with a discount of 2 per cent. for cash, with privilege of vendor to require an advance of \$8,000, which was in fact made. Third, the lumber as cut was piled separate from other kinds and each length and width separate, as per the contract. * * * The construction of the contract and the determination of the matter of when title passed were questions of general law. And so was the question as to whether the parties had changed the contract, so as to pass the title at the yard, without delivery on the cars or preliminary inspection or measurement. The contract made no provision in respect to inspection to determine grade, nor as to measurement. If the parties elected to deliver without inspection or measurement, the title would pass if so accepted. The one essential thing was that the hemlock lumber then cut and piled should be then and there appropriated to this contract. In the absence of conditions to the contrary, the title would pass upon such appropriation subject to grading and measurement later as a preliminary to settlement of the price according to the written agreement."

Page 677, note 22. In addition, see *McDonald v. Clearwater Ry. Co.*, 21 A. B. R. 182, 164 Fed. 1007 (U. S. C. C. Idaho).

Instance, where machinery was sold for cash and delivered to buyer on its promise to send a check forthwith, which it fails to do and thereafter the seller's agent accepts negotiable vouchers, secured by bonds, in payment and the buyer executes a lease—all the parties all the time acting in accordance with the idea that the title still remained in the seller—the title will be held still to be in the seller, *Canning Machinery Co. v. Fuller*, 20 A. B. R. 157, 158 Fed. 588 (C. C. A. Ala.).

Instance, construed as trust agreement and not mortgage or conditional sale requiring record, *Wood Co. v. Eubanks*, 22 A. B. R. 307, 169 Fed. 929 (C. C. A. N. C.).

Page 677, note 23. Contra, under the laws of Pennsylvania, *In re Millbourne Mills Co.*, 20 A. B. R. 747, 162 Fed. 988 (D. C. Pa.), quoted at § 964; *Fourth St. Nat. Bank v. Millbourne Mills Co.*, 22 A. B. R. 442, 172 Fed. 177 (C. C. A. Pa.), quoted at § 1146.

Page 677. But where there has been no actual change of possession, but a mere pretended change, the pledge will not be upheld.

Page 677. (*Security*) *Warehousing Co. v. Hand*, 19 A. B. R. 291, 206 U. S. 415: "The findings show that the receipts of the warehousing company were not entitled to the status of negotiable instruments, the transfer of which operates as a delivery of the property mentioned in them. Upon that question the case is sufficiently stated in the opinion of the court below, wherein it was said that the 'receipts themselves would put the holders on notice of

the facts.' If the receipts were not negotiable instruments, it is contended that the transactions showed a valid pledge of the property to some of the appellants, and hence they are entitled to its possession until they are paid the debts due them from the bankrupt. Whether there was a sufficient change of possession of the thing pledged to render the same valid under the law of Wisconsin, we think was correctly answered in the negative by the courts below. *Geilfuss v. Corrigan*, 95-Wis. 651, 665, 669, 37 L. R. A. 166, 60 Am. St. Rep. 143, 70 N. W. 306. The general law of pledge requires possession, and it cannot exist without it. *Casey v. Cavaroc*, 96 U. S. 467 * * *. There was scarcely a semblance of an attempt at such change of possession from the hands of the knitting company to the hands of the warehousing company. Actual possession of the property in question was exercised by and existed with the knitting company substantially the same after the issuing of the receipts as before. It is a trifling with words to call the various transactions between the knitting company and the warehousing company a transfer of possession from the former to the latter. There was really no delivery, and no change of possession, continuous or otherwise. The alleged change was a mere pretense, a sham."

Fourth St. Nat. Bank v. Millbourne Mills Co., 22 A. B. R. 442, 172 Fed. 177 (C. C. A. Pa., affirming *In re Millbourne Mills Co.*, 20 A. B. R. 746, 162 Fed. 988): "The present case arises out of an attempt, by the bankrupt, a milling company, to pledge its property for money advanced, while still retaining possession and dominion over it. The form adopted was the issuing of so-called certificates, for so much grain or flour, in store at the mills, these certificates being issued to different parties, as collateral to loans, somewhat like ordinary warehouse receipts. The grain in question was contained in tanks, adjoining the mills, from which it was run to the mills, to be made into flour, by means of a conveyor, by simply unlocking a slide. It was drawn upon freely, in this way, no definite quantity being kept on hand, and there being no special arrangement with the holders of certificates, with regard to it, except that it was not to be reduced beyond the amount called for thereby. The fact is, that it was a shifting quantity, sometimes running far below this, although sometimes possibly above it, there being certificates outstanding at the time of bankruptcy for a hundred and thirty-eight thousand bushels, while there were but eighty-three thousand bushels on hand. The difference is ascribed to the depredation of insects, by which the grain became heated and lost weight, but it is difficult to see how fifty-five thousand bushels could have disappeared in that way. Nor is it material, the fact being, from whatever cause, that it was not there. The arrangement with regard to the flour was somewhat similar. It was stored in barrels in the basement of the company's warehouse under the charge of the superintendent, in three sections, two of two hundred barrels each, and one of eight hundred barrels, divided off from each other, by upright posts, and all bearing a certain common brand. There was also a sign that it was not to be touched by an employee; but aside from what this might vaguely imply, there was nothing to indicate that there was any control or ownership over it other than that of the bankrupt company in whose possession it was. Differing from the grain, there was no change in the quantity of the flour from the start; and certificates for the whole twelve hundred barrels were issued to the one bank. It is clear upon this showing, that the certificate holders have no case. The certificates, admittedly, cannot be sustained as warehouse receipts, however they may bear that form. A man cannot make a warehouse of himself as to his own goods. *Bank v. Jagode*, 186 Pa. 556;

Security Warehousing Co. v. Hand, 206 U. S. 415, 19 Am. B. R. 291. Neither, there having been no delivery of the property, was there a valid pledge. The lien of a pledge, undoubtedly is preserved in bankruptcy. *Hiscock v. Varick Bank*, 206 U. S. 28, 18 Am. B. R. 1. But to have this so, the essentials of a pledge must appear, to which possession is indispensable, there being no lien as there is no pledge, without it."

Similarly, a bona fide sale of personal property by a debtor to another and a contemporaneous lease back at a rental to the seller, who, all the time, retained possession of the chattels, was held not to have passed title to the intended purchaser, for lack of delivery.

In *re Beihl*, 23 A. B. R. 905, 176 Fed. 583 (D. C. Pa.): "I see no difference in principle between this case and *Re Millbourne Mills Co.* (C. C. A., 3d Circuit), 20 Am. B. R. 746, 172 Fed. 177. There the milling company was the absolute owner of grain and flour in its own possession, and undertook to pledge it by issuing warehouse receipts, but without delivering the property itself. The attempted pledge was held to be invalid and of course therefore the absolute title had passed to the trustee. This is precisely what happened here. The bankrupt had an absolute title to the horses and wagons in his own possession, and undertook to pledge them by a somewhat round-about method, but without delivering the property. The bill of sale and the so-called lease and the parol contract concerning the payment of the past due claim for coal—taken together, as they should be taken—clearly amount to a pledge or mortgage of the property. The bill of sale is equivalent to the deed, and the lease and parol agreement constitute the defeasance."

The trustee also is bound by the sufficiency or insufficiency under State law of acts of delivery of pledged property.

In *re Automobile Livery Service Co.*, 23 A. B. R. 799, 176 Fed. 792 (D. C. Ala.), on the theory that though lack of corporate authority originally executed, yet the corporation is estopped from repudiation by retaining the benefits of the attempted sale.

In so far, of course, as a creditor would be bound thereby, who had levied process thereon, if in the custody of the bankruptcy court.

Compare ante, discussion of § 1137½ and of 1145½.

Thus, a verbal assignment of book accounts where there was no manual delivery of any kind has been sustained in bankruptcy.

In *re Macauley*, 18 A. B. R. 459, 158 Fed. 322 (D. C. Mich.).

However, the delivery of a distilling company's own bonded warehouse receipt has been held to be sufficient delivery to consummate a pledge of whiskey, even though the warehouse be on the pledgor's own premises, the case being different from the ordinary attempts at warehousing on the pledgor's own premises, because of the stringent regulations of the government.

In *re Miller Pure Rye, Distilling Co.*, 23 A. B. R. 890, 176 Fed. 606 (D. C. Pa.).

§ 1147. Bankrupt's Contracts of Purchase or Sale, and His Mortgages.

Likewise, the trustee is bound by the terms of the bankrupt's sales.

Instance, *In re Millbourne Mills Co.*, 21 A. B. R. 363, 162 Fed. 988 (D. C. Pa., affirmed sub nom. *Fourth St. Nat. Bk. v. Millbourne Mills Co.*, 22 A. B. R. 442, 172 Fed. 177 C. C. A., quoted ante, at § 1146).

Instance, corporation selling its stock for a patent right, the trustee cannot enforce any "unpaid stock subscription," for there is none unpaid, *Sternbergh v. (Duryea) Power Co.*, 20 A. B. R. 625, 161 Fed. 540 (C. C. A. Pa.); instance, contract of sale of season's output, *Mills v. Virginia-Carolina Lumber Co.*, 20 A. B. R. 750, 164 Fed. 168 (C. C. A. N. Car.).

The trustee is also bound by the terms of the bankrupt's mortgages.

See post, § 1229 et seq. Also, see instances, § 1146 note; also instance, conditional sale of newspaper press, and subsequent liens thereon, and as to whether by annexation other parts came under a chattel mortgage, *In re Atlanta Pub. Co.*, 20 A. B. R. 193, 160 Fed. 519 (D. C. Ga.); and also *In re Clark Coal & Coke Co.*, 23 A. B. R. 273, 173 Fed. 658, 176 Fed. 955 (D. C. Pa.).

Page 677, note 24. See, in addition, *In re Schindler*, 19 A. B. R. 800, 158 Fed. 458 (D. C. N. Y.); *In re Landis*, 18 A. B. R. 483, 151 Fed. 896 (D. C. Pa.).

Page 677, note 25. *Pridmore v. Puffer Mfg. Co.*, 20 A. B. R. 851, 163 Fed. 496 (C. C. A. S. Car.). Instance, *In re Paper Co.*, 17 A. B. R. 121, 147 Fed. 858 (D. C. Pa.), wherein held that after delay of year too late to deny title in bankrupt; instance, *In re Kingston Realty Co.*, 19 A. B. R. 703, 157 Fed. 303 (D. C. N. Y.); *In re Landis*, 18 A. B. R. 483, 151 Fed. 896 (D. C. Pa.).

Likewise, as to sales on payment.

In re Kingston Realty Co., 19 A. B. R. 703, 157 Fed. 303 (D. C. N. Y.); *Pridmore v. Puffer Mfg. Co.*, 20 A. B. R. 851, 163 Fed. 496 (C. C. A. S. C.).

Likewise, where the bankrupt had refused to accept goods, though receiving them on the premises, claiming they did not comply with the contract of purchase.

In re Planet Mfg. Co. (Schultz v. Scott), 19 A. B. R. 729, 157 Fed. 916 (C. C. A. Ind.).

Likewise, as to sales where bill of lading is accompanied with draft.

In re Reboulin Fils, 21 A. B. R. 296, 165 Fed. 245 (D. C. N. Y.).

Similarly, where the lessee of a steam shovel continued to pay rent after the end of the year within which an option to purchase was to be exercised.

McEwen v. Totten, 21 A. B. R. 336, 164 Fed. 837 (C. C. A. Ga.).

Likewise, as to "leases" of personal property, where not in fraud of creditors' rights.

Nyles v. Am. Trust & Sav. Bank, 21 A. B. R. 535, 166 Fed. 276 (C. C. A. Ills.). Also, compare post, § 1228, et seq.

Similarly, where a draft and its accompanying bill of lading have fallen into different hands.

In *re Kessler & Co.*, 21 A. B. R. 583, 165 Fed. 508 (D. C. N. Y.).

Likewise, as to the relation between an "agent" and a manufacturer, etc.

In *re Sassman*, 21 A. B. R. 893, 167 Fed. 419 (D. C. Pa.).

Thus, as to the validity of chattel mortgages.

Page 677, note 27. Instance, In *re Grainger*, 20 A. B. R. 166, 160 Fed. 69 (C. C. A. Calif.).

Also, as to mortgages on real estate to cover future advances, and as to what advances are covered thereby.

See, in addition, *Hendricks v. Webster*, 20 A. B. R. 112, 159 Fed. 927 (C. C. A. N. Y.).

Similarly, as to goods on consignment.

In *re Bailey*, 23 A. B. R. 876, 176 Fed. 628, 176 Fed. 990 (D. C. S. Car.); *York Mfg. Co. v. Brewster*, 23 A. B. R. 474, 174 Fed. 566 (C. C. A. Tex.). Also, see post, § 1228.

Thus, as to the bankrupt's pledges.

In *re Automobile Livery Service Co.*, 23 A. B. R. 799, 176 Fed. 792 (D. C. Ala.): In *re Miller Pure Rye Distilling Co.*, 23 A. B. R. 890, 176 Fed. 606 (D. C. Pa.). See also, ante, § 1146.

Page 678. The interest on the mortgage is also included within the protection of the law; for the trustee takes title to mortgaged property subject to the mortgage debt including interest, the bankruptcy adjudication not operating to cut off the interest.

Coder v. Arts, 18 A. B. R. 513, 152 Fed. 943 (C. C. A. Iowa, affirmed in 23 A. B. R. 1, 213 U. S. 223): "By the terms of the note and mortgage the mortgagor agreed to pay interest on his debt until it was paid * * *. The covenant for the sale and the application of the proceeds of these lands to the payment of the debt and interest was valid and binding, and it ran with the land, so that when the latter came into the hands of the trustee it was mortgaged for the payment of the interest as much as for the payment of the principal. * * *. Another rule might prevail if the proceeds of the mortgaged property were insufficient to pay the mortgaged debt and its interest in full and the mortgagee was seeking to collect an unpaid balance by sharing with other creditors in the distribution of the common property. He might not be entitled then to recover from the proceeds of the common property interest upon his debt to any later date than the unsecured creditors would recover interest upon their claims."

See also, §§ 598, 758½, 1997½.

Likewise, the trustee is bound by the bankrupt's contracts of conditional sale.

National Bank *v.* Williams, 20 A. B. R. 79, 159 Fed. 615 (C. C. A. Tex.); instance, *In re* Max Cohen, 20 A. B. R. 796, 163 Fed. 444 (D. C. N. Y.); *Pridmore v. Puffer Mfg. Co.*, 20 A. B. R. 851, 163 Fed. 496 (C. C. A. S. C.); *Crucible Steel Co. v. Holt*, 23 A. B. R. 302, 174 Fed. 127 (C. C. A. Ky.). Also, see post, §§ 1228, 1241, 1242, 1244, 1263, 1878. Instance, *In re* Grainger, 20 A. B. R. 166, 160 Fed. 69 (C. C. A. Calif.), though here the court's order of payment of remaining price held unauthorized.

Certificates of stock bought and paid for by a customer belong to the customer and the trustee must surrender them.

In re Meadows, Williams & Co., 24 A. B. R. 251, 177 Fed. 1004 (C. C. A. N. Y., affirming 23 A. B. R. 124, 173 Fed. 694).

§ 1148. Bankrupt's Assumption of Mortgage or Other Obligation.

The trustee is bound by the bankrupt's assumption of mortgages or other obligations.

Instance, held no assumption, *In re* Baumblatt, 18 A. B. R. 496, 153 Fed. 485 (D. C. Pa.).

Page 678, note 35. Instance, *In re* Beavor Knitting Mills, 18 A. B. R. 528, 154 Fed. 320 (C. C. A. N. Y.); *In re* Fire Proof Door & Trim Co., 21 A. B. R. 714, 168 Fed. 159 (D. C. N. Y.).

§ 1149. Estoppels against Bankrupt, Good against Trustee.

Page 678, note 36. Instance, estoppel to deny authority of president to bind bankrupt corporation by lease of machinery purchased by his authority, *Canning Machinery Co. v. Fuller*, 20 A. B. R. 157, 158 Fed. 588 (C. C. A. Ala.). Vendee of cash register under conditional sale selling to another, his levy is not effective to avoid contract afterwards. *In re* Greek Mfg. Co., 21 A. B. R. 714, 164 Fed. 211 (D. C. Pa.).

Instance, *In re* Automobile Livery Service Co., 23 A. B. R. 899, 176 Fed. 792 (D. C. Ala.), wherein the court held that the trustee, succeeding to the bankrupt's title, was estopped from urging the original lack of authority on the part of the corporate officers to make the pledge, by retention of the consideration received therefrom.

But compare, apparently contra, *In re* Laundry Co., 23 A. B. R. 859, 176 Fed. 740 (D. C. N. Y.), wherein the court held that the renewal of a chattel mortgage given by a corporation for borrowed money, where the assent of two-thirds of the stockholders had not been obtained as required under the New York statute, was invalid as against the trustee, though the bankrupt itself would have been estopped.

§ 1149½. Right of Subrogation.

The right of subrogation, in accordance with the ordinary rules of equity, is unimpaired.

In re Bruce, 19 A. B. R. 770, 158 Fed. 123 (D. C. N. Y.); also, see post, § 2278, et seq.

§ 1150. Specific Contractual Rights and Equitable Liens.

Page 678, note 37. But are void if in fraud of creditors' rights, see §§ 1207½, 1216, 1222, 1263½; *In re Bellevue Pipe & F'd'y Co.*, 22 A. B. R. 97, 16 Ohio Dec. 247 (Ref. Ohio).

Equitable Lien Defined.—Post, § 1878; also, see *In re Max Goldman*, 23 A. B. R. 497, 174 Fed. 579 (C. C. A. Ohio); *In re Wilson*, 23 A. B. R. 814, (D. C. Hawaii).

Page 678. And, similarly, where a bona fide contract of purchase of a lumber mill's entire output is in existence, on which moneys have been advanced to the seller, the delivery of lumber thereunder, though on the eve of the seller's bankruptcy, is valid.

Mills v. Virginia & Carolina Lumber Co., 20 A. B. R. 750, 164 Fed. 168 (C. C. A. N. Car.).

Again, where a contract to furnish certain articles provides that, until sold, or paid for in cash, they should remain the seller's property, and, when sold, all proceeds of the sale, including cash, notes, etc., should be kept separate as a trust fund and be turned over to the seller as collateral security, the seller's rights are unimpaired by the bankruptcy.

In re McGehee, 21 A. B. R. 656, 166 Fed. 928 (D. C. Ga.).

Page 679, note 41. Also, see post, §§ 1253, 1370.

Likewise, an oral agreement to insure for the benefit of a mortgagee will operate as an equitable lien upon the proceeds of a fire insurance policy taken out by the mortgagor in his own name.

Hanson v. Blake & Co., 19 A. B. R. 325, 150 Fed. 342 (D. C. Me.).

But not as an equitable lien upon the proceeds of a policy taken out by the grantee of the equity of redemption.

Hanson v. Blake & Co., 19 A. B. R. 325, 150 Fed. 342 (D. C. Me.). Also, see post, §§ 1253, 1370.

Page 679, note 44. See ante, § 451; post, § 2662.

Page 679. Again, where a mining company was under contract to supply a railway company with coal, but became embarrassed, and the railway company thereupon advanced it money to meet its pay roll on the oral agreement that such money should be advance payment for the coal, an equitable pledge was thereby created of the unmined coal which the Supreme Court upheld in bankruptcy.

Hurley v. Atchison Ry. Co., 22 A. B. R. 17, 213 U. S. 126: "Equity looks at the substance, and not at the form. That the coal for which this money was advanced was not yet mined, but remained in the ground to be mined and delivered from day to day, as required, does not change the transaction into one of an ordinary independent loan on the credit of the coal company or upon express mortgage security. It implies a purpose that the coal, as

mined, should be delivered, and is, from an equitable standpoint, to be considered as a pledge of the unmined coal to the extent of the advancement. The equitable rights of the parties were not changed by the commencement of bankruptcy proceedings. All obligations of a legal and equitable nature remained undisturbed thereby. If there had been no bankruptcy proceedings, the coal as mined was, according to the understanding of the parties, to be delivered as already paid for by the advancement."

A bona fide pledgee of stock standing in the bankrupt's name, will be protected though the stock was originally subscribed for the bankrupt's father who afterwards died before completing payment, the bankrupt completing payment with his own funds and taking the stock in his own name, though executor of his father's estate.

In re McCord, 23 A. B. R. 164, 174 Fed. 820 (C. C. A. N. Y.).

Page 679. Similarly, the trustee's right to the proceeds of the sale of the bankrupt's seat in a stock exchange is subject to the lien of creditor members, under the rules of the exchange.

In re Gregory, 23 A. B. R. 270, 174 Fed. 629 (C. C. A. N. Y.).

Page 679. Thus, equitable liens upon standing timber, created by verbal agreement before the four months period, have been held valid as against the trustee, the bankrupt's potential interest in the logs and timber being held sufficient.

Mercantile & Stock Co. v. Galloway, 19 A. B. R. 244, 156 Fed. 504 (D. C. Ore.).

Similarly, liens created by an agreement to secure "by the goods themselves" has been upheld.

In re Louis Levin, 21 A. B. R. 665, 173 Fed. 119 (D. C. N. Y.); to same effect, Wood Co. v. Eubanks, 22 A. B. R. 307, 169 Fed. 929 (C. C. A. N. C.), where in the court held that a provision in a contract, under which certain machinery and implements were sold to a bankrupt, that "all goods on hand, and the proceeds of all sales of goods received under this contract, whether such proceeds of sales consist of notes, cash or book accounts, the party of the second part agrees to hold as collateral security in trust and for the benefit of the party of the first part, until all obligations hereunder due party of the first part from the party of the second part are paid in cash," constituted a trust, valid as against the bankrupt's trustee, and was neither a mortgage nor a contract of conditional sale, and under the law of the State was not required to be registered.

And an equitable lien before four months has been held created, though delivery was not made until within four months.

Godwin v. Murchison National Bank, 22 A. B. R. 703, 145 N. Car. 320.

Page 679. But a mere promise by a government contractor, made before the four months period, to pay a subcontractor with the money

expected from the government on an estimate, will not constitute an "equitable assignment" of the money.

In *Smedley v. Speckman*, 19 A. B. R. 694, 157 Fed. 815 (C. C. A. Pa.).

Page 680, note 51. However, compare post, § 1681.

Page 680. Likewise, a verbal assignment of book accounts, without delivery of manual possession of any kind, has been held good in bankruptcy, and the trustee been ordered to pay over the collections thereon to the assignee.

In *re Macaulay*, 18 A. B. R. 459, 158 Fed. 322 (D. C. Mich.).

But the reservation of secret charges or liens upon property are not to be upheld as "equitable liens" to which the property is to be considered subject in the hands of the trustee, where they amount to a fraud upon the law.

In *re Liberty Silk Co.*, 18 A. B. R. 582, 152 Fed. 844 (D. C. N. Y.), quoted at § 1263½.

Page 680. An equitable assignment has been defined to be any writing or act which shows an intention to transfer the specific funds in the hands of another, the same being completed when notice is given to the fund holder.

In *re Wilson*, 23 A. B. R. 814 (D. C. Hawaii).

It has been held that the assignment of a debt requires for its validity as to third parties notice to the debtor, but not acceptance by him.

In *re Wilson*, 23 A. B. R. 814 (D. C. Hawaii).

An assignment of a subcontract for furnishing and setting tile for buildings, as collateral security for borrowed money, has been held not to pass title to the tile itself, the wording of the contract being insufficient.

In *re Wilson & Co.*, 23 A. B. R. 907, 176 Fed. 652 (D. C. Pa.).

Similarly, patented articles left with the bankrupt to be sold under license—the trustee is bound by the terms of the license.

In *re Spitzel & Co.*, 21 A. B. R. 729, 168 Fed. 156 (D. C. N. Y.).

The trustee takes property subject to the right of subrogation of one paying off liens thereon, where such right of subrogation would have existed against the bankrupt.

In *re Automobile Livery Service Co.*, 23 A. B. R. 799, 176 Fed. 792 (D. C. Ala.).

Thus, it has been held that the trustee takes property subject to the rights of the bankrupt children, who had surrendered to their father life

insurance policies for specific purposes, to subrogation to certain mortgages paid off through misuse of the policies.

In re MacDougall, 23 A. B. R. 762, 175 Fed. 400 (D. C. N. Y.).

That a wife's delivery of money to her husband is presumptively a gift has been decided in accordance with State law; likewise, whether sufficient proof exists to establish a resulting trust in favor of a wife in lands bought in her husband's name, has been decided in accordance with general rules of law.

Teter v. Visquesney, trustee, 24 A. B. R. 242, 179 Fed. 655 (C. C. A. W. Va., affirming *In re Teter*, 23 A. B. R. 223, 173 Fed. 798).

§ 1150½. Oral Modifications of Written Contracts Unknown to Trustee.

The trustee in the absence of fraud is bound by valid modifications of written contracts made by the bankrupt before adjudication, whether such modifications were known to the trustee or not.

Atchison, etc., Ry. Co. v. Hurley, 18 A. B. R. 396, 153 Fed. 503 (C. C. A. Kans., affirmed sub nom. *Hurley v. Atchison, etc., Ry. Co.*, 22 A. B. R. 17, 213 U. S. 126): "Any valid modifications of a written contract which may have been made by the bankrupt before adjudication, whether oral or in writing, and whether known or unknown to the trustees, are binding upon them if they elect to assume and perform the contract. They take it subject to all equities between the original parties. *Reeves v. Kimball*, supra; *Wood v. Donovan*, 132 Mass. 84; *Homer v. Shaw*, 177 Mass. 1, 58 N. E. 160; *Mangles v. Dixon*, 3 H. of L. Cas. 703. The duty rests upon the trustees to make inquiry and ascertain the true nature, character, and conditions of the contract before exercising their election. When the election is made to assume it where no fraud has been practiced upon them, they stand in exactly the same situation as the bankrupt himself stood prior to the adjudication. *Cases*, supra. After presumably making all the inquiries necessary to fully acquaint themselves as to the advisability of taking over the executory contract in question the trustees in this case determined to do so, assumed the contract and entered upon its execution. They mined coal, delivered it to the railway company, and, in the language of the trial court, "performed fully all the terms of the contract as was written," but failed to conform to the condition created by the oral agreement to deliver coal to the railway company in payment of the advances made by it to keep the mine going." Quoted further ante, § 1145.

§ 1151. Forfeiture Clauses, Rent, etc.

But he may urge that forfeiture has been waived by the conduct of the parties.

In re Palatable Water Co., 18 A. B. R. 833, 154 Fed. 531 (D. C. Pa.); *Mound Mines Co. v. Hawthorne*, 23 A. B. R. 242, 173 Fed. 882 (C. C. A. Colo.).

§ 1152. Fixtures.

Page 680, note 54. See ante, § 1000.

§ 1152½. After-Acquired Property.

The trustee stands in the bankrupt's shoes as to after-acquired property and as to the right to the increase of property, etc. [except where creditors, under State law have greater rights, as to which, see post, § 1207, et seq.].

Mercantile & Stock Co. v. Galloway, 19 A. B. R. 244, 156 Fed. 504 (D. C. Ore.): "Another suggestion is that it was incompetent for the parties thus to impose a lien upon after-acquired property. It is sufficient answer to this that Buck had at least a potential interest in the logs and lumber, and it is believed that it was competent for him to affix the lien, looking first to the manufacture of such logs and lumber; the timber out of which the product was to be manufactured being his by indisputable purchase."

§ 1154. Mechanics' and Subcontractors' Liens, Landlords' Liens.

Page 680, note 56. Impliedly, *In re Lynn Camp Coal Co.*, 22 A. B. R. 60, 168 Fed. 998 (D. C. Ky.); *In re New England Breeders' Club*, 23 A. B. R. 689, 175 Fed. 501 (D. C. N. H.). See ante, § 1145½.

Page 681, note 56. Instance, whether a turpentine still is "machinery" within Georgia Mechanics' Lien Law, *In re Anderson*, 21 A. B. R. 413, (Ref. Ga.).

Instance, mechanics' lien superior to corporate bond mortgage, *In re Park Coal & Coke Co.*, 23 A. B. R. 273, 173 Fed. 638, 176 Fed. 955 (D. C. Pa.).

§ 1155. Mechanics' Liens, etc., Not Liens Obtained by Legal Proceedings nor Preferences.

Page 681, note 57. Obiter, *In re Robinson & Smith*, 18 A. B. R. 563, 154 Fed. 343 (C. C. A. Ills.); *In re New England Breeders' Club*, 23 A. B. R. 689, 175 Fed. 501 (D. C. N. H.).

Page 681, note 58. To same general effect, *In re Lynn Camp Coal Co.*, 22 A. B. R. 60, 168 Fed. 998 (D. C. Ky.); *In re New England Breeders' Club*, 23 A. B. R. 689, 175 Fed. 501 (D. C. N. H.).

Page 681, note 59. *In re New England Breeders' Club*, 23 A. B. R. 689, 175 Fed. 501 (D. C. N. H.).

§ 1156. Subcontractors' Liens.

Page 682, note 61. Subcontractors' claims "allowed" only after deduction of fund appropriated by attested accounts, *In re Grive*, 18 A. B. R. 737, 153 Fed. 597, 151 Fed. 711 (D. C. Conn.).

Page 683. In Pennsylvania the subcontractor acquires rights against the fund only by instituting suit and garnisheeing the owner; and therefore it is there held that the legal proceedings create the lien and do not simply enforce a lien already pre-existing.

Fairlamb v. Smedley Construction Co., 22 A. B. R. 824, 36 Pa. Super. Ct. 17.

§ 1158. Artisan's Liens.

Page 683, note 65. See ante, § 1145½.

§ 1159. Statutory Liens for Supplies.

Page 683, note 66. *Obiter*, In re Lynn Camp Coal Co., 22 A. B. R. 60, 168 Fed. 998 (D. C. Ky.). See ante, § 1145½.

Whether acceptance of chattel mortgage waives lien, In re Lynn Camp Coal Co., 22 A. B. R. 60, 168 Fed. 998 (D. C. Ky.).

§ 1160. Landlord's Lien or Priority for Rent.

Page 683, note 67. See, in addition, In re West Side Paper Co., 20 A. B. R. 660, 162 Fed. 110 (C. C. A. Pa.); In re V. D. L. Co., 23 A. B. R. 643, 175 Fed. 635 (D. C. Ga.); instance, In re Hersey, 22 A. B. R. 860, 171 Fed. 998, (D. C. Iowa). See ante, § 1145½.

Page 683. It is not strictly speaking, a "lien by legal proceedings," and is not void under § 67 (f), though enforced by legal proceedings.

See further post, §§ 1437, 1444, 2204. Also, see In re Robinson & Smith, 18 A. B. R. 563, 154 Fed. 343 (C. C. A. Ill.); In re Seibold, 5 A. B. R. 358, 105 Fed. 910 (C. C. A. La.); *Plaut Tr. v. Gorham Mfg. Co.*, 23 A. B. R. 42, 174 Fed. 852 (D. C. N. Y.).

Page 683. In re West Side Paper Co., 20 A. B. R. 660, 162 Fed. 110 (C. C. A. Pa.): "Distress for rent in arrear, is one of the most ancient, as well as 'one of the most efficient of the landlord's remedies for the collection of rent.' It is in most of our States, as it was at common law, a right *sui generis*, belonging to the landlord whenever the relation of landlord and tenant existed. It appears to have been abolished in a few of the States, and in most of them its exercise has been regulated by statute. Its essential characteristics are, however, for the most part the same as existed at common law. In Pennsylvania, as at common law, the distress warrant issues directly from the landlord to his bailiff, who, if he happens to be a constable, is no less the agent and bailiff of the landlord than if he were a private person. The State law provides that, after the goods have been distrained, or levied upon, unless the same be replevied by the plaintiff within five days, the landlord may apply to the sheriff of the county, or to a constable, who is required to take proceedings for the sale of the said goods, or so much thereof as may be required for the satisfaction of the rent. In other respects, the right of the landlord remains for the most part as it was at common law. The right to distrain or levy upon all the goods upon the demised premises, whether those of the tenant or of a stranger, arises the moment the relation of landlord and tenant is established. It is a right in the nature of a lien, rather than a lien, until the goods are actually distrained under a landlord's warrant. It was originally in the nature of a property right in the *reditus* or return from the land, reserved to the landlord. No suit or proceeding at law, whether in personam or in rem, in the proper sense of those words, was necessary for the assertion of this right. It belongs to that small category of personal rights, the assertion of which has always been independent of legal procedure; of which the right to abate a nuisance, under certain circumstances, and the right to distrain cattle damage feasant, are examples. While there is no specific lien, except on the goods actually distrained under the landlord's

warrant, all the goods on the demised premises are to be considered as being under a quasi pledge, which gives superiority to the specific lien established by the distraint. Such a lien is in no sense "obtained through legal proceedings." Nor is it within the spirit of the bankrupt law in this regard, as evidenced by other provisions thereof, as well as that of 67f, above quoted."

In *re Burns*, 23 A. B. R. 640, 175 Fed. 633 (D. C. Ga.): "See particularly the opinion of Circuit Judge Grosscup, in *Re Robinson & Smith*, 18 Am. B. R. 503, 154 Fed. 343, speaking for the Circuit Court of Appeals for the Seventh Circuit, when he held that the provision of the bankruptcy law on which the trustee here relies 'relates only to those actions of proceedings taken by creditors who, having no existing lien or right of lien, resting in existing contract, entered into in good faith, seek to obtain a preference by being first in the race of diligence, and such provisions do not affect the lien obtained by a landlord by the levy of a distress warrant for rent.' This case is precisely in point, and long postdates any adverse holding. 'The right of the landlord is one upon which every permanent hope of general prosperity must depend. Our legislature, in the several statutes set forth in the various sections of the Code of Georgia, have made very clear the policy of the State on this subject. Section after section reiterates not only the right of the landlord to a general lien, but they also give a special lien upon the corps made on the land. The general lien attaches to all of the property of the debtor liable to levy and sale. It is true that this lien attaches from the date of the levy, but that does not mean that the right of the landlord to the general lien, or to the special lien, is created by levy.' The right exists by virtue of the statute. * * * But the State law has created the general right, and as well the special right, and the lien of the landlord thus created is one of those debts having priority by the law of the State, which under the express provisions of the Bankruptcy Act * * *, must be paid from the assets of the bankrupt, provided the lien has attached, before the general creditors can participate therein. It follows, in my judgment, that the bankruptcy of the tenant does not defeat this lien of highest dignity except the lien of taxes."

§ 1161. Mechanics' Liens, etc., Valid Though Affidavit or Stop Notice Not Filed Till after Bankruptcy of Owner, etc.

Page 684, note 69. But compare, analogously, peculiar decision In *re Epstein*, 19 A. B. R. 89, 156 Fed. 42 (C. C. A. Colo.), quoted at § 1806½; compare, In *re Clark Coal & Coke Co.*, 23 A. B. R. 273, 173 Fed. 658, 176 Fed. 955 (D. C. Pa.).

§ 1166. Inchoate Dower Right Unimpaired.

Page 686, note 80. See, in addition, *Thomas v. Woods*, 23 A. B. R. 132, 173 Fed. 585 (C. C. A. Kans.), quoted at § 1166½; Impliedly, In *re Acretelli*, 21 A. B. R. 537, 173 Fed. 121 (D. C. N. Y.).

§ 1166½. Dower in Lands Located in Another State.

From the wording of the statute, it might seem that where the bankrupt owns real estate located in another State, and dies, his widow is entitled to such dower rights as would belong to her in the State of the

bankrupt's residence and so it was ruled in a case which was subsequently reversed.

Bank v. Act, § 8; *Hurley v. Devlin*, 18 A. B. R. 627, 151 Fed. 919 (D. C. Kans.), overruled by *Thomas v. Woods*, 23 A. B. R. 132, 173 Fed. 585 (C. C. A.); contra, *Thomas v. Woods*, 23 A. B. R. 132, 173 Fed. 585 (C. C. A. Kans.), quoted at § 1166½.

Probably the state of the residence meant was the state of the bankrupt's residence at the date of adjudication, since that is the date of cleavage of title.

Compare, ante, § 1025.

Such a construction, however, might lead to the giving of greater or perhaps less dower to the widow than she would be entitled to under the laws of the State where the land was actually located; and it is altogether likely that the proviso of § 8, "That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence," should be read as if the clause "fixed by the laws of the State of the bankrupt's residence" modified simply "allowance" and not also "dower;" by this construction the right of dower being left in each State in precisely the condition the State law intended.

Thomas v. Woods, 23 A. B. R. 132, 173 Fed. 585 (C. C. A. Kans.): "It is next urged that the right of dower belongs in the same class as the right of exemptions and homesteads, which are confined by § 6 of the Bankruptcy Act to the State of the bankrupt's domicile. Their similitude is very slight. Both are in a general way for the protection of the family. There, however, their likeness ceases. The homestead and exemptions are a part of the bankrupt's estate. They are both primarily to be claimed by him and set off to him. Their selection from his estate arises at the time when that estate is to be appropriated to the payment of the claims of his creditors. Dower, on the other hand, is no part of the bankrupt's estate. The wife derives no right from him either by grant or contract. As the Supreme Court says in *Randall v. Krieger*, 23 Wall. 137, 148: 'It is wholly given by law.' Congress has plenary power over the subject of exemptions, because they are part of the bankrupt's estate. It may, as in the present law, adopt the exemption laws of the several States, or it may, as in the Act of 1867 * * *, adopt local laws in part, and supplement these with a schedule of its own. Its power to deal with the subject, however, arises out of the fact that exemptions are a part of the bankrupt's estate. This consideration shows that the right of dower does not belong in the same class. Again, the right of dower has nothing to do with the insolvency of the husband. It arises from time to time during the marriage relation as the husband acquires real property. If the wife has not released her right of dower, it is as much her own private, absolute property as if she had acquired it by purchase. That estate can no more be transferred to her husband's creditors than any other portion of her separate estate. At the present time in the United States, the wife, as to her property rights, is a third person, and her estate is no more affected by the insolvency of her husband than is the property of other third parties. In our judgment it

would be beyond the constitutional power of Congress to provide that in case of bankruptcy the dower rights of the bankrupt's wife, as defined by laws of the several States, ceased, and the real property owned by him passed to his trustee in bankruptcy discharged from such right of dower. Bankruptcy can only deal with what in law belongs to the bankrupt. It may annul his acts and the acts of his creditors which interfere with the just enforcement of its provisions. It cannot, however, annul an act of the legislature of a State which previous to the statute of bankruptcy had vested an estate in the wife of the bankrupt. Its whole field of operation is circumscribed to getting in the estate which under the law belongs to the bankrupt, and distributing the same to his creditors. It cannot reach out and take property which under the law belongs to the wife, and apply it to the payment of the bankrupt's debts, any more than it could seize that portion of her property which she acquired by purchase or devise. Again, it does not follow that because the right of homestead and exemptions is confined in most of the States to the domicile of the claimant, such a restriction would be appropriate in regard to dower. Dower is not measured in value or quantity as homesteads or exemptions are. The amount of it is dependent solely upon the amount of real property of which the husband is seized. * * * The proviso deals with two classes of rights: First, the widow's right of dower in real property; second, the allowances to the family out of the personal estate. This second class of rights is necessarily fixed by the laws of the State of the bankrupt's residence, for general rights in personal property follow the person of the owner and are determined by the laws of the State of his residence. The framer of the proviso used, in its last clause, language which was entirely appropriate to the allowances, and in part appropriate as to the right of dower. Having in mind several classes of rights, he made the not uncommon mistake of using language which was not quite comprehensive enough to cover all those rights under all conditions. If the proviso was a grant of rights, there would be reason in restricting the rights to its language; but, being intended to protect existing rights, it ought not to be given an interpretation which would destroy any part of those rights."

It has been held, that the bankruptcy court wherein the adjudication of bankruptcy was had may determine the rights of dower in land located in another State, in the custody of the trustee there.

Hurley v. Devlin, 18 A. B. R. 627, 151 Fed. 919 (D. C. Kans., sustained on this point, though reversed on other points, by *Thomas v. Woods*, post): "The ultimate question for determination, therefore, is, shall the trustees of the estate being administered in this court at the suit of the widow be compelled to appear in the State courts of foreign states to defend their interests, or supposed interests in the estate, when at the time such suits were brought they were in the actual possession of the property in the custody of this court, in the due process of administration. * * * While the act itself nowhere provides in what court or by what procedure the widow's rights to dower and the allowance to the widow and children provided for by § 8 thereof is to be determined and set apart, yet the above-quoted provisions clearly stake out, define, and limit the rights of the widow and the creditors of the deceased [bankrupt as represented by the trustees in the bankrupt estate. Hence, it is clear, in whatever court jurisdiction of the controversy resides, the rights of the parties are governed, controlled, and must be measured by the Bankrupt Act, and not by the laws of the particular State in which the property is

situate, except in so far only as such laws are adopted and preserved by the act for the determination of such rights. As has been seen, this was the State of the residence of the bankrupt before the commencement of the bankruptcy proceedings. For this reason jurisdiction was conferred upon this court by the Bankrupt Act for the purpose of entertaining the voluntary petition of the debtor to be adjudged a bankrupt, to take possession of his property through its appropriate officers, wherever situate, to conserve the estate, and to determine the rights of the respective creditors, and all others therein, and through its trustee or trustees to set apart all exemptions to the bankrupt and to pass title to nonexempt property to the purchasers thereof from the trustees in the settlement of the sequestered estate. As has been further seen, before the death of the bankrupt, while the widow's right of courtesy or dower in the lands of her husband remained inchoate, and for that reason afforded her no right of suit or action for its ascertainment and allowance, the trustees of the estate reduced the same to their actual possession, and were proceeding with the administration of the estate in this court in conformity with the provisions of the act, when the contingency giving her the right of action for her dower happened, and when the suits were brought by her in the State courts of foreign States. This court having assumed jurisdiction of the administration of this bankrupt estate, and having through its receivers taken actual possession of the property in which the widow, by the happening of the subsequent event of the death of her husband, acquired the interest she now asserts (an interest in and right to a portion of such property), I am of the opinion the determination of the controversy involving such right is drawn to and must be asserted in this court having jurisdiction of the administration of the estate and the custody of the property; that this jurisdiction, of necessity, is exclusive, and that the widow may, if she is so advised by her solicitors, exhibit her bill against the trustees and all parties in interest in said property, and all property in which she claims to be endowed out of her husband's estate, to this court, and that this court has full, ample, and exclusive jurisdiction to cause all such parties to be brought before it and to make complete determination of the rights of all parties." See § 1706½.

Or otherwise in the custody of the bankruptcy court, as, for instance, in the custody of the bankrupt at the date of the filing of the bankruptcy petition.

Thomas v. Woods, 23 A. B. R. 132, 173 Fed. 585 (C. C. A. Kans., reversing on other grounds and affirming on this ground. *Hurley v. Devlin*, supra): "The objection of the appellant that the trial court was without jurisdiction of the property, because it was not situated in the district of Kansas, has no merit. Upon the filing of a petition in bankruptcy, all property held by or for the bankrupt is brought within the custody of the court of bankruptcy, and, upon adjudication, that court is vested with jurisdiction to determine all liens and interests affecting it. This jurisdiction is coextensive with the United States."

It is questionable, however, whether the bankruptcy court has such jurisdiction to adjudicate titles to real estate in other States. Though the act is a "uniform law," yet that does not give the bankruptcy court extraterritorial jurisdiction; and in matters of title to real estate jurisdiction has always been particularly confined to land within the district, though indirectly land elsewhere may be affected by the exercise

of control over parties interested therein who may be found in the district. Were it not so, in the course of years, the devolution of title to real estate from one to another, with all the vicissitudes of the successive owners involved, would complicate the search of records intolerably, sometimes resulting in the search of titles in many different States, each State a one time State of the residence of some bankrupt owner of the land.

§ 1168. Right of Stoppage in Transitu Unimpaired.

Page 686, note 83. Compare on facts, but not placed on this ground, *Pridmore v. Puffers Mfg. Co.*, 20 A. B. R. 851, 163 Fed. 496 (C. C. A. S. C.). Compare effect of Amendment of 1910, ante, § 1145½.

Page 686. In re *Darlington*, 20 A. B. R. 800, 163 Fed. 389 (D. C. N. Y.): "The doctrine of stoppage in transitu can only be invoked where insolvency exists, and except for the provisions of the bankruptcy statutes of 1867 and 1898, the administration of insolvent estates in the United States has been under the various assignment acts of the different States. Such laws relating to assignments and the general doctrines of insolvency, recognize preferences and preferential payments. But both the Bankruptcy Act of 1867 and that of 1898 make preferential payments within a certain period voidable, and provide against the recognition of preferences in the administration of the bankrupt estate. The theory of the present bankruptcy law would seem to be utterly hostile to the idea of returning to a creditor, goods as to which title but not actual possession had passed to the bankrupt, and thus securing to the creditor who stops the goods payment in full, as against partial dividends to other creditors. But at the time the bankruptcy law of 1867, and the bankruptcy law of 1898, were passed, the doctrine of stoppage in transitu was well known in the courts and in the general body of the law. The application of the doctrine of stoppage in transitu, since the passage of the Bankruptcy Act, and its recognition by the courts, indicates that it cannot be inferred from the bankruptcy statute that a principle of law, so recognized by the courts as to have become a legal right, was wiped out and intended to be disregarded, when no express evidence of that intent was set forth in the text of the law. For the sake of consistency, and in order to carry out the principle of the bankruptcy statute, that the filing of a petition and the appointment of a receiver is notice to the world and creates an inchoate title which cannot be disregarded by those who have in their possession any part of the bankrupt estate, as indicated in the *Muller* case, supra, the doctrine of stoppage in transitu might have been excluded, if it had seemed wise to those framing the law so to do. But, as has been said, the trend of decision and the language of the statutes seem to indicate that no change in the doctrine of stoppage in transitu was made by either of the Bankruptcy Acts of the United States, and the present case must depend upon the determination of the issue involved, according to the principle of that doctrine as set forth by decisions."

§ 1169. Right to Rescind for Fraud Unaffected.

Page 687, note 85. See, in addition, *Haywood v. Pittsburg Industrial Iron Works*, 19 A. B. R. 780, 163 Fed. 799 (D. C. Pa.). Whether affected by Amendment of 1910, see ante, § 1145½.

§ 1170. Right of Set-Off and Counterclaim Unimpaired.

Page 687, note 88. Instance, *McDonald v. Clearwater Ry. Co.*, 21 A. B. R. 182, 164 Fed. 1007 (U. S. C. C. Idaho); *Walther v. Williams Mercantile Co.*, 22 A. B. R. 328, 169 Fed. 270 (C. C. A. Mich.), wherein a bailor of stock of goods and business which has been delivered to a firm to operate upon condition that the bailee firm should keep it replenished and pay certain percentages to the bailor for the use, was held entitled, on repossessing the business, to offset the unpaid commissions and other charges against the increased value of the business; *Taylor v. Nichols*, 23 A. B. R. 306, 134 App. Div. (N. Y.) 783; *In re Harper*, 23 A. B. R. 918, 175 Fed. 412 (D. C. N. Y.). See ante, § 818½; post, § 1203. Whether affected by Amendment of 1910, see ante, § 1145½.

§ 1171½. Mutual Demands Must Have Existed.

Mutual demands must have existed.

In re Northrup, 20 A. B. R. 86, 159 Fed. 686 (C. C. A. N. Y.): "The District Court also reached the conclusion that the Syracuse Bank remitted the proceeds of its collections to the Central Bank through a mistake of fact. This conclusion is apparently based upon the assumption that, had the Syracuse Bank been advised of the collection of the Paul draft, it would have set off the accounts. But it does not appear that the Syracuse Bank had any right to make such offset. On the contrary, it seems clear that it had no such right. The bankrupts undoubtedly acted wrongfully in failing to give notice of the collection of the Paul draft. But this was a matter outside the obligation of the Syracuse Bank to remit for what it had collected."

§ 1172. And Must Have Existed before Bankruptcy.

Page 688, note 89. Damages on attachment bond for wrongful attachment, accruing after the filing of the bankruptcy petition, may not be offset. *In re Bevins*, 21 A. B. R. 344, 165 Fed. 434 (C. C. A. N. Y.).

§ 1173. Offset Need Not Be Due if Owing.

Page 688. *Obiter, Steinhardt v. National Bank*, 19 A. B. R. 72, 120 N. Y. App. Div. 255: " * * * it is well settled that this provision of the Bankruptcy Act relating to set-offs applies to any debt provable in bankruptcy, even though not then due."

Page 688, note 90. But see, *Irish v. Citizens Trust Co.*, 21 A. B. R. 39, 163 Fed. 880 (D. C. N. Y.), where precisely the opposite was held, the court refusing to allow the bankrupt to offset against a bankrupt's deposit his unmatured note. *Obiter, Taylor v. Nichols*, 23 A. B. R. 306, 134 App. Div. (N. Y.) 783, where a bankrupt's father who owed a debt to his daughter surrendered to her a note he held of his in excess of her debt to him.

§ 1177. Offset Must Be Provable Debt.

Page 690. Similarly, the bankrupt has been allowed to offset a claim for unliquidated damages arising from the false representations of the creditor in inducing the bankrupt to enter into the contract of sale involved in the claim.

In re Harper, 23 A. B. R. 918, 175 Fed. 412 (D. C. N. Y.).

§ 1178. But Claim Not Proved within Year, Nevertheless Available as Offset.

But claims that are provable in their nature and have not been "proved" [filed] within the year are nevertheless available as offsets, if otherwise proper offsets.

Page 690. *Steinhardt v. National Park Bank*, 19 A. B. R. 72, 120 App. Div. N. Y. 255: "Owing to the expiration of the year, the defendant had doubtless lost its right to prove its claim in bankruptcy; but that is of no consequence in the determination of this appeal, for it was entitled to the benefit of the set-off provision of the Bankruptcy Act regardless of the fact that it failed to prove its claim in bankruptcy."

See ante, § 733.

Page 690. This rule would seem to apply to cases where the trustee in bankruptcy has recovered a preference and the preferential transferee has failed to prove his claim in the bankruptcy court within the year.

Yet compare, obiter, *Ommen, Trustee, v. Talcott*, 23 A. B. R. 570, 175 Fed. 259, 261 (D. C. N. Y.): "In equity his claim as beneficiary must be subject to the same rules of limitation as though he applied in the bankruptcy court for his beneficial interest pro rata in the funds of that court. In other words, it is a case in which a court of equity ought to observe the same limitation in giving a remedy on the cross-bill as the claim itself would be subject to were suit brought upon it in the tribunal which normally has jurisdiction over it. Besides, I think that Mr. Czaki has shown that the cases which seem to permit a claim of this character to be set off are all cases arising in bankruptcy, and that a court of equity has never attempted to allow a claim at a time when it could no longer be proved. All these were cases originally in bankruptcy, and, if so, they are equally authorities to the defendant in a bankruptcy court as they are in a court of equity. It is true that *Page v. Rogers*, 211 U. S. 575, 21 Am. B. R. 496, 53 L. Ed. 332, was a case in which the decree was in equity, but in that case the court did not allow the set-off in the suit itself, but, on the contrary, directed the defendant to file his proof of claim in the bankruptcy court. On the other hand, there is a hope of the substantial determination of this litigation, if the cross-bill is not interjected at the present time, and, in view of the extraordinary delays which the suit has already suffered, I am not in the least disposed to give the parties any further grounds for procrastination. I will not, however, deprive the defendant of the use of so much of the recovery as he is apparently entitled to under his claim in bankruptcy, and therefore I will let him retain in his hands that proportion of his assets which his claim in bankruptcy, if filed, represents of the total of all claims filed, including his own. This he may do if at the time the decree is entered he has already filed his proof of claim in the bankruptcy court. Of course, a certain portion of his dividend so retained, he will have to pay over as his proportion of the expenses of administration, but that cannot be ascertained at the present time. When I come to decide the case and direct the final decree, I will therefore allow the defendant to retain his proportion of his claim in bankruptcy out of the proceeds of this suit. If the complainant desires, the defendant will be obliged to give security for the payment of the portion so retained, provided he does not succeed in proving

his claim in bankruptcy for any part or all of the same, and the complainant will be permitted at any time to apply at the foot of the decree for a modification as to that portion, if the defendant procrastinate in pressing his claim in bankruptcy, or to compel him to pay his share of the expenses."

§ 1179. Voidable Preference Not Available as Offset in Favor of Preferred Creditor.

Page 690, note 98. *Obiter*, *Mason v. Herkimer Co. Bank*, 22 A. B. R. 733, 172 Fed. 529 (C. C. A. N. Y.); compare, *In re White* (*Froehling v. Amer. Trust & Savings Bank*), 24 A. B. R. 197, 177 Fed. 194 (C. C. A. Ill.), although the decision in this case is better placed upon the doctrine of § 1184, post.

§ 1179½. But Dividend Available as Offset in Favor of Preferred Creditor.

But the dividend to which the preferred creditor would be entitled upon recovery of the preference by the trustee, may be offset by the preferred creditor.

See ante, §§ 716, 717, 717½, 733, 775, 1178; *Ommen, Trustee, v. Talcott*, 23 A. B. R. 570, 175 Fed. 259, 261 (D. C. N. Y.), quoted at § 1178.

And, where a preferential transferee had failed to set up his claim to dividend by way of cross-bill, the court protected him by an order permitting him to retain sufficient of the funds, on the giving of a bond, to cover his possible dividend.

Ommen, Trustee, v. Talcott, 23 A. B. R. 570, 175 Fed. 259, 261 (D. C. N. Y.).

§ 1180. But General Deposits in Bank Available to Bank as Set-off, if not Applied by Bankrupt on Bank's Claim.

Page 691, note 99. *Steinhardt v. National Bank*, 19 A. B. R. 72, 120 App. Div. (N. Y.) 255. Compare post, §§ 1297, 1341; *Booth v. Prete*, 22 A. B. R. 579, 81 Conn. 636, 71 Atl. 938; *obiter*, *Irish v. Citizens Trust Co.*, 21 A. B. R. 39 (D. C. N. Y.).

It has been held that the bank's right of offset may not be exercised as to notes not yet due. *Irish v. Citizens Trust Co.*, 21 A. B. R. 39 (D. C. N. Y.).

Page 692. And the rule is not changed where a bank holds ample security for the debt at the time of bankruptcy, but, by delay, the security depreciates and leaves a deficit; the deposit may still be offset.

Page 692, note 100. *Steinhardt v. National Bank*, 19 A. B. R. 72, 120 App. Div. (N. Y.) 255, reversing 18 A. B. R. 86, 52 Misc. (N. Y.) 464.

§ 1181. Creditor Selling Claim to Effect Indirect Preference by Purchaser's Using Claim as Offset to Purchase Price.

Similarly, a creditor who purchased a portion of the bankrupt's property, whilst the bankrupt's business was in the hands of a creditors' committee (of which the purchasing creditor was a member), has been

refused the right of offsetting his claim against the unpaid purchase price.

In re White (Froehling v. Amer. Trust & Savings Bank), 24 A. B. R. 197, 177 Fed. 194 (C. C. A. Ill.).

§ 1182. Offsets Purchased with Knowledge of Insolvency or to Use as Offset, etc., Not Allowable.

Page 692, note 103. Compare, In re White, 24 A. B. R. 197, 177 Fed. 194 (C. C. A. Ill.).

Compare, analogously, ante, § 1179½.

§ 1184. Supervening Insolvency Destroying Right of Offset.

Thus, a creditor who has purchased a portion of the bankrupt's property whilst it was in charge of an advisory creditors' committee, may not offset his claim against the unpaid purchase price.

In re White (Froehling v. Amer. Trust & Savings Bank), 24 A. B. R. 197, 177 Fed. 194 (C. C. A. Ill.), although not placed upon this ground.

Although, no doubt, the creditor could, by proper proceedings, offset the dividend to which he might be entitled, against the unpaid purchase price.

§ 1185. Thus, Stockholding Creditor May Not Offset against Unpaid Subscriptions.

Thus a stockholder who is also a creditor may not offset his claim against his liability for unpaid stock subscription, after the corporation becomes insolvent.

In re Standard Dairy & Ice Co., 20 A. B. R. 321 (Ref. D. C.). Compare, similar propositions, ante, §§ 805½, 810¾.

Page 693. Babbitt v. Read, 23 A. B. R. 254, 173 Fed. 712 (U. S. C. C. N. Y.): "Coming to the second defense, the set-off alleged is not available against the trustee in bankruptcy, because it involves no mutual debt or credit between the stockholder and the estate of the bankrupt, within § 68 of the Bankruptcy Act. Sawyer v. Hoag, 17 Wall. 610, 21 L. Ed. 731. When the Central Trust Company, as trustee under the mortgage, distributes among the bondholders it represents the dividend paid it by the trustee in bankruptcy, so far as the same has been collected from the stockholders, this equity can be adjusted. In that proceeding the paying stockholders will get back whatever they are entitled to as bondholders. The trustee in bankruptcy is not concerned in settling the equities of the bondholders and the stockholders inter sese. If, however, for the protection of creditors other than the bondholders, it should prove necessary to settle these equities in the bankruptcy court, that court has power to do so, because it is necessary for the proper distribution of the bankrupt's estate."

Nor may a stockholder, after the bankruptcy of the corporation, rescind his stock subscription for fraud or misrepresentation and present

his claim for moneys paid by him, for sharing in the bankruptcy dividends; and this is so, notwithstanding the fraud was not discovered before.

Scott v. Abbott, 20 A. B. R. 335, 160 Fed. 573 (C. C. A. Mo.), quoted at § 805½.

However, the dividend on the stockholding creditor's claim may, without doubt, be offset against his unpaid subscription.

Compare, obiter, inferentially, *In re Alleman Hardware Co.*, 22 A. B. R. 871, 172 Fed. 611 (D. C. Pa.); (1867) obiter, *Wilbur v. Stockholders of the Corporation*, 18 Nat. Bankr. Reg. 179.

§ 1186. Supervening Insolvency Creating Right of Offset.

And this right may be exercised by the trustee against an insolvent stockholder who is also a creditor.

Inferentially, *Babbitt v. Read*, 23 A. B. R. 254, 173 Fed. 712 (U. S. C. C. N. Y.), quoted at § 1185.

§ 1188. Likewise, no Judgment in Bankruptcy Proceedings against Claimant Where Estate's Claim Exceeds Claimant's.

Page 694, note 108. Analogously, *In re Peacock*, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.); apparently, contra, *In re White* (*Froehling v. Amer. Trust & Savings Bank*), 24 A. B. R. 197, 177 Fed. 194 (C. C. A. Ill.).

§ 1190. Thus, Creditor's Right to Apply in Absence of Debtor's Instructions.

The right of a creditor to apply payments as he may desire, in the absence of instructions from the debtor before the application, is unimpaired by the debtor's subsequent bankruptcy; although thereby the creditor is permitted to apply them on a claim not entitled to priority rather than on a priority claim.

In re Andrews, 19 A. B. R. 441 (Ref. N. Car.). Also, see post, § 2179½. But compare, *In re Flick*, 5 A. B. R. 465, 105 Fed. 503. And in some States the court, in the absence of application by the parties, will apply payments most favorably to the debtor rather than to the creditor, *In re McIntyre Bros.*, 21 A. B. R. 588 (Ref. Miss.).

But if he apply payments received during the four months period before bankruptcy (limited for avoiding preferences) on wages earned before the statutory period of three months (limited for priority of wages), thus leaving a priority claim for the full amount earned within the statutory three months, he must surrender the preferential payments, for the payments were not made on claims entitled to priority; but not, if he did not receive the payments with reasonable grounds of belief, etc.

In re Andrews, 19 A. B. R. 441 (Ref. N. Car.).

§ 1191. Application to Be as Equity Requires, in Absence of Directions.

Likewise, where, under one continuous arrangement, book accounts were assigned as collateral each time a lender made an advancement, the proceeds of each account, when collected, were applied first to the particular note for which the account was assigned, then any surplus to the debtor's general account.

Young v. Upson, 8 A. B. R. 377, 115 Fed. 192 (U. S. C. C. N. Y.).

§ 1192. Trustee Succeeds to Bankrupt's Defenses and Rights.

Page 695. *Drew v. Myers*, 22 A. B. R. 656, 81 Neb. 750: "We think it safe to say that the trustee of a bankrupt may maintain any action which the bankrupt might have maintained but for the intervention of the bankruptcy, and it is not necessary in such a case for him to state that the property already in his hands is insufficient to pay the debts of the bankrupt. It is only when he brings an action which is in the nature of a creditor's bill that he is required to make such an allegation."

Amendment of 1910.—The Amendment of 1910, giving the trustee also the title of a creditor levying process, as to property in the custody of the bankruptcy court, and of a creditor with execution unsatisfied as to property not in such custody, does not prevent the trustee's succession to all the bankrupt's defenses and rights; the trustee still is entitled to urge all the rights and all the defenses the bankrupt might have urged had there been no bankruptcy.

Bankr. Act, § 70a.

§ 1193. May Interpose Bar of Statute of Limitations.

Page 696, note 116. Thus, to wife's claim of vendor's lien for money advanced for husband, bankrupt, 25 years before, *In re Teter*, 23 A. B. R. 223, 173 Fed. 798 (L. C. W. Va.).

§ 1199. May Defend That Mortgage Does Not Cover Specific After-Acquired Property or Is Void for Indefiniteness or for Failure to Comply with Statutory Requirements.

Page 697, note 125. Instance, *In re Atlanta News Pub. Co.*, 20 A. B. R. 193, 160 Fed. 519 (D. C. Ga.); instance, *Mattley v. Wolfe*, 23 A. B. R. 673, 175 Fed. 619 (D. C. Neb.).

And where the trustee is plaintiff and seeks to recover from the mortgagee property which he claims is not covered, of course the burden of proof that the property is after-acquired property not covered by the mortgage will be upon the trustee. *Mattley v. Wolfe*, 23 A. B. R. 673, 175 Fed. 619 (D. C. Neb.).

Page 697, note 126. Instance, void where description is "five horses" where bankrupt owned six, *In re Martin*, 23 A. B. R. 151, 173 Fed. 597 (C. C. A. Mo.).

The trustee may defend that a chattel mortgage claiming to cover after-acquired property contains no "after-acquired property" clause.

In re Doran, 18 A. B. R. 760, 154 Fed. 467 (C. C. A. Ky.).

§ 1201. May Plead Waiver.

The trustee may plead waiver of a forfeiture.

Instance, lease, In re Montello Brick Wks., 20 A. B. R. 859, 163 Fed. 621 (D. C. Pa.); instance, In re Palatable Water Co., 18 A. B. R. 833, 154 Fed. 531 (D. C. Pa.); instance, land contract, Mound Mines Co. v. Hawthorne, 23 A. B. R. 242, 173 Fed. 882 (C. C. A. Colo.).

§ 1202. May Plead Payment, Accord and Satisfaction, etc.

Thus, both parties are bound by valid accord and satisfaction.

Instance, Missouri Elec. Co. v. Hamilton-Brown Co., 21 A. B. R. 270, 165 Fed. 283 (C. C. A. Mo.).

§ 1202½. May Ask Reformation of Contract.

The trustee may ask for reformation of contract; also he may resist such application.

Impliedly, Hardy v. Chandler, 23 A. B. R. 717, 175 Fed. 138 (D. C. Ga.).

§ 1203. Trustee Entitled to All Offsets, Rebates, etc., of Bankrupt.

In re Harper, 23 A. B. R. 918, 175 Fed. 412 (D. C. N. Y.): "Any debt, liquidated or unliquidated, owing to the bankrupt from a creditor of his, whether for damages or on contract, express or implied, which passes to the trustee, may, of course, be used by him to reduce the claim of such creditor when presented or to extinguish it altogether."

Page 698, note 131. Embry v. Bennett, 20 A. B. R. 651, 162 Fed. 139 (C. C. A. Ky.): No offset of money's expended by the bankrupt father in educating his children at college, against their claims against him for money lost by him as their guardian. See ante, § 818½.

Thus, the trustee has been held entitled to counterclaim or offset against a creditor's claim, damages suffered by the bankrupt through the creditor's fraudulent representation inducing the entering into the contract claimed upon; and the words "mutual debts" used in § 68 (a) will include rights of action existing in favor of the bankrupt against a creditor for false representations inducing the bankrupt to enter into a contract for the sale of goods.

In re Harper, 23 A. B. R. 918, 175 Fed. 412 (D. C. N. Y.).

And the burden of proof is upon the trustee to establish his counterclaim.

In re Harper, 23 A. B. R. 918, 175 Fed. 412 (D. C. N. Y.).

Since the claim itself is *prima facie* established by the deposition for proof of debt introduced into evidence by the creditor.

§ 1204. May Plead Bankrupt's Lack of Capacity.

Thus, the trustee may plead that a transfer was *ultra vires*.

Page 698. *American Mach. Co. v. Norment*, 19 A. B. R. 679, 157 Fed. 801 (C. C. A. N. Car.): "Again, the misappropriation of these 17 \$1,000 notes secured by this deed of trust executed by this bankrupt corporation, by its managing officer, to his own use, to the security of his own debt, is so clear and apparent, that such act must be held clearly unauthorized and beyond the scope of his power or right as such officer. To hold otherwise would establish the dangerous doctrine that a managing officer of a corporation, having possession of its notes and securities, could dispose of them at will. Finally, it is clear that an attempt upon the part of even a majority of stockholders to divert the corporation assets to purposes wholly outside of the scope of its charter powers, purposes that clearly can inure to no benefit to it or its stockholders and creditors as such, is *ultra vires* and void. We therefore, for these reasons, find no error in the ruling of the court below that the notes and deed of trust executed by the bankrupt corporation are void as against its creditors."

Page 698, note 134. Instance, brick making plant-kilns, factory building, engines, boilers, etc., held removable trade fixtures. In *re Montello Brick Works*, 20 A. B. R. 859, 163 Fed. 621 (D. C. Pa.). Possibly, instance, In *re Darlington*, 20 A. B. R. 805, 163 Fed. 389 (D. C. N. Y.); instance, turpentine still not machinery, In *re Anderson*, 21 A. B. R. 413 (Ref. Ga.); instance, steam shovel, In *re Montello Brick Works*, *supra*.

Page 699, note 136. **Parol Evidence to Show What Future Advances Intended.**—Where a valid estate mortgage was given to cover future advances, the court held parol evidence incompetent to show the parties intended it to cover advances for other purposes than the protection of the mortgage lien. *Hendricks v. Webster*, 20 A. B. R. 112, 159 Fed. 927 (C. C. A. Iowa).

§ 1206¼. Or Novation.

And the trustee may urge that the facts constitute a novation.

Instance, *Long v. Gump*, 16 A. B. R. 501, 144 Fed. 824 (C. C. A. Ohio); instance, novation, however, found not to exist, In *re Straub*, 19 A. B. R. 808, 158 Fed. 375 (D. C. W. Va.).

§ 1206½. May Urge Facts Do Not Constitute Pledge or Other Transfer.

The trustee may defend that there has not been a sufficient delivery or that there are other essentials lacking which would be requisite to effect a transfer of title by way of pledge or otherwise.

French v. White, 18 A. B. R. 905, 78 Vt. 89; also, In *re Automobile Livery Service Co.*, 23 A. B. R. 799, 176 Fed. 792 (D. C. Ala.). Compare *ante*, § 1146, *et seq.*

§ 1207. Second, Trustee's Title and Rights as Successor to Creditors.

Page 699, note 137. See, in addition, *Coder v. Art's*, 22 A. B. R. 1, 213 U. S. 223, quoted partly at § 1498.

Page 700, note 137. In *re Beede*, 14 A. B. R. 697, 138 Fed. 441 (D. C. N. Y.); In *re Hewitt v. Berlin Machine Co.*, 11 A. B. R. 709, 714, 194 U. S. 296.

Not an "Innocent Purchaser."—See, in addition, *Dunlop*, 19 A. B. R. 361, 156 Fed. 545 (C. C. A. Minn.); In *re Pierce*, 19 A. B. R. 662, 157 Fed. 755 (C. C. A. N. Dak.); In *re (Columbia) Fire Proof & Trim Co.*, 21 A. B. R. 714, 168 Fed. 159 (D. C. N. Y.).

Zartman, Trustee, v. Nat. Bank, 216 U. S. 134, 23 A. B. R. 635: "The trustee claims that he takes the same kind of title as a bona fide purchaser for value; but the rule applicable to this and all similar cases is that the trustee takes the property of the bankrupt, not as an innocent purchaser, but as the debtor had it at the time of the petition, subject to all valid claims, liens, and equities."

Whether Trustee a "Third Person."—Held in one case that under the statutes of Georgia as to the filing of conditional sales contracts, a trustee in bankruptcy is a "third person" as to whom an unfilled conditional sale contract is void, In *re Burke*, 22 A. B. R. 69, 168 Fed. 994 (D. C. Ga.). However, such holding seems to place the trustee elsewhere than "in the shoes of the bankrupt."

Page 700. *Security Warehousing Co. v. Hand*, 19 A. B. R. 291, 206 U. S. 415: " * * * and it is contended that the transfers were valid between the parties; that the trustee in bankruptcy takes only the title and right of the bankrupt and therefore he cannot assert a right not possessed by the knitting company. It is no new doctrine that the assignee or trustee in bankruptcy stands in the shoes of the bankrupt, and that the property in his hands, unless otherwise provided by the Bankrupt Act, is subject to all of the equities impressed upon it in the hands of the bankrupt. This has been the rule under former acts and is now the rule. * * * By § 70 (a) the trustee in bankruptcy is vested, by operation of law, with the title of the bankrupt to all property transferred by him in fraud of his creditors, and to all property which prior to the filing of the petition might have been levied on and sold by judicial process against him; and by subdivision (e) of the same section, the trustee in bankruptcy may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might avoid, and may recover the property so transferred or its value. Here are special provisions placing the title to the property transferred by fraud or otherwise, as mentioned in the trustee in bankruptcy, and giving him the power to avoid the same. * * * The case illustrates the distinction taken between fraud in fact and the mere failure to file a mortgage otherwise valid against the world."

§ 1207¼. As to Fraudulent Transactions, Creditors Title Taken by Trustee Is That Which Any Creditor Might Have Asserted "Arming with Process" Not Requisite.

The title taken by the trustee is not necessarily that of creditors "armed with process," much less that of the bankrupt himself, as to property "affected by the bankrupt's fraud toward creditors." [see

§§ 1144, 1207.] As to such property he neither “stands in the shoes of the bankrupt” nor takes the title of creditors armed with process.”

See also, § 1216¾; *In re Bellevue Pipe and Foundry Co.*, 22 A. B. R. 99, 16 O. Dec. 247 (Ref. Ohio); *Fourth St. Nat. Bank v. Millbourne Mills Co.*, 22 A. B. R. 442, 172 Fed. 177 (C. C. A. Pa.), quoted at § 1146.

As to property transferred fraudulently by the bankrupt, the Bankruptcy Act gives direct title in § 70 a (4), whilst as to property not “transferred” by the bankrupt, but otherwise held by him or for him in fraud of creditors, the uniform exception in the Supreme Court’s decisions (which state the rule as to standing “in the bankrupt’s shoes” always with the qualification that the trustee so stands only “in cases unaffected by the fraud of the bankrupt towards creditors”) disposes, similarly, of the necessity of the existence of creditors “armed with process;” although, upon this latter point, some of the decisions would be in conformity with the interpretation that the Supreme Court should adopt, as a further qualification, that the exception only applies to cases “unaffected by the fraud of the bankrupt towards creditors *so far as such creditors may be entitled under State law.*”

The creditor’s title taken then in cases of fraud is fundamentally different from what it is in cases where a lien is not recorded; in the latter case [before the Amendment of 1910 to Bankr. Act, § 47 (a) (2)], the trustee getting, in general, only such title as already had been actually asserted by some creditor.

(Security) *Warehousing Co. v. Hand*, 19 A. B. R. 291, 206 U.S. 415: “* * * and it is contended that the transfers were valid between the parties; that the trustee in bankruptcy takes only the title and right of the bankrupt and therefore he cannot assert a right not possessed by the knitting company. It is no new doctrine that the assignee or trustee in bankruptcy stands in the shoes of the bankrupt, and that the property in his hands, unless otherwise provided by the Bankrupt Act is subject to all of the equities imposed upon it in the hands of the bankrupt. This has been the rule under former acts and is now the rule. * * * By § 70a the trustee in bankruptcy is vested by operation of law with the title of the bankrupt to all property transferred by him in fraud of his creditors, and to all property which prior to the following of the petition might have been levied upon and sold by judicial process against him; and by subdivision (e) of the same section the trustee in bankruptcy may avoid any transfer by the bankrupt of his property which any creditor or the bankrupt might avoid, and may recover the property so transferred or its value. Here are special provisions placing the title to the property transferred by fraud, or otherwise as mentioned, in the trustee in bankruptcy, and giving him the power to avoid the same. * * * The case illustrates the distinction taken between fraud in fact and the mere failure to file a mortgage otherwise valid against the trustee.”

In re Gebbie & Co., 21 A. B. R. 691, 167 Fed. 609 (D. C. Pa.): “As it seems to me the superiority of the trustee’s title is clear. In some cases he merely stands in the bankrupt’s shoes, but his position here is different because the bankruptcy act expressly gives him a better title and therefore the

doctrine of *York Mfg. Co. v. Cassell*, 201 U. S. 344, 15 A. B. R. 635, does not apply."

Also, *Thomas v. Roddy*, 19 A. B. R. 873, 122 App. Div. N. Y. 857, 107 N. Y. Supp. 473, quoted at § 1216¾.

Thus, in States where the statute requiring the recording of conditional sales contracts is interpreted as construing unrecorded conditional sales contracts to be fraudulent, such unrecorded contracts have sometimes been held to be void though no creditor "armed with process" exists, since they are "affected" by "fraud."

In *re Trunk Co.*, 23 A. B. R. 914, 176 Fed. 1007 (D. C. Pa.). Perhaps, also, the basis of the decision in *In re Burke*, 22 A. B. R. 69, 168 Fed. 994 (D. C. Ga.).

But since a mere failure to record is simply the fault of the holder of the instrument, not necessarily participated in by the bankrupt, it is difficult to see how it would, *per se*, constitute "fraud."

Likewise, as to attempts to "warehouse" on one's own premises.

Fourth Street Nat. Bank v. Millbourne Mills Co., 22 A. B. R. 442, 172 Fed. 177 (C. C. A. Pa., affirming *In re Millbourne Mills Co.*, 20 A. B. R. 746, 162 Fed. 988), quoted at § 1146.

Likewise, as to sales disguised as "consignments," the trustee does not "stand in the bankrupt's shoes," because the transaction is "affected with fraud."

In *re Penny & Anderson*, 23 A. B. R. 105 (Ref. N. Y.).

§ 1207½. Amendment of 1910 Gives Trustee Rights of Creditor "Armed with Process."

The Amendment of 1910 to Bankruptcy Act, § 47 a (2), provides that the trustee, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon, and also as to all the property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied. This amendment, whilst still preserving to the trustee all the rights, remedies and powers of the bankrupt, as given in the Bankruptcy Act, § 70, no longer limits him to those rights, but effectually lifts him out of his former contracted position "in the shoes of the bankrupt," and gives to him the rights also of a creditor "armed with process" so that, as previously remarked, in §§ 1137½ and 1145½, respectively, the trustee's title is enlarged, and, instead of being merely the successor to the bankrupt's title, with, of course the peculiar rights conferred by the Bankruptcy Act relative to preferences, etc., and the very limited additional rights of any existing creditor (in some States

only if such creditor be "armed with process"), it now includes also whatever rights existing creditors under State law would have had had they been "armed with process," whether actually so "armed" or not; the trustee being deemed a levying creditor, so far as property in the custody of the bankruptcy court is concerned, and a creditor armed with an execution returned unsatisfied as to property not in such custody.

By this amendment the discussions of §§ 1208, 1209, 1210, 1211, 1212, 1213, 1214, are displaced, although they are very instructive as explaining the meaning of the Amendment of 1910 in this particular, as well as showing the reasonings of the courts in adopting the former doctrine.

A full discussion of the changes effected by the Amendment of 1910 in the title of the trustee is had, ante, in § 1137½ and § 1145½. In accordance with the rules therein enunciated the statement of § 1207 as to the trustee's title and rights as successor to the creditors is better given as follows, to-wit:

In cases affected by the fraud of the bankrupt towards creditors, as also where there has been some transfer, encumbrance, or holding of the property void as to the bankrupt's creditors or inuring to their benefit by State law, for want of record or otherwise, the trustee succeeds to the rights of any existing creditor already qualified by State law or who would be qualified thereby had such existing creditor as to the property in the custody or coming into the custody of the bankruptcy court, held a lien by legal or equitable proceedings thereon, or, as to the property not in such custody, been a creditor holding an execution duly returned unsatisfied.

§ 1208. But Where Fraud Not Involved Generally, That Only of Some Existing Creditor "Armed with Process."

Page 704. That the bankruptcy places the trustee in the position of a creditor with process was the holding in some cases, even before the Amendment of 1910.

Instance, *In re Burlage Bros.*, 22 A. B. R. 410, 169 Fed. 1006 (D. C. Iowa), but the *Cassell v. York* case is not discussed and therefore this decision is not of great value.

Page 705, note 139. Amendment of 1910 "arms" trustee with "process." See ante, § 1207½.

Or at any rate dispenses with process, by virtue of the sequestration itself, this rule being held in some cases applicable in bankruptcy.

Page 705. *In re Bement* (*Smith v. Mishawaka Woolen Mfg. Co.*), 22 A. B. R. 616, 172 Fed. 98 (C. C. A. Wis.): "While the title of the bankrupt is not, by the adjudication in bankruptcy, enlarged through the fact that it has gone

into the hands of the trustee, the adjudication none the less suspends the rights of the creditors to proceed. To some extent at least the trustee has taken the place of the creditors, in bankruptcy. He has possession of the property that otherwise would be open to them to make good their claims; but they may not seize it. He has under the law, the power to sell the property, and distribute the proceeds; and this is the only access the creditors have, either to the property or its proceeds. He stands, from the moment of the adjudication, possessed of the whole sum of power that all the creditors might have exercised had not the adjudication taken place—all things considered, a substitution of trustee for creditors that carries with it, we think, the power to represent the creditors against the assertion of claims, that were the creditors permitted to resist them, would, under the express language of the local laws of Wisconsin, render the claim invalid."

Also, Bankr. Act, § 67 (a), providing that "claims which for want of record, or for other reasons, would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate," and Bankr. Act, § 67 (b), providing that "whenever a creditor is prevented from enforcing his rights as against a lien created or attempted to be created by his debtor who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate," are strongly indicative of such intention.

Crucible Steel Co. v. Holt, 23 A. B. R. 302, 174 Fed. 127 (C. C. A. Ky.): "This contract for a conditional sale was not recorded. Certain parties became creditors of the bankrupt after the date of the contract, but before the filing of the petition in bankruptcy; and it is these parties in whose behalf the trustee makes this contest against the claim of the vendors in the contract of sale of the title and for the possession of the goods. The district court rejected the claim of the vendor, and denied its petition. In the case of *York Mfg. Co. v. Cassell*, the Supreme Court, reversing a judgment of this court, held that the trustee in bankruptcy takes the assets in precisely the same condition and with the like title as that by which they were held by the bankrupt, and further, that the inchoate equity of creditors who had not then secured a lien by some judicial proceeding could not be worked out in their behalf by the trustee in the bankruptcy proceedings. That decision necessarily negatives the application to such a case of the provision of act July 1, 1898, § 67a, that, 'claims which for want of record, or for other reasons, would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate,' and the further provision of § 67b, that 'whenever a creditor is prevented from enforcing his rights as against a lien created or attempted to be created by his debtor who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.' Those provisions were not referred to in the opinion of the court and, of course, their meaning and scope were not defined further than is done by the necessary implication from the decision; but it cannot be supposed they were overlooked."

Page 705. Such might have been an available construction of the statute as to the title of the trustee in bankruptcy, even before the Amendment of 1910 to Bankr. Act § 47 (a) (2).

In re *Standard Tel. Co.*, 19 A. B. R. 491, 157 Fed. 106 (D. C. Wis.), affirmed sub nom. *Knapp v. Milwaukee Tr. Co.*, 20 A. B. R. 671, 162 Fed. 675 (C. C. A.).

Page 705. But the bankruptcy merely transferred whatever rights the bankrupt or any of his creditors actually had acquired at the time—save and except always as to preferences and liens by legal proceedings within the four months period.

Similar to assignee's title under Massachusetts insolvency laws, *In re Littlefield*, 19 A. B. R. 18, 155 Fed. 838 (C. C. A. Mass.).

No "creditor armed with process" requisite, to set aside fraudulent transfer, see post, § 1216½.

The bankruptcy, in other words [it was held before the Amendment of 1910], picked up the estate precisely where it found it, giving the trustee thereby no additional rights save such as were conferred by the peculiar provisions of the act relative to preferences and legal liens, but giving to him all rights possessed by the bankrupt at the time of the bankruptcy and all rights then asserted by any creditor or which any creditor had already placed himself in position to assert.

(Security) *Warehousing Co. v. Hand*, 19 A. B. R. 291, 206 U. S. 415, quoted at § 1137; impliedly, *In re Grainger*, 20 A. B. R. 166, 160 Fed. 69 (C. C. A. Calif.).

Page 706. Compare, inferentially, *Thomas v. Woods*, 23 A. B. R. 132, 173 Fed. 585 (C. C. A. Kans.): "The most conspicuous feature of the present Bankruptcy Act is a clear purpose to save to the bankrupt and his family every right possessed by them under the laws of the several States, and to grant to creditors no property or right which would not have been theirs if the Bankruptcy Act had not been passed. The courts have repeatedly referred to this as a feature distinguishing the present act from all previous statutes on the subject. It makes the law of the several States the measure of the rights to be protected and enforced, both as to the bankrupt and his creditors. In defining what shall pass to the trustee for the benefit of creditors, it designates 'property which prior to the filing of the petition the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him.' By the express provisions of the statute of Missouri the wife's right of dower does not fall within this language. It being no part of the property which the trustee is to administer, it is difficult to understand how the right of dower can be affected by the Bankruptcy Act."

Page 706. The Amendment of 1910, however, has placed the trustee in the position of a creditor armed with process.

See ante, § 1207½; also see, §§ 1137½, 1144½, 1145½.

§ 1209. "Creditor" Same as in State Law, So Far as Concerns Necessity of "Arming with Process."

Page 706, note 141. See, in addition, *Davis v. Crompton*, 20 A. B. R. 53, 158 Fed. 735 (C. C. A. Pa.), quoted at § 1144; *Pridmore v. Puffer Mfg. Co.*, 20 A. B. R. 851, 163 Fed. 496 (C. C. A. S. C.); *In re Fish Bros. Wagon Co.*, 21 A. B. R. 149, 164 Fed. 553 (C. C. A. Kans.), quoted at §§ 1489, 1603.

For discussion and distinction of the *York Cassell* case, see, in addition,

Standard Tel. Co., 19 A. B. R. 491, 157 Fed. 106 (D. C. Wis., affirmed sub nom. Knapp v. Milw. Tr. Co., 20 A. B. R. 671, 162 Fed. 675 (C. C. A.), quoted at § 1210; In re Hickerson, 20 A. B. R. 682, 162 Fed. 345 (D. C. Idaho); In re Newton (Swafford Bros. Dry Goods Co. v. Bryant), 18 A. B. R. 567, 153 Fed. 841 (C. C. A. Ark.), quoted at § 1381; In re Youngstom, 18 A. B. R. 572, 580, 153 Fed. 97 (C. C. A. Colo.); In re Doran, 18 A. B. R. 760, 154 Fed. 467 (C. C. A. Ky.); In re Trunk Co., 23 A. B. R. 914, 176 Fed. 1007 (D. C. Pa.); In re McDonald, 21 A. B. R. 358 (Ref. Mass.); In re Gebbie Co., 21 A. B. R. 694, 167 Fed. 609 (D. C. Pa.); Fourth St. Nat. Bank v. Millbourne Mills Co., 22 A. B. R. 442, 172 Fed. 177 (C. C. A. Pa.); In re McDonald, 23 A. B. R. 51, 173 Fed. 99 (D. C. Mass.), quoted at § 1210; In re Penny & Anderson, 23 A. B. R. 115 (Ref. N. Y.); In re Bement (Smith v. Mishawaka Woolen Mfg. Co.), 22 A. B. R. 616, 172 Fed. 98 (D. C. A. Wis.), quoted at § 1208.

For discussion and reaffirmance of York case, see (Security) Warehousing Co. v. Hand, 19 A. B. R. 291, 206 U. S. 415, quoted at § 1137; In re Littlefield, 19 A. B. R. 18, 155 Fed. 838; Davis v. Crompton, 20 A. B. R. 53, 59, 158 Fed. 735 (C. C. A. Pa.), quoted in part at § 1144; In re Grainger, 20 A. B. R. 166, 160 Fed. 69 (C. C. A. Calif.); Bryant v. Swafford Bros., 22 A. B. R. 111, 214 U. S. 279, quoted at § 1140; Crucible Steel Co. v. Holt, 23 A. B. R. 302, 174 Fed. 127 (C. C. A. Ky.), quoted at § 1208; also, In re Atlanta News Pub. Co., 20 A. B. R. 193, 160 Fed. 519 (D. C. Ga.); Mishawaka Woolen Mfg. Co. v. Smith, 20 A. B. R. 317, 158 Fed. 885 (D. C. Wis., modified, however in In re Bement (Smith v. Mishawaka), 22 A. B. R. 616, 172 Fed. 98; In re Barker, 20 A. B. R. 674 (Ref. Colo.); In re Perkins, 19 A. B. R. 134, 155 Fed. 237 (D. C. Me.); In re Pierce, 19 A. B. R. 662, 157 Fed. 755 (C. C. A. N. Dak.); Pridmore v. Puffer Mfg. Co., 20 A. B. R. 851, 163 Fed. 496 (C. C. A. S. Car.); Corbitt Buggy Co. v. Ricand, 22 A. B. R. 316, 169 Fed. 935 (C. C. A. N. Car.). Also following York v. Cassell, see Mattley v. Wolfe, 23 A. B. R. 673, 175 Fed. 619 (D. C. Neb.); York Mfg. Co. v. Brewster, 23 A. B. R. 474 (C. C. A. Tex.).

Page 707, note 141. The case of In re Economical Printing Co., held not to correctly state the law of New York in Pontiac Buggy Co. v. Skinner, 20 A. B. R. 206, 217 (D. C. N. Y.); and in (Security) Warehousing Co. v. Hand, 19 A. B. R. 291, 206 U. S. 415, quoted at § 1137; and In re Hickerson, 20 A. B. R. 682, 162 Fed. 345 (D. C. Idaho). Also held not to correctly state the law of New York in In re Gerstman & Bandman, 19 A. B. R. 145, 157 Fed. 549 (C. C. A. N. Y.): "This court In Re Economical Printing Company, 6 Am. B. R. 615, 110 Fed. 514, 517, held that a non-filed mortgage was void only as to creditors who by judgment or attachment or otherwise had seized or were in a position to seize the mortgaged property. Since that decision, however, the Court of Appeals of the State of New York has held that a non-filed mortgage is void as to general creditors although it cannot be attacked until they are in a position to seize the mortgaged property by virtue of a judgment, attachment or otherwise. This, however, is a mere matter of procedure and the mortgage is none the less void as to them. Cullen, Ch. J., says in that case: 'As appears by the opinion the result was reached on the assumption that by the law of the State of New York a non-filed chattel mortgage was void only as to judgment creditors obtaining a lien, not as to general creditors. We think the very eminent judge who wrote in the case misconceived the law of the State in this respect. If it were a Federal question we would follow the decision

regardless of our own opinion, but as the question is as to the law of this State we must adhere to the prior decisions of this court.' *Skilton v. Codrington*, 185 N. Y. 80, 88, 15 Am. B. R. 810. As we are bound to follow the construction of the State law adopted by the highest court of the State, the case of the Economical Printing Company must be held to have gone too far in deciding that a non-filed mortgage is valid as to general creditors. Regarding the mortgage as void, though not subject to attack because there were no judgments against the bankrupts at the time of the adjudication, the question is whether the trustee is in a position to attack it. We think he is." Citing §§ 67 (a) (d), 70 (a), 70 (a) (5).

Page 708. *In re Dunlop*, 19 A. B. R. 361, 156 Fed. 545 (C. C. A. Minn.): "Trustees of bankrupt estates have no better title, in the absence of fraud, than the bankrupt and his creditors had at the time of the filing of the petition in bankruptcy. Agreements of conditional sale, whereby the title is retained in the vendor until the agreed purchase price is paid, which are not filed or recorded in any public office, are voidable by bona fide purchasers attaching creditors and judgment creditors only, under the statutes of Minnesota, and there were no such purchasers or creditors in this case."

John Deere Plow Co. v. Anderson, 23 A. B. R. 480, 174 Fed. 815 (C. C. A. Ga.): "We therefore hold that third parties, within the meaning of the law of Georgia, as well as under the general law, are such creditors as have, in some manner, secured a lien on the property conditionally sold, and not mere ordinary creditors. It is true the adjudication vests the title of the bankrupt's property in the trustee; but it does not operate as a judicial seizure to create a lien in favor of the ordinary creditors. The trustee has no greater right in property sold under a conditional sale contract than the bankrupt had."

Mattley v. Wolfe, 23 A. B. R. 673, 175 Fed. 619 (D. C. Neb.): "Who are 'creditors' of the class that may attack such mortgage, because it was so withheld from record pursuant to such an understanding? Jones on Chattel Mortgages (5th Ed.), § 178, states the rule as follows: 'If a mortgagee take possession of the mortgaged chattels before any other right or lien attaches, his title under the mortgage is good against everybody, if it was previously valid between the parties, although it be not acknowledged and recorded, or the record be ineffectual by reason of any irregularity. The subsequent delivery cures all such defects; and it also cures any defect there may be through an insufficient description of the property. The taking of possession is an identification and appropriation of the specific property to the mortgage. * * * Delivery of possession under a mortgage, before rights have been acquired by others, will cure any invalidity there may be in the instrument, whether arising from an insufficient description of the property, an insufficient execution of the instrument, the omission to record it, or from its containing a provision which makes it void except as between the parties, as, for instance, an agreement that the mortgagor may retain possession and sell a stock of goods in the usual course of trade. The presumption of fraud which the statute raises against a mortgagee who fails to take immediate possession of the things mortgaged is not available to one who attaches the property after the mortgagee has taken possession. * * *' The doctrine thus stated is supported by many decisions of other States. * * * By these decisions the Supreme Court of Nebraska has declared that only those creditors who have fastened a lien upon the property before the mortgagee takes possession under such a mortgage, are entitled to set it aside as fraudulent. The

trustee in bankruptcy steps into the shoes of the bankrupt, and, as the bankrupt could not have thus attacked the mortgagee in possession at the time of the adjudication in bankruptcy, the trustee may not do so."

Page 708, note 142. See, in addition, *In re Fish Bros. Wagon Co.*, 21 A. B. R. 147, 164 Fed. 553 (C. C. A. Kans.), quoted at §§ 1489, 1603.

And a creditor is held by the State court of New York (notwithstanding the bankruptcy court decisions) to be sufficiently "armed with process" if he has a judgment, even though he has not actually levied upon the property.

Page 708. *Skilton v. Codington*, 15 A. B. R. 810, 185 N. Y. 80: "The case in the Circuit Court of Appeals (the *Economical Printing Co.* case) is in point and it was there held, that a trustee in bankruptcy could not attack a chattel mortgage for default in filing. As appears by the opinion, the result was reached on the assumption that by the law of the State of New York a non-filed chattel mortgage was void only as to judgment creditors obtaining a lien, not as to general creditors. We think the very eminent judge who wrote in the case, misconceived the law of the State in this respect. If it were a federal question, we would follow the decision regardless of our own opinion, but as the question is as to the law of this State, we must adhere to the prior decisions of this court." Quoted further at § 1214, note 151.

Page 708, note 143. See also, *Pontiac Buggy Co. v. Skinner*, 20 A. B. R. 206, 158 Fed. 858 (D. C. N. Y.).

Page 708. And it is even held in some cases that judgment is not necessary—that the bankruptcy itself is a sufficient "arming with process."

Zartman v. First Nat. Bank, 19 A. B. R. 27, 189 N. Y. 267.

Page 708. *Obiter*, *Dunn Salmon Co. v. Pillmore*, 19 A. B. R. 172, 106 N. Y. Supp. 546: "Under the Bankruptcy Law of 1867, the lien of an unrecorded chattel mortgage was held to be good against the assignee in bankruptcy. *Stewart v. Platt*, 101 U. S. 731. There was nothing then in the Bankruptcy Act to save the rights of creditors under our State statute requiring the filing of chattel mortgages. Under the present Bankruptcy Act, the defect in the old law has been remedied, and the trustee in bankruptcy now can protect the rights of the creditors. Subdivision a of § 67 of the present Bankruptcy Act is as follows: 'Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.' This chattel mortgage was not a valid lien upon the property covered by it as against the claims of the creditors of the bankrupt for the want of record or filing. That is plain. The Court of Appeals has recently held that the present Bankruptcy Act arms the trustee in bankruptcy with the right to assert the invalidity of an unfilled chattel mortgage in favor of the creditors of the mortgagor, even though their claims are not in judgment. *Skilton v. Codington*, 15 Am. B. R. 810, 185 N. Y. 80."

Page 708. Since the Amendment of 1910, however, the vexing questions discussed in §§ 1208, 1209, 1210, have been settled in favor

of giving the trustee the rights, powers and remedies of a creditor "armed with process."

See discussions, ante, §§ 1137½, 1144½, 1145½, 1207½.

§ 1210. Where "Arming with Process" Not Requisite by State Law, Not Requisite in Bankruptcy.

Page 708, note 144. See, in addition, *In re Barker*, 20 A. B. R. 674 (Ref. Colo.); *In re Hickerson*, 20 A. B. R. 682, 162 Fed. 345 (D. C. Idaho). But compare, *In re Doran*, 18 A. B. R. 760, 154 Fed. 467 (C. C. A. Ky., modifying 17 A. B. R. 799); instance, *In re Burt*, 19 A. B. R. 123, 155 Fed. 267 (D. C. Pa.); obiter, *Warehousing Co. v. Hand*, 19 A. B. R. 291, 206 U. S. 415, quoted at § 1137. Compare, *Hanson v. Blake*, 19 A. B. R. 325, 150 Fed. 342 (D. C. Me.). Also Compare, *In re Millbourne Mills Co.*, 20 A. B. R. 747, 162 Fed. 988 (D. C. Pa.), quoted in part at § 964; *Fourth St. Nat. Bk. v. Millbourne Mills Co.*, 22 A. B. R. 442, 172 Fed. 177 (C. C. A., affirming *In re Millbourne Mills Co.*, 20 A. B. R. 747, 162 Fed. 988); *In re Martin*, 23 A. B. R. 151, 173 Fed. 597 (C. C. A. Mo.); impliedly, *In re Southern Textile Co.*, 23 A. B. R. 172, 174 Fed. 523 (C. C. A. N. Y., interpreting N. Car. statute); *Simmons v. Greer*, 23 A. B. R. 443, 174 Fed. 654 (C. C. A. S. Car.), quoted at § 1225½. Thus, in Pennsylvania, as to conditional sales where the buyer has possession, *In re Trunk Co.*, 23 A. B. R. 914, 176 Fed. 1007 (D. C. Pa.).

Page 709. Apparently, *In re American Machine Works, (Chilberg v. Smith)*, 23 A. B. R. 483, 174 Fed. 805 (C. C. A. Wash.): "Under the bankruptcy law, the interest which passes to the trustee in personal property sold to the bankrupt upon condition depends upon the law of the State. In jurisdictions where the statute makes such an unrecorded conditional sale absolute as to subsequent purchasers, pledgees or mortgagees in good faith, and to no others, the failure to record does not affect the title of the vendor as against the vendee's trustee."

Page 709. Thus, where void as "against a person other than the parties thereto."

Page 709. *In re McDonald*, 23 A. B. R. 51, 173 Fed. 99 (D. C. Mass.): "The mortgage should have been recorded, if the mortgagor lived at Winthrop and had his principal place of business at Boston, on the records of both those municipalities, in order to comply with Rev. Laws Mass., ch. 198, § 1. Not having been so recorded, and the property having meanwhile remained in the mortgagor's possession, it was invalid at the time of his bankruptcy 'against a person other than the parties thereto,' as the same section provides. * * * It is true that 'creditors,' in the section quoted, does not necessarily include all creditors without distinction, and that when, as in York, etc., *Co. v. Cassell*, 201 U. S. 344, 15 Am. B. R. 633, the local law limits the right to avoid a lien, valid between the parties, to such creditors only as have fastened upon the property by some specific lien while the want of record continues, and no creditor has taken any such step, the lien is valid against the trustee. But by the local law which governs the present case, if it was not recorded as that law required, the mortgage was invalid against all creditors not parties to it, without distinction. The plain language of the Massachusetts statute

affords no ground for any distinction between creditors who have and creditors who have not 'fastened upon' the property. Nor is there any recognition of such a distinction in the Massachusetts decisions which hold a mortgage not properly recorded invalid against a trustee in bankruptcy. According to the local law, therefore, the trustee, if allowed to prove the want of record, could have avoided this mortgage, for the reason that the lien it created would thereby have been proved invalid against the claims of the bankrupt's creditors in general."

Page 709, note 145. In re Doran, 17 A. B. R. 799 (D. C. Ky., modified by 18 A. B. R. 760, 154 Fed. 467). But compare, In re Doran, 18 A. B. R. 760, 154 Fed. 467 (C. C. A. Ky.).

§ 1211. Discussion of Certain Rejected Doctrines—First Rejected Doctrine—That Trustee's Title as to Property Not in Custody, Analogous to Receiver's or Assignee's in State Courts.

Page 709, note 146. Compare, Knapp v. Milw. Tr. Co., 20 A. B. R. 671, 162 Fed. 675 (C. C. A. Wis.), affirming In re Standard Tel. Co., 19 A. B. R. 491, 157 Fed. 106; also compare, to similar effect, In re Hickerson, 20 A. B. R. 682, 162 Fed. 345 (D. C. Idaho); also, to similar effect, Zartman v. First Nat. Bank, 19 A. B. R. 27, 189 N. Y. 267.

Page 709. Compare, In re Standard Tel. Co., 19 A. B. R. 491, 157 Fed. 106 (D. C. Wis.), affirmed sub nom. Knapp v. Milwaukee Trust Co., 20 A. B. R. 671, 162 Fed. 675 (C. C. A.): "The only impediment in the way of the simple creditor is that under the rules of practice he cannot attack the mortgage by an independent action in equity. The Supreme Court of Wisconsin has, however, several times held that such a contest may be waged by an assignee representing general creditors under the said assignment laws, upon the theory that his powers were substantially the same as a trustee in bankruptcy, or a sheriff armed with an execution. Batten v. Smith, 62 Wis., 92, 98, 22 N. W. 342; Sheldon Co. v. Mayers, 81 Wis. 627, 51 N. W. 1082; Valley Lumber Co. v. Hogan, 85 Wis. 366, 55 N. W. 415; Re Ellis, 97 Wis. 92, 72 N. W. 387. Formerly the assignee under the voluntary assignment statute represented the assignor only, but by chapter 207, p. 255, Laws 1901, he is authorized to represent creditors, and may sue to set aside any fraudulent conveyance where the creditors might have proceeded if no assignment had been made. This is in substance and effect the same authority with which the trustee is clothed under §§ 60b and 70e and other provisions of the present Bankruptcy Act. * * * It is also true that the effect of the filing of a petition in bankruptcy, as laid down in Mueller v. Nugent, 184 U. S. 1, 7 Am. B. R. 224, * * * has been modified by the Supreme Court in York Manufacturing Co. v. Cassell, 201 U. S. 344, 15 Am. B. R. 633, * * * so that the institution of bankruptcy proceedings no longer has the effect of an attachment or an injunction; but the Supreme Court of Wisconsin has squarely decided in Mueller v. Bruss, 8 Am. B. R. 442, 112 Wis. 406, 410, * * * that a trustee in bankruptcy under the present Act, representing only creditors at large, may maintain an action in equity to set aside transfers of property by the bankrupt in fraud of creditors. This is put upon the ground that the Bankruptcy Act renders it practically impossible for creditors to comply with the equitable rule, and that equity

does not demand impossibilities. *Jackman v. Bank*, 125 Wis. 476. * * * Thus it appears that the general doctrine of equity that to institute such a suit a creditor must be armed with a judgment and execution is observed in Wisconsin, but that such rule is one of procedure only, and not a condition precedent. The same doctrine is held in *Skilton v. Codington*, 15 Am. B. R. 810, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885. This authority is the more persuasive because Wisconsin borrowed its statute from New York. The Wisconsin law in favor of simple creditors commends itself to me on stronger grounds than mere comity. It is in harmony with the spirit of the bankrupt law."

Amendment of 1910.—By the wording of the Amendment of 1910 to Bankruptcy Act, § 47a (2), the trustee, as to all property not in the custody of the bankruptcy court, is to be deemed vested with all the rights, powers and remedies of a judgment creditor holding an execution duly returned unsatisfied.

See discussion, ante, §§ 1137½, 1144½, 1145½, 1207½.

§ 1212. Second Rejected Doctrine—That Bankruptcy Operates as "Equitable Levy," as to Property in Custody.

Page 712. *Zartman v. First Nat. Bank*, 19 A. B. R. 27, 189 N. Y. 267: "The plaintiff, as trustee in bankruptcy of the mortgagor, has the same rights as a creditor armed with an attachment or execution."

Amendment of 1910.—By the Amendment of 1910 to the Bankruptcy Act, § 47a (2); this "rejected doctrine" that bankruptcy operates as an "equitable levy" as to property in the custody of the bankruptcy court—has become the accepted doctrine.

See Report No. 691 of the Senate Judiciary Committee of the 61st Congress, Second Session: "One of the most important decisions under the present law is *York Manufacturing Company v. Cassel* (201 U. S., 344), wherein it was held that property covered by an unrecorded instrument, which would have been void in the State courts had the property been taken by an assignee or receiver or levied upon by attachment or execution, was not void where possession was taken by a receiver or trustee in bankruptcy, the Supreme Court holding that the trustee stood precisely in the bankrupt's shoes with regard to the unrecorded instrument, even though in the State courts had the seizure been made by an assignee in insolvency or receiver, or by the sheriff under execution or attachment, the unrecorded lien would have been void as against creditors. By this ruling the trustee in bankruptcy is held to be vested solely with the bankrupt's own title, except as to property fraudulently transferred and as to property which (within four months before the bankruptcy) has been seized by a creditor by legal process or voluntarily transferred to him by way of a preference. The trustee, under the present law, does not (except as to fraudulently transferred property) take the rights that a creditor under State law might have acquired, but only such as some creditor has actually acquired by levy of process, and then only in the event that such levy has occurred within four months before the bankruptcy and the lien of the levy (otherwise void under § 67 f) been preserved for the benefit of the trustee

by order of court. In this way a distinct advantage is given in bankruptcy to the holders of unrecorded liens. The creditors' hands meanwhile are tied from making any levy, because the separate rights of the creditors have become vested in the trustee for all; besides which, as to property already in the custody of the bankruptcy court, of course individual creditors would be in contempt of court should they levy thereon. Thus the evil of secret liens has continued. It is this evil and the injustice worked upon creditors who rely upon the debtors' apparent ownership against which the bankruptcy law has set its face. The proposed amendment, whilst correcting the defect named, at the same time carefully guards the rights of all parties. It is evident that in the proposed amendment attempt is made to give effect to two ideas quite distinct: First, that as to the property in the custody of the bankruptcy court the bankruptcy trustee shall be considered to have the same title that a creditor holding an execution or other lien by legal or equitable proceedings levied upon that property would have under State law; and, second, that as to property not in the custody of the bankruptcy court the trustee should stand in the position of a judgment creditor holding an execution returned unsatisfied, thus entitling him to proceed precisely as an individual creditor might have done to subject assets. In this way, in effect, proceedings in bankruptcy will give to creditors all the rights that creditors under the State law might have had had there been no bankruptcy and from which they are debarred by the bankruptcy—certainly a very desirable and eminently fair position to be granted to the trustee."

§ 1214. Accepted Doctrine—Bankruptcy Not an Equitable Levy.

Page 715, note 151. *Obiter*, (Security) Warehousing Co. v. Hand, 19 A. B. R. 291, 206 U. S. 415, quoted at § 1137; *In re Dunlop*, 19 A. B. R. 361, 156 Fed. 545 (C. C. A. Min.), quoted at § 1209.

Page 717. *Davis v. Crompton*, 20 A. B. R. 53, 158 Fed. 735 (C. C. A. Pa.): "We agree, therefore, with the learned referee in the court below * * * and we quote with approval the following from his opinion; * * *, the bankruptcy proceedings in themselves are not tantamount to an attachment or execution for the benefit of all the creditors, and it therefore follows that the bankruptcy court can do nothing else than determine the status of the trustee with regard to the property by the only test provided by the law, namely, the determination of the status of the bankrupt himself with regard to the said property as of the date of his adjudication."

Page 717, note 152. For other cases discussing the York case, see ante, § 1209, note.

Amendment of 1910.—The Amendment of 1910 effectually changes the formerly "accepted doctrine," so that the trustee now is "to be deemed vested with all the rights, powers and remedies of a creditor 'armed with process.'"

See discussion ante, §§ 1137½, 1144½, 1145½, 1207½.

§ 1215. Maxim That "Filing of Petition a Caveat, Attachment and Injunction."

Page 718, note 153. See, in addition, *In re Youngstrom*, 18 A. B. R. 572, 153 Fed. 97 (C. C. A. Colo.); *In re Wilk*, 19 A. B. R. 178, 155 Fed. 943 (D. C. N. Y.).

Page 718, note 153. The case *In re Peacock*, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.), is not contra to the author's view as expressed in the latter part of paragraph 1215, although the court apparently gives adhesion to the unlimited doctrine that "immediately upon and by virtue of the adjudication, all the property of the bankrupt wherever situate and in whosever's possession it may be, passes into the custody of the court, and upon the appointment of a trustee vests in him," the court saying: "This is undoubtedly correct and is fully sustained by the authorities cited." The proposition is *not* correct and never has been correct, for property does not pass "into the custody of the court" regardless of "whosever's possession it may be in." The fact of the case and the final decision of the court are, however, wholly in conformity with the correct view, as laid down in § 1215, limiting the maxim to cases where actual custody has first been obtained.

Amendment of 1910.—The Amendment of 1910, to Bankruptcy Act, § 47 (a) (2), whereby the trustee is, "as to all property in the custody or coming into the custody of the Bankruptcy Court, to be deemed vested with all the rights, remedies and powers of a creditor holding a lien thereon by legal or equitable proceedings," effectually restores the validity of the maxim that "the filing of the petition in bankruptcy is a caveat to all the world and in effect an attachment and injunction," and at the same time the amendment establishes the qualification mentioned above by the author, that such filing can so operate only as to property "in the custody or coming into the custody of the bankruptcy court."

§ 1216. Fraudulent Transfers, and Property Held on Secret Trust, Recoverable.

Page 719, note 154. Bankr. Act, § 67 (e), last part. Compare, also, post § 1493, et seq. Also see, § 1709. See, in addition, *Coder v. Arts*, 22 A. B. R. 1, 213 U. S. 223, quoted in part at § 1498; *Allen v. Gray*, 21 A. B. R. 828 (N. Y. Sup. Ct.); *Phillips Tr. v. Kleinman*, 23 A. B. R. 266 (Pa. Com. Pleas); (*Security*) *Warehousing Co. v. Hand*, 19 A. B. R. 291, 206 U. S. 415, quoted at § 1137; (1867) *Bean v. Amsink*, 8 N. B. Reg. 228.

Page 720, note 154. 12. Fictitious sale by bankrupt shortly prior to bankruptcy. *In re Siegel*, 21 A. B. R. 154, 164 Fed. 559 (D. C. N. Y.).

13. Real estate purchased partly with funds derived from a boarding house run by wife, but deed not delivered until eve of bankruptcy, and clear intent shown to aid husband to get goods on credit on false appearances. *Prescott v. Galluccio*, 21 A. B. R. 229, 164 Fed. 618 (D. C. N. Y.).

14. Peculiar case; wherein it was held that the trustee was subrogated to the rights of certain sellers who had sold their goods to the bankrupt through fraudulent misrepresentations, to pursue the property into the hands of third parties to whom in turn the bankrupt had transferred them with full knowledge of the fraud, the defrauded sellers themselves having waived the fraud by proving their claims in bankruptcy. *Lynch v. Bronson*, 20 A. B. R. 409, 160 Fed. 139 (D. C. Conn.). But this decision does not seem to state sound law, for it would seem that the right of such creditors was to have pursued the property themselves and that by waiving the right

they did not confer it on the trustee, but that the trustee was relegated to such right as all the creditors possessed, not to those of the defrauded sellers who had sold to the bankrupt, whose fraud did not harm the estate but only the sellers themselves.

15. Depositing funds in fictitious names assisted by his attorney. *Clay v. Waters*, 20 A. B. R. 561, 161 Fed. 815 (C. C. A. Mo.).

16. Country merchant transferring to banker all his property at 75 per cent. of its true value, no inventory, mere cursory examination, no inquiry about indebtedness, knowledge of dishonored checks within forty days. *Houck v. Christy*, 18 A. B. R. 330, 152 Fed. 612 (C. C. A. Kans.).

17. Unfiled bill of sale of sewing machines, where dates of instruments false, etc. *In re Schlessel*, 18 A. B. R. 434 (Ref. N. Y.).

18. Sale of entire stock two days before bankruptcy, effected behind closed doors, part of proceeds paid over to preferred creditors, though sale based on presently passing consideration. *Johnston v. Forsyth Mercantile Co.*, 19 A. B. R. 48 (D. C. Ga.).

Sale of entire stock of merchandise and fixtures in bulk, but purchaser innocent of participation in seller's fraudulent intent, sale not set aside. *Shelton, Trustee, v. Price*, 23 A. B. R. 431, 174 Fed. 891 (D. C. Ala.).

19. Sale of entire stock of goods of retail merchant casts burden of proof on purchaser, when. *Allen v. McMannes*, 19 A. B. R. 276, 156 Fed. 615 (D. C. Wis.).

20. Pretended "warehousing" and pledge though debtor continued still to use the goods. (Security) Warehousing Co. *v. Hand*, 19 A. B. R. 291, 206 U. S. 415, quoted at § 1137; *Fourth St. Nat. Bank v. Millbourne Mills Co.*, 22 A. B. R. 442, 172 Fed. 177 (C. C. A. Pa.).

21. Voluntary transfers to wives within the four months, held void under § 67 (e), but whether voidable only under the first provision of § 67 (e) not adverted to. *Henkel v. Seider*, 20 A. B. R. 773, 163 Fed. 553 (D. C. N. Y.).

22. Pretended sale of real estate. *Visanska v. Cohen*, 21 A. B. R. 350, 165 Fed. 552 (D. C. Ga.).

23. Forming corporation to take over assets of an insolvent debtor for the purpose of defeating his creditors, assets thus sold held still to belong to bankrupt seller's estate. *In re (Holbrook) Shoe & Leather Co.*, 21 A. B. R. 511, 165 Fed. 973 (D. C. Mont.).

24. One creditor receiving secret advantage over others in a composition, amount paid recoverable by trustee. (1867) *Bean v. Amsink*, 8 N. B. Reg. 228.

25. Pretended pledging of books by a publishing concern where debtor continues to exercise dominion. *In re Gebbie*, 21 A. B. R. 694, 176 Fed. 609 (D. C. Pa.).

26. Pretended consignments, etc. See post, § 1228, et seq.

27. Conveyance of real estate two years before bankruptcy, without consideration, conveyance itself creating the insolvency. *Phillips Tr. v. Kleinman*, 23 A. B. R. 266 (Pa. Com. Pleas).

28. Deed of real estate from wife to husband on eve of bankruptcy of firm of which both were partners, held prima facie fraudulent where grantor has nothing left with which to pay creditors. *Fouche v. Shearer*, 22 A. B. R. 828, 172 Fed. 592 (D. C. Ga.).

Page 721, note 154. 18. Partner selling out all the firm assets to remaining partner although both partners and firm also insolvent, not per se fraudulent. *Sargent v. Blake*, 20 A. B. R. 115, 160 Fed. 57 (C. C. A. Mo.).

19. Insolvent partnership paying individual debt of one partner, not per se fraudulent. *Sargent v. Blake*, 20 A. B. R. 115, 160 Fed. 57 (C. C. A. Mo.).

20. Bill of sale of machinery by bankrupt corporation to secure its principal stockholder for trust funds illegally turned over to it by her, the machinery remaining in possession of the corporation as "under lease." *In re Arkonia Fabric Mfg. Co.*, 18 A. B. R. 470, 151 Fed. 914 (D. C. Pa.).

21. Where, anterior to the four months period, a bankrupt, while insolvent, transfers to his wife for a nominal consideration all of his attachable property, consisting of a small stock of groceries and book accounts, for the sole purpose of preventing a levy upon same by attachment, his trustee in bankruptcy is entitled to have the bill of sale set aside as fraudulent as against the creditors. *Thomas v. Fletcher*, 18 A. B. R. 624, 153 Fed. 226 (D. C. Me.).

22. Only testimony that of parties themselves, which show valid transfer. *Entwisle v. Seidt*, 19 A. B. R. 185, 155 Fed. 864 (D. C. N. Y.).

23. Transfer merely preferential and not fraudulent, not voidable in New Jersey. *Manning v. Evans*, 19 A. B. R. 217, 156 Fed. 106 (D. C. N. J.).

Transfer where transferor was a man reputed of great wealth, etc. *Coder v. Arts*, 22 A. B. R. 1, 213 U. S. 223.

24. Transfer not fraudulent but merely to get money to make preferential payments. (*Van Iderstine*) *Trustee v. Natl. Discount Co.*, 23 A. B. R. 345, 174 Fed. 518 (C. C. A. N. Y.).

25. *In re Elletson Co.*, 23 A. B. R. 530, 174 Fed. 859 (D. C. W. Va.), Deed of trust.

Page 721. *Am. Mach. Co. v. Norment*, 19 A. B. R. 679, 157 Fed. 801 (C. C. A. B. N. Car.): "But again we must go a step farther. For these parties to secure from this insolvent lumber company this deed of trust, sufficient to consume the sum total of its assets, to secure debts not its own, but personal ones alone of its principal stockholder and manager; debts of his incurred before its corporate birth, not one dollar of which, so far as shown, it derived any benefit of—not only stamps the transaction outside of the saving subdivision 'd' of § 67 of the act, but clearly brings it within the scope of subdivision 'e' of that section. It must be held a clear fraud upon the rights of creditors, and both the deed of trust and the debt itself must be held void as to such creditors."

A sale, although for present valuable consideration, may be set aside, if made with fraudulent intent participated in by the purchaser.

Page 721, note 155. *Johnston v. Forsyth Mercantile Co.*, 11 A. B. R. 669, 127 Fed. 845, 19 A. B. R. 48 (D. C. Ga.); instance, *Houck v. Christy*, 18 A. B. R. 330, 152 Fed. 612 (C. C. A. Kans.); obiter, *Thomas v. Fletcher*, 18 A. B. R. 624, 153 Fed. 226 (D. C. Me.). Likewise as to a mortgage for a valid debt, *In re Elletson Co.*, 23 A. B. R. 530, 174 Fed. 859 (D. C. W. Va.).

Page 721. Obiter, *Coder v. Arts*, 22 A. B. R. 1, 213 U. S. 233: " * * * and it makes no difference that the conveyance was made upon a valuable consideration, if made for the purpose of hindering, delaying or defrauding creditors. The question of fraud depends upon the motive.

Page 722. *Thomas v. Fletcher*, 18 A. B. R. 623, 153 Fed. 226 (D. C. Me.): "I have had occasion before, when issues of this sort have been presented, to refer to *Blennerhassett v. Sherman*, 105 U. S. 100, in which the court said: 'It is not enough, in order to support a settlement against creditors, that it be made for a valuable consideration. It must also be bona fide. If it be made with intent to hinder, delay, or defraud them, it is void as against them, although there may be in the strictest sense a valuable or even an adequate consideration.' In *Davis v. Schwartz*, 155 U. S. 631, Mr. Justice Brown, in speaking for the Supreme court, said: 'It has been the accepted law ever since *Twyne's Case*, 3 Coke, 80, that good faith, as well as a valuable consideration, is necessary to support a conveyance as against creditors. In that case *Pierce*, being indebted to *Twyne* in £400, was sued by a third party for £200. Pending such suit, he conveyed all his property to *Twyne* in consideration of his debt, but continued in possession, sold certain sheep, and set his mark on others. It was resolved to be a fraudulent gift, though the deed declared that it was made bona fide. Most of the cases illustrative of this doctrine, however, have been like that of *Twyne*, wherein a debtor, knowing that an execution was to be taken out against him, had sold his property to a vendee having knowledge of the facts, for the express purpose of avoiding a levy, or receiving a consideration which could not be reached by execution. In such cases the fact that he receives a good consideration will not validate the transaction, unless at least the creditor has obtained the benefit of the consideration.'"

Thus, the sale, hurriedly or under unusual circumstances, by a retail merchant, of his entire stock of goods, throws the burden upon the purchaser of enquiring into the seller's financial condition.

Page 722, note 156. Impliedly, *Houck v. Christy*, 18 A. B. R. 330, 152 Fed. 612 (C. C. A. Kans.).

Page 722. *Allen v. McMannes*, 19 A. B. R. 276, 156 Fed. 615 (D. C. Wis.): "The sale of an entire stock of goods of a retail merchant is a suspicious circumstance per se, naturally calculated to put the purchaser on inquiry. *Walbrun v. Babbitt*, 16 Wall. 577, 21 L. Ed. 489; In re *Knopf* (D. C.), 16 Am. B. R. 432, 146 Fed. 109; *Dokken v. Page*, 17 Am. B. R. 228, 147 Fed. 438, 77 C. C. A. 674. Such a purchase is presumptively questionable, and casts the burden of proof on the purchaser to show that he had no notice of facts or circumstances sufficient to arrest his attention, puts him on inquiry, and requires him to use such means of knowledge as were at hand in order to learn whether the seller is not in financial difficulty, and whether a general statement, such as that the book accounts are sufficient to pay the mercantile creditors, was true."

Page 722. Pretended "warehousings" and the pledging of warehouse receipts based thereon, and similar transactions, the debtor retaining possession and power of disposition, are fraudulent and void as against the trustee.

(Security) *Warehousing Co. v. Hand*, 19 A. B. R. 291, 206 U. S. 415; In re *Gebbie*, 21 A. B. R. 694, 167 Fed. 609 (D. C. Pa.).

Likewise, where goods are nominally sold to a go-between corporation whose stock, all but two shares, is owned by the bankrupt and

which was organized for the very purpose of protecting the seller in its dealings with the bankrupt, it has been held that the nominal buyer was the "alter ego" of the bankrupt and that the goods in its possession belonged to the bankrupt estate.

Ludvigh v. Woolen Co., 19 A. B. R. 795, 159 Fed. 796 (D. C. N. Y.).

There must exist an intent to hinder, delay or defraud, more than merely the making of the transfer itself necessarily would cause to render the transfer fraudulent, where the transfer is applied upon a pre-existing debt.

Sargeant v. Blake, 20 A. B. R. 115, 160 Fed. 57 (C. C. A. Mo.), quoted post. § 1498; *Allen v. Gray*, 21 A. B. R. 828, (N. Y. Sup. Ct.).

Page 722. *Coder v. Arts*, 18 A. B. R. 513, 152 Fed. 943 (C. C. A. Iowa): "A transfer by an insolvent, within four months prior to the filing of a petition, for the purpose of securing or paying a pre-existing debt, without any intent or purpose to affect other creditors injuriously beyond the necessary effect of the security, is lawful, if not violative of other provisions of law, and it does not evidence any intent to hinder, delay or defraud creditors within the meaning of Bankruptcy Act, 1898, § 67e."

The mere selling out of the usual course of business is not of itself proof, nor does it make a *prima facie* case of fraudulent intent, alone considered.

Houck v. Christy, 18 A. B. R. 330, 152 Fed. 612 (C. C. A. Kans.).

Conditional sales of personal property, where the conditional buyer has the power of selling in the usual course of business, are, in general, void.

See post, § 1263. See also, *In re Gilligan (Troy Wagon Works v. Hancock)*, 23 A. B. R. 668, 152 Fed. 605 (C. C. A. Ind.).

The intent need not be actually to cheat and defraud; it is enough if it be to hinder and delay; and it does not alter the legal effect that the debtor honestly believed that by making such conveyance he would be able to continue in business and in time work out of it a profit sufficient to pay all debts; nor that the transferee shared in such belief.

In re Elletson Co., 23 A. B. R. 530, 174 Fed. 859 (D. C. Va.): "The intent may not be to actually cheat and defraud; it is enough if it be to hinder and delay. A debtor may honestly believe that by making such conveyance of personal property he will be able to continue in business and in time work out of it a profit sufficient to pay all debts existing and that may be incurred in accomplishing this purpose. The favored creditor, to be secured may share in this view and be willing to sell his property on long time thus secured, in order to allow the experiment to be tried. But it is not sound morality nor good law to allow these two to determine the rights of others, or to hinder or delay those others in the enforcement of their rights."

And the intent may be gathered from the surrounding circumstances.

In re Elletson Co., 23 A. B. R. 530, 174 Fed. 859 (D. C. W. Va.); also, see post, § 1745.

§ 1216 $\frac{1}{4}$. Badges of Fraud Considered Together, Not Separately.

Badges of fraud are to be considered together, not separately.

Page 722. *Houck v. Christy*, 18 A. B. R. 330, 152 Fed. 612 (C. C. A. Kans.): "Moreover, we think the evidence before recited brings the case well within the rule that badges of fraud, altogether inconclusive if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof of fraudulent intent on the part of both vendor and vendee."

See also, post, §§ 1496 $\frac{1}{2}$, 1504; ante, § 109.

§ 1216 $\frac{1}{2}$. Great Latitude in Admission of Evidence.

Questions of fraud can scarcely ever be proved by direct evidence, and great latitude is to be allowed in the admission of all the circumstances fairly connected with the case.

In re Luber, 18 A. B. R. 476, 152 Fed. 492 (D. C. Pa.); also, see ante, §§ 114 $\frac{1}{2}$, 856 $\frac{3}{4}$.

§ 1216 $\frac{3}{4}$. Conspiracy to Defraud.

Action may be brought by the trustee against several defendants for conspiracy to defraud creditors.

See post, §§ 1742 $\frac{1}{2}$, 2328 $\frac{1}{2}$; also, see *Strasburger v. Bach*, 19 A. B. R. 732, 157 Fed. 918 (C. C. A. Ills.); instance, apparently, *Ludwig v. Am. Woolen Co.*, 19 A. B. R. 795, 159 Fed. 796 (D. C. N. Y.); contra, where no goods received by conspirators, *Friedman v. Myers*, 19 A. B. R. 883, 30 Ohio C. C. Rep. 303.

Although it is held in one case that it must appear that property was actually taken.

See *Friedman v. Myers*, 19 A. B. R. 883, 30 Ohio C. C. 303.

However, the latter holding seems to lose sight of § 70 (a) (6) which, passes title to the trustee to "rights of action arising * * * from the unlawful taking or detention of, or injury to" the bankrupt's property.

§ 1216 $\frac{7}{8}$. "Creditor Armed with Process" Not Requisite.

In suits by the trustee to recover property fraudulently transferred, it is not requisite that there exist a creditor "armed with process." The Bankruptcy Act itself, in § 70 (a) (4), specifically provides that title to such property shall pass to the trustee.

Page 722. *Thomas v. Roddy*, 19 A. B. R. 873, 122 App. Div. 857, 107 N. Y. Supp. 473: "The trustee, by this provision of the act, is invested with the title of all property of the bankrupt transferred by him in fraud of creditors, unless his right in this respect is restricted—which I do not believe it is—by subdivision e. The policy of the act is to secure an equal distribution of all property of the bankrupt among all his creditors. For that purpose the trustee represents all the creditors and may maintain an action to set aside any transfer which any creditor could or which any creditor might acquire by any process taken by him. *Matter of McNamara*, 2 Am. B. R. 566; *Mueller v. Bruss*, 8 id. 442; *Sheldon v. Parker*, 11 id. 152; *Beasley v. Coggins*, 12 id. 355. Under the Bankruptcy Act of 1867, which contained a provision to the effect that title to property fraudulently transferred vested in the assignee, now the trustee, it was held that the assignee could maintain an action to set aside such transfers whether any individual creditor could have done so or not. *Platt v. Matthews*, 10 Fed. 280; *Matter of Leland*, 10 Blatchf. 503. Judge Wallace, who delivered the opinion in the *Matthews* case, concluded by saying: 'Numerous other authorities might be cited to sustain the position that an assignee may proceed to recover property transferred in fraud of creditors whether any creditor was in a position to attack the transfer or not, and that his title accrues by force of the act, and not through the rights of the creditor to assert the fraud.' The same view was entertained by the Court of Appeals in *Southard v. Benner*, 72 N. Y. 424. There the court had under consideration the construction to be put upon chapter 314 of the Laws of 1858 in connection with the Bankruptcy Act of 1867. The provisions of that act are somewhat similar to the one under consideration in so far as relates to the maintenance of an action by an assignee or a trustee, irrespective of the rights of individual creditors. The court, speaking through Judge Allen, said: 'Upon sound reason and the policy of the law, as well as the authorities quoted and others that might be referred to, there can be no doubt, we think, that the plaintiff as assignee has a right of action for property conveyed by the bankrupt in fraud of his creditors, although none of the creditors have acquired a specific lien. It is not such liens, or any particular interest in the property, or an interest for the benefit of any one creditor or class of creditors, that is vested in the assignee, but the entire property fraudulently transferred and for the benefit of all the creditors. The assignee takes title not under any claim of right existing in the creditors, but under the statute, and that right he may assert by action, although no individual creditor, or all the creditors combined, could have a standing in court to challenge the conveyance.' Therefore, it seems to me, even though it be held, as contended, that the complaint does not show that any of the creditors whose claims were filed in the bankruptcy proceeding were in a position to attack the transfers, nevertheless, the trustee may do so. This must be so if the reasoning in the authorities cited be sound. To hold that a trustee cannot attack a fraudulent conveyance made by the bankrupt more than four months before the filing of the petition, without showing that some creditor had obtained a judgment and issued execution thereon, so that he could maintain a similar action, would be simply to provide an easy and convenient method for a dishonest debtor to dispose of his property. In that case the debtor could fraudulently dispose of all his property more than four months before bankruptcy proceedings were instituted, and unless some creditor—intermediate the disposition of the property and the filing of the petition in bankruptcy—had put himself in position

to attack the fraudulent transfers by obtaining a judgment, issuing an execution and having the same returned unsatisfied, the trustee would be powerless to reach the property fraudulently disposed of."

For this same proposition, see ante, § 1207 $\frac{1}{4}$. See also, *Warehousing Co. v. Hand*, 19 A. B. R. 291, 206 U. S. 415, quoted at § 1207 $\frac{1}{4}$; *In re Gebbie & Co.*, 21 A. B. R. 691, 167 Fed. 609 (D. C. Pa.), quoted at § 1207 $\frac{1}{4}$; *Fourth St. Nat. Bank v. Millbourne Mills Co.*, 22 A. B. R. 442, 172 Fed. 177 (C. C. A. Pa.), quoted at § 1146; *In re Bellevue Pipe & Foundry Co.*, 22 A. B. R. 99, 16 Ohio Decisions 247 (Ref. Ohio); *In re Penny & Anderson*, 23 A. B. R. 105 (Ref. N. Y.).

§ 1217. **Fraudulent Transfers before Four Months of Bankruptcy.**

Page 722, note 160. *Thomas v. Roddy*, 19 A. B. R. 873, 122 App. Div. 851, 107 N. Y. Supp. 473, quoted, on other points at § 1216 $\frac{7}{8}$. *Phillips Tr. v. Kleinman*, 23 A. B. R. 266 (Pa. Com. Pleas); *In re Elletson Co.*, 23 A. B. R. 530, 174 Fed. 859 (D. C. W. Va.), quoted post, at § 1888. Similarly, under the law of 1867, *Hyde v. Sontag*, 8 N. B. Reg. 225.

Page 722. Thus as to "voluntary conveyances" by way of gift, to hinder and delay creditors; or transfers for nominal considerations, for the same purpose, as, for example, to avoid levy of attachment.

Thomas v. Fletcher, 18 A. B. R. 623, 153 Fed. 226 (D. C. Me.).

§ 1218 $\frac{1}{2}$. **Transfer Itself Creating the Insolvency.**

The insolvency may have been created by the transfer itself.

Compare, analogously, § 1344; also, see *Phillips, Trustee, v. Kleinman*, 23 A. B. R. 266 (Pa. Com. Pleas).

§ 1219. **Complicity of Transferee to Be Shown.**

Page 723, note 163. Intermediate transferee and transferror made party, *Phillips, Trustee, v. Kleinman*, 23 A. B. R. 266 (Pa. Com. Pleas).

The doctrine that it may not always avail, in cases of fraudulent transfers to creditors, that the creditors have taken no affirmative or independent action to collect their claims, but simply have accepted the advantages which the fraudulent debtor has voluntarily given them for his own purposes and as a part of the fraudulent scheme, does not dispense with the necessity of proving participation of the transferee in the intent.

Wright v. Sampter, 18 A. B. R. 354, 152 Fed. 196 (D. C. N. Y.).

But the transferee will not necessarily be exonerated by the fact that he shared the transferror's belief that the transfer, though it might for the present delay creditors, yet in the end would enable the debtor to pay all debts and extricate himself safely.

In re Elletson Co., 23 A. B. R. 530, 174 Fed. 859 (D. C. W. Va.), quoted ante, § 1216.

Page 723, note 164. See post, "Fraudulent Conveyances within Four Months of Bankruptcy," § 1493, et seq.

In addition, see *Smith v. Mutual Life Ins. Co.*, 19 A. B. R. 707, 158 Fed. 365 (D. C. Mass.), quoted at § 1219½.

Sales of Merchandise in Bulk.—In the absence of any statute governing sales of merchandise in bulk, such a sale, though made within four months and whilst insolvent, will not be set aside if not made with the transferee's participation in the fraudulent intent. *Shelton, Trustee, v. Price*, 23 A. B. R. 431, 174 Fed. 891 (D. C. Ala.).

§ 1219½. Transferee Innocent but Consideration from Him Purely Executory.

If the transferee be entirely innocent yet the consideration moving from him be wholly executory, as, for example, a mere promise to do something at a future time not yet arrived, it has been held that the fraud of the transferor alone will suffice to avoid the transfer, and the trustee may recover the property transferred. Such has been the holding where an insolvent debtor paid a lump sum for an annuity to begin at a future time not yet arrived.

Smith v. Mutual Life Ins. Co., 19 A. B. R. 707, 158 Fed. 365 (D. C. Mass.): "It is admitted on both sides (1) that the bill sufficiently alleges Dunning's insolvency; (2) that the court may assume that the defendant was ignorant of this fact, and that it received payment from Dunning in good faith; (3) that the contract made between Dunning and the defendant was upon an adequate consideration, and might have been enforced by Dunning. By virtue of the Statute of Elizabeth, a trustee in bankruptcy can recover from the holder property transferred by the bankrupt in fraud of his creditors, unless the holder is a bona fide purchaser for value. This right of the trustee may come into controversy in many ways. Thus the trustee may recover goods from one who bought them, unless value was paid by the purchaser to the bankrupt before notice of the latter's fraud. In the case at bar the money was paid, not by an alleged purchaser for value, but by the bankrupt himself, and it is the very price paid, and not the object bought with it, which the trustee here seeks to recover. Nearly every transfer for a consideration, however, can be treated as an exchange, in which something is given by each party to the other. A fraudulent transfer of money is within the terms of the Statute of Elizabeth as well as a fraudulent transfer of land or of goods. Where the bankrupt has paid money to an honest vendor in the purchase of goods, such as a horse or a coat, the bargain cannot be canceled, although the goods be offered for return. Value has been given by the vendor for the bankrupt's money. The sale is complete and cannot be rescinded. The court has here to decide a case in which the value given for the bankrupt's money was not land or goods, but a valid executory agreement. Does that agreement, binding upon the defendant, constitute value paid by him for the money he has received? Is the agreement the equivalent of a chattel? The law is settled otherwise, if the defendant's part of the contract is wholly executory at the time the action is commenced. This has been held in cases where a note, a mortgage, or other agreement to pay money was given by the purchaser to the insolvent. *Hardingham v. Nichols*, 3 Atk. 304; *Baldwin v. Sagar*,

70 Ill. 503, 507; *Kitteridge v. Chapman*, 36 Iowa, 348, 351; *Dixon v. Hill*, 5 Mich. 404, 409; *Blanchard v. Tyler*, 12 Mich. 339, 86 Am. Dec. 57; *Arnholt v. Hartwig*, 73 Mo. 745; *Young v. Kellar*, 94 Mo. 581, 7 S. W. 293, 4 Am. St. Rep. 405; *Haughwort v. Murphy*, 21 N. J. Eq. 118; *Freeman v. Deming*, 3 Sandf. Ch. 327. If, therefore, the defendant's contract in the case at bar was wholly executory at the time this bill was filed, the complainant must prevail. The defendant contends that its agreement is no longer completely executory on its part, but that it will incur loss beyond the loss of its bargain, and that, by the rescission proposed, it will be left in a position worse than that which it occupied before the contract was made. It seeks to liken the agreement in question to a policy of insurance. Although no loss has happened, yet the premium on an insurance policy paid in fraud of creditors cannot be recovered from a bona fide insurer after the expiration of part of the term of the policy. The contract does not remain wholly executory on the part of the insurer; the insured has been protected during the time which has elapsed. But the agreement in the case at bar is, in many respects, the converse of a policy of life insurance. The defendant's liability to pay the annuity is conditioned upon Dunning's remaining alive beyond July 1, 1916. The price of the conditional annuity promised by the defendant in 1901 was fixed in view of this contingency. In 1907, when the bill was brought, Dunning's chance of living beyond July 1, 1916, had appreciably increased. During the six years he had received nothing, either in money or in protection. On the contrary, if the contract is now rescinded, the defendant will have profited materially from the lapse of time."

§ 1221. Fraudulent Transfer Not to Be Confused with Preferential Transfer.

Page 723, note 166. Also, see (*Van Iderstine*) *Trustee, v. Natl. Discount Co.*, 23 A. B. R. 345, 174 Fed. 518 (C. C. A. N. Y.); also, *Coder v. Arts*, 213 U. S. 223, 22 A. B. R. 1, quoted post at § 1498.

But an apparently mere preferential transfer may be turned into a fraudulent transfer by proof of a secret trust.

Obiter, (*Van Iderstine*) *Trustee, v. Natl. Discount Co.*, 23 A. B. R. 345, 174 Fed. 518 (C. C. A. N. Y.).

§ 1222. Mortgages Withheld from Record.

Page 724, note 168. See, in addition, *In re Hickerson*, 20 A. B. R. 682, 162 Fed. 345 (D. C. Idaho).

Page 724. But in Iowa, Kentucky and probably other States there must be showing made that it was withheld by agreement or that prejudice resulted from the withholding.

In re Doran (*Moorman v. Beard*), 18 A. B. R. 760, 154 Fed. 467 (C. C. A. Ky.).

Page 724. And in New York, that the withholding resulted in inducing credit, such as to estop the mortgagee.

Compare, on the facts, to same general effect, *In re Schiebler*, 21 A. B. R. (209) 309, 165 Fed. 363 (D. C. N. Y.).

Page 724, note 171. Compare, *In re Atlanta News Pub. Co.*, 20 A. B. R. 193, 160 Fed. 519 (D. C. Ga.). Likewise, apparently in Iowa. Compare, *Post v. Berry*, 23 A. B. R. 699, 175 Fed. 564 (C. C. A. Iowa).

Page 724. *Obiter*, *Mattley v. Wolfe*, 23 A. B. R. 673, 175 Fed. 619 (D. C. Neb.): "This mortgage was not recorded for over eight months after it was given, and this was pursuant to an agreement that, because it would injure the mortgagor's credit, the mortgage was not to be filed unless the mortgagor was about to get into difficulty with his creditors, in which case the mortgagor was to notify Wolfe, so that he might file his mortgage. About seven months before his adjudication as a bankrupt, Parker had also given a chattel mortgage to one McWhinney on his stock of goods and fixtures to secure a note given by him for money loaned to him by McWhinney. This mortgage was withheld from record pursuant to a similar agreement between the mortgagor and mortgagee that, because it would injure Parker's credit, the mortgage was not to be filed except in case some creditor threatened trouble. The note and mortgage were twice renewed, and substantially the same understanding was had between the mortgagor and mortgagee with reference to the filing of these renewal mortgages. By § 67a of the Bankruptcy Act * * *: Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate. The validity of the claim which is thus to be tested is determined by the law of this State. * * * Such an agreement between the mortgagor and mortgagee, under the decisions of the Supreme Court of Nebraska, renders the mortgage fraudulent as to certain creditors. Those creditors who can avoid the mortgage as fraudulent are those who have been misled by the keeping of the mortgage from record, and during the interim between its execution and recording have extended credit to the mortgagor on the faith that the mortgagor was the owner of such property. * * * There is no proof in this case that any creditors extended credit to Parker during the time the mortgages were withheld from record or in the belief that he was the owner of the property mortgaged."

Page 724. And are void, in South Carolina, only as to parties becoming creditors in the meantime, but as to them are void whether simple contract creditors or levying creditors.

Simmons v. Greer, 23 A. B. R. 443, 174 Fed. 654 (C. C. A. S. Car.), quoted at § 1225½.

But such mortgages are not void in some states unless actual fraudulent intent is proved.

In re McLoon, 20 A. B. R. 719, 162 Fed. 575 (D. C. Me.).

Page 725. In other states, a mortgage withheld from record is void as against a creditor becoming such after the execution and before the recording, whether such creditor be "armed with process" or not; and the trustee succeeds to such right.

In re Martin, 23 A. B. R. 151, 173 Fed. 597 (C. C. A. Mo.); see also, § 1265.

Page 725, note 174. See, in addition, *In re Hickerson*, 20 A. B. R. 682, 162 Fed. 345 (D. C. Idaho).

And where withheld from record, but not by agreement with the mortgagor, the mortgage may not be void.

In re Evans Lumber Co., 23 A. B. R. 881, 176 Fed. 643 (D. C. Ga.).

But the debt itself may be proved, if otherwise valid, the claim upon the withheld mortgage being waived, or being adjudicated invalid.

Post v. Berry, 23 A. B. R. 699, 175 Fed. 564 (C. C. A. Iowa).

§ 1222¹/₄. Conditional Sales Contracts Withheld from Record.

Conditional sales contracts purposely withheld from record to give credit, follow the same rules applicable to chattel mortgages, where subject to such rules by State law. Thus they are void in Maine.

In re Perkins, 19 A. B. R. 134, 155 Fed. 237 (D. C. Me.): "The facts in the case at bar disclose that the nonrecording of a 'conditional sales contract' was not a mere matter of omission. It was in pursuance of a distinct plan that there should be no record of this contract; but that the wagons should appear to be the property of the vendee. The lien was never attempted to be brought to light until after the failure of the bankrupt and his voluntary assignment. The vendee was put into possession of the wagons, of which he was apparently the absolute owner. * * * He also cites *York Manufacturing Co. v. Cassell*, supra, in which the decision is based somewhat upon *Thompson v. Fairbanks*, 196 U. S. 516, 13 Am. B. R. 437, 25 Sup. Ct. 660, 49 L. Ed. 577. In that case, in speaking for the Supreme Court, Mr. Justice Peckham said: 'Under the present Bankrupt Act the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act.' But the case at bar is not 'unaffected by fraud.' The facts bring it distinctly within the rule given by Judge Wallace in *re Garcewich*, supra. In coming to a conclusion, the court gets little assistance from the line of cases which hold that, in equity, for certain purposes, the trustee merely stands in the shoes of the bankrupt, and takes all property subject to valid liens; for the case at bar does not disclose a 'valid lien,' but rather an attempted lien which is invalid and fraudulent."

And in Georgia.

In re Braselton, 22 A. B. R. 419, 169 Fed. 960 (D. C. Ga.).

§ 1224. Fraudulent Court Orders or Judgments.

Page 723, note 180. Compare, *In re Koslowski*, 18 A. B. R. 723, 153 Fed. 823 (D. C. Pa.).

§ 1225. Subsequent Creditors.

Page 726, note 182. *Prescott v. Galluccio*, 21 A. B. R. 229, 164 Fed. 618 (D. C. N. Y.).

§ 1225½. Ignoring Fiction of Corporate Entity.

The doctrine of corporate entity is not so sacred that a court of equity, looking through forms to the substance of things, may not, in a proper case, ignore it to preserve the rights of innocent parties or to circumvent fraud.

Instance, apparently, *Ludvigh v. Am. Woolen Co.*, 19 A. B. R. 795, 159 Fed. 796 (D. C. N. Y.). Compare, *Allen v. McMannes*, 19 A. B. R. 276, 156 Fed. 615 (D. C. Wis.); *Ludvigh, Trustee, v. Am. Woolen Co.*, 23 A. B. R. 314, 176 Fed. 145 (D. C. N. Y.); *In re Montello Brick Works*, 23 A. B. R. 375, 384, 174 Fed. 498 (C. C. A. Pa.).

Thus, where a corporation was organized to take over the assets of an insolvent in order to defeat and delay his creditors, the assets thus sold have been held recoverable despite the corporate entity.

In re (Holbrook) Shoe & Leather Co., 21 A. B. R. 511, 165 Fed. 973 (D. C. Mont.): "Surely the law will not allow this mere form of corporate organization, a mere fiction, to be used to thwart the substance of right, and thus permit the innocent creditors to be deprived of what is theirs, but will disregard the corporate entity and hold the real parties as actually having in their hands the property which is lawfully in the custody of the law, as belonging to the bankrupt. It follows that Dunn must be regarded as but a servant and agent, running a branch store of the Holbrook Company in Helena, under the style of the Packard Shoe Company; and it must be held as established that when he purchased his shares, and put the money in the shares of the Packard Company, he was really lending money to the amount of his subscription to the Holbrook Company; and so, in fact, became a creditor of the Holbrook Company, of which organization he was also a director."

In re Berkowitz, 22 A. B. R. 233, 173 Fed. 1012 (D. C. N. J.): "The Berkowitz Tailoring Company was incorporated shortly before the petition in bankruptcy was filed. The bankrupt was then insolvent and conveyed all his assets to the company for an alleged consideration of \$1,500. The incorporators were the bankrupt and three of his brothers-in-law. These brothers-in-law seem to have paid into the corporation, for its capital stock, the sum of \$2,000, and the bankrupt \$25. The brothers-in-law made no inquiry concerning the quantity or value of the property transferred to the company by the bankrupt and have nothing whatever to do with the business of the company. If they did in fact pay \$2,000 into the treasury of the corporation, it is clear that their purpose was not to invest that sum in the business on their own account, but to aid the bankrupt in business that was to be treated by him as his own and not as a business in which they had any interest whatever. The corporation was intended to operate as a cloak to shield the property from seizure by the bankrupt's creditors. Obviously, it was a fraud upon the creditors of the bankrupt. The referee's orders of September 26 and 27, 1907, directing the receiver to seize the property in possession of the company, were amply sustained by the proofs, and will be confirmed."

Thus, it was held in one case that where ninety-nine per cent. of the stock of a manufacturing corporation was owned by a partnership and

the remainder of the stock was held by relatives of one of the partners who as officers and directors of the corporation maintained its business for the benefit of the partnership, the corporation was a mere adjunct of the firm and upon its adjudication, a receivership in the bankruptcy proceedings was extended to the property in possession of the corporation as a part of the assets of the partnership.

In re Rieger, Kapner and Altmark, 19 A. B. R. 622, 157 Fed. 609 (D. C. Ohio).

Again, the court disregarded the fiction of corporate entity and held that the trustee in bankruptcy of the corporation was bound by an unfiled conditional sales contract where the original purchase of the property had been made by the promoters of the corporations with the declared intent of transferring it to the corporation when organized.

York v. Brewster, 23 A. B. R. 474, 174 Fed. 566 (C. C. A. Tex.): "It may be true that notice to a promoter of a corporation is not notice to the corporation itself when formed; but where associates, who hold property subject to a lien or under a conditional sale, combine to create a corporation to hold the property, and to which they transfer it, such associates being the only persons who have any substantial interest in the corporation, the corporation stands in no better position than that in which the associates stood. * * * To avoid a result so unjust, equity will disregard forms, ignore the corporate entity, and treat the buyers, promoters, and their associates in the enterprise as the parties really interested."

Again, the fiction of corporate entity has been disregarded to the extent of consolidating bankruptcy proceedings of a partnership, of its individual members and of a corporation owned wholly by one of the partners.

Salt Lake Valley Canning Co. v. Collins, 23 A. B. R. 716, 176 Fed. 91 (C. C. A. Mont.).

But such right to ignore corporate entity may be lost by laches or by the intervention of innocent third parties rights.

In re Alleman Hardware Co., 19 A. B. R. 765, 158 Fed. 119 (D. C. Pa.): "The petitioner, who is the trustee in bankruptcy of L. M. Alleman, asks that the funds realized from the sale of the assets of the L. M. Alleman Hardware Co., which is also bankrupt, be taken out of the hands of its trustees, and turned over to the petitioner to be administered and distributed as the estate of L. M. Alleman individually, whom he represents. This is based on the alleged identity of L. M. Alleman with the hardware company bearing his name, which concern, as it is charged, is nothing more than L. M. Alleman himself in corporate guise. If this were true, the transfer which is asked for might be a proper one to make, although it would still be a question whether the same result could not be reached by allowing the creditors of L. M. Alleman individually to make proof of their claims against the company and so avoid circuitry. But the difficulty is that the facts are not as thus assumed. There is evidence, no doubt, from which it could be found that the arrangement by which in July, 1900, S. L. Johns and H. N.

Gitt took a bill of sale from Alleman for his store stock was collusive and fraudulent as to existing creditors, on the strength of which an execution or attachment, levied on the goods, would probably have held. No move of that kind however was made, and the situation at this time is not the same, so as to give a right now to what might have been done then. Over seven years have elapsed, and other rights have come in, which are entitled to consideration here. After an intermediate partnership, bearing the same name, the L. M. Alleman Hardware Co. was incorporated in March, 1903, with the capital of \$50,000, Johns subscribing for forty-nine shares, Gitt for forty-eight shares, and Alleman, C. J. Spaulding and George D. Gitt for one share each, and to it the business and stock in trade were duly transferred. In the transaction of its business, following upon that, up to the time it became bankrupt in December, 1906, new goods were purchased by the company and new and independent indebtedness incurred therefor, a large part of which remains unpaid. The parties to whom it is due, having given credit solely to the company, can look to no one else, and must be paid, so far as they are paid at all, out of its property, which the transfer to the trustee of L. M. Alleman, which is sought, would entirely cut off. It is said, however, that laches are not to be imputed to the creditors of L. M. Alleman, in this matter, as it is only since the examination of the parties in the bankruptcy proceedings, that the fraudulent character of the transaction has been disclosed. But while the evidence to establish the fraud, which is charged, may not have been within reach in the same fullness, as now, the outward indications of it were certainly there, and were as well known at the time of the occurrence as at any time since. And even if the details could not have been compelled from the immediate parties, as they have been here, there is no reason why they could not have been effectively obtained from the other witnesses called, who seem to have had knowledge at least of the essential facts. It is to be noted, moreover, that the present petition is refused, not so much upon the ground of laches as out of regard for the rights of creditors of the hardware company who are clearly entitled to the first concern."

§ 1225¾. Distribution Among Prior and Subsequent Creditors, etc., on Setting Aside of Transfers Void as to a Class.

Where a transfer, void as to a certain class of creditors under State law, has been set aside, the question as to whether the proceeds shall be shared by all creditors equally or redound solely to the benefit of those belonging to the special class, is largely a question to be determined by State law, though the decisions do not usually place it upon that ground.

Simmons v. Greer, 23 A. B. R. 443, 174 Fed. 654 (C. C. A. S. Car.). Quoted below. Also, compare, *Moore v. Green*, 16 A. B. R. 648, 145 Fed. 480 (C. C. A. W. Va.); also, *In re Gray*, 3 A. B. R. 647, 62 N. Y. Supp. 618. Also, see post, §§ 1266, 1738.

Thus, in South Carolina, where a chattel mortgage has been withheld from the records for more than the forty days limit allowed for filing by statute, only creditors who have become such during the period of the withholding may share in the proceeds.

Page 726. *Simmons v. Greer*, 23 A. B. R. 443, 174 Fed. 654 (C. C. A. S. Car.): "The statute of South Carolina enacts that mortgages of real or personal property shall be valid, so as to affect subsequent creditors, whether lien creditors or simple contract creditors, only when recorded within 40 days; but the subsequent recording shall operate as notice to all creditors who become such after the date of the recording. Section 2456 of the Civil Code of South Carolina of 1902. This act, therefore, creates a class of creditors who are not affected by the mortgage, while all others take rights which are subordinate to it. That class is those who have become creditors between the date of the mortgage and the date of its record, and that without regard to whether they are 'lien creditors or simple contract creditors.' If there is a fund to be distributed among creditors, and some take subordinate to a lien, and there are others who are not affected by the lien, the result must be that those who are not affected by the lien are paid first, and the lien creditor is postponed to them. The South Carolina statute governs the rights of the respective parties. By that statute, and the construction placed upon it by the South Carolina courts, the mortgage is good without recording as to the bankrupt and as to all creditors whose rights accrued prior to its execution, and it is of no effect as to those creditors, whether simple contract or lien creditors, whose rights accrued between the execution of the mortgage and its recording."

Also, *In re Cannon*, 10 A. B. R. 64, 121 Fed. 582 (D. C. S. Car.).

And the mortgagee is not to be regarded as one of the meantime creditors, nor may he share with those becoming creditors during the period of the withholding.

Simmons v. Greer, 23 A. B. R. 443, 174 Fed. 654 (C. C. A. S. Car.): "The assignments of error on this appeal are in effect that the judge below should have held that *Simmons*, the mortgagee, was entitled to share in the fund with the subsequent creditors. This contention must be upon the theory that he was as to his debt a subsequent creditor. This, we think, is an obviously strained and untenable construction. *Simmons'* debt and the mortgage to secure it were created simultaneously, and the debt cannot be said to have been subsequent to the mortgage. The only sensible meaning to be given to the words 'subsequent creditors,' used in the statute, is that they are creditors who become such subsequent to the execution of the mortgage."

Probably the better rule is that, in the absence, at any rate, of State law to the contrary, all creditors participate pro rata, both prior and subsequent creditors.

See [1867] *Smith v. Kehr*, 7 Nat. Bankr. Reg. 97.

Page 726. *In re Kohler*, 20 A. B. R. 89, 159 Fed. 871 (C. C. A. Ohio): "The matter was referred to a special master who held that the distribution should be pro rata among all the creditors. Exceptions to his report were taken before the court below, who held that the distribution should be limited to those who were creditors at the time of the transfer, on the 22nd of August, 1901. Thus, the question has reached us. The argument in favor of the conclusion reached by the court below seems to be based largely upon what is claimed to be the law of Ohio in such case, while the master in holding the distribution should be made pro rata among all the creditors, plants himself squarely upon what he contends are the policy

and provisions of the present bankruptcy law. The court below pointed out that under the finding of facts as he reads it, the transfer was only 'to the detriment of his [bankrupt's] then existing creditors,' which he regards as controlling. The court thinks it 'not harmonious with justice that persons whose legal rights have in no wise been invaded, may participate in funds arising out of a transfer, which did result in the invasion of the rights of others.' And it cannot believe that the bankruptcy law, in distributing an estate, intended to give any more rights to certain creditors than they had prior to its enactment. One object of the bankruptcy law is to prevent preferences and secure equality. The letter of the law, from which we have quoted, provides for an equal distribution. All the estate of a bankrupt is to go to the trustee. This includes preferences and property fraudulently conveyed. In our view, the strong objection to the construction of the lower court is that it provides a ready method of effectuating preferences. A man heavily in debt, and likely to go in deeper, in other words, insolvent, but yet in business, may convey a large part of his property to his wife. Having thus put out an anchor to windward, he has the satisfaction of knowing that if the conveyance stands, his wife is taken care of, but if it is set aside, the creditors existing then will be preferred over the later ones. There may be reasons why the bankrupt would like to prefer his earlier over his later creditors. If so, here is a method ready at hand for the purpose. The construction of § 67f and 67c will be found in the case of *First National Bank v. Staake*, 202 U. S. 141, 15 Am. B. R. 639. Here, certain attachments had been levied within four months. The court held they could be annulled, or the lien of the attachments could be preserved under the Bankruptcy Act, for the benefit of the estate. There was no method suggested of passing over the property covered by these attachments to the creditors who had secured them. But they could be held by the trustee 'for the benefit of the entire body of creditors, that is, "for the benefit of the estate"—in other words, the statute recognizes the lien of the attachment, but distributes the lien among the whole body of creditors' (202 U. S. 146). We have examined a number of Ohio decisions, but have not found one in which the distribution of the proceeds of property transferred in fraud of creditors, recovered by a trustee in bankruptcy, directly or through others, was limited to creditors existing at the time of the transfer. The precise question does not appear to have been raised, but the rule seems to be that the title of such recovered property would be held by the trustee for the benefit of all the creditors."

§ 1227. Bona Fide Holder for Value Prior to Adjudication.

Page 726, note 184. See post, § 1504; Under N. Y. Stock Corp. Law, *Perry v. Van Norden Trust Co.*, 20 A. B. R. 190 (N. Y. Ct. App.).

3. *Houck v. Christy*, 18 A. B. R. 330, 152 Fed. 612 (C. C. A. Kans.).

4. *Obiter*, *Coder v. Arts*, 22 A. B. R. 1, 213 U. S. 223.

The hurried purchase of an entire stock of a retail merchant at less than cost, the purchaser making no inquiries, indicates lack of good faith, although the purchaser paid the price and was actually ignorant of the seller's financial condition.

Houck v. Christy, 18 A. B. R. 330, 152 Fed. 612 (C. C. A. Kans.). See also, ante, §§ 1216, 1216½; post, §§ 1496, 1496½.

But, where the vendees of an unregistered conditional sale contract transferred the property to a corporation, the formation of which and the transfer to which had been the basis of the negotiations for the purchase, the conditional vendees holding the only substantial interests in the corporation, the corporation was held not to be protected as a bona fide purchaser for value, even though third parties had become interested in the purchasing corporation, the court disregarding the fiction of corporate entity in such instance.

York Mfg. Co. *v.* Brewster, 23 A. B. R. 474, 174 Fed. 566 (C. C. A. Tex.), quoted at § 1225½.

§ 1228. Alleged "Consignments," "Leases," "Agencies," "Pledges," "Bailments," Where Really Sales.

Page 727, note 185. See, in addition, *In re Burt*, 19 A. B. R. 123, 155 Fed. 267 (D. C. Pa.): Conditional sale disguised as bailment.

In re Penny & Anderson, 23 A. B. R. 115, 176 Fed. 141 (D. C. N. Y.): Sale disguised as a lease.

Ludvigh, trustee, v. Woolen Co., 23 A. B. R. 314, 176 Fed. 145 (D. C. N. Y.): Consignment held to be a sale. So-called consignee a corporation created for purpose of giving apparent bona fides to fictitious consignment.

In re Agnew, 23 A. B. R. 360 (D. C. Miss.): Pretended conditional sale but no accounting made, though recording not required by State law.

In re Priegle Paint Co., 23 A. B. R. 385, 175 Fed. 586 (D. C. Ala.): Pretended conditional sale but an absolute sale in fact, with no right in the seller to the proceeds nor to an accounting, but only to rest on buyer's general credit.

Pontiac Buggy Co. v. Skinner, 20 A. B. R. 206, 158 Fed. 858 (D. C. N. Y.): Pretended conditional sale, or pretended agency in vendee to hold proceeds as collateral security.

In re Arkonia Fabric Mfg. Co., 18 A. B. R. 467, 151 Fed. 914 (D. C. Pa.): Pretended "lease."

In re Landsberger, 24 A. B. R. 107, 177 Fed. 443 (D. C. Ga.).

Page 728, note 187. Compare, to same effect, ante, § 1146. See, in addition, *Warehousing Co. v. Hand*, 19 A. B. R. 291, 206 U. S. 415, quoted at § 1137; *Fourth St. Natl. Bank v. Millbourne Mills Co.*, 22 A. B. R. 442, 172 Fed. 177 (C. C. A. Pa.), affirming *In re Millbourne Mills Co.*, 20 A. B. R. 747, 162 Fed. 988), quoted at § 1146.

Page 729, note 188. See, in addition, *Pontiac Buggy Co. v. Skinner*, 20 A. B. R. 206, 158 Fed. 858 (D. C. N. Y.): Pretended conditional sale. *In re Southern Textile Co.*, 23 A. B. R. 172, 174 Fed. 523 (C. C. A. N. Y.): Unfiled chattel mortgage, claimed to be either held in trust or under "equitable lien."

Again, it is often sought to make an absolute sale to the bankrupt, appear to be a bailment, in order that the property may be reclaimed. But the property affected will pass if the true nature of the transaction makes it a sale.

Page 730, note 189. Instance, goods actually sold and paid for, yet claimed to be consigned. In *re Landsberger*, 24 A. B. R. 107, 177 Fed. 443 (D. C. Ga.).

Page 730. In *re Morris*, 19 A. B. R. 422, 159 Fed. 591 (D. C. Pa.): "It is difficult to give a written instrument a character which the transaction, which it purports to represent, does not inherently bear. While, therefore, it is easy enough to make an agreement speak as a lease or a bailment, where that was what was actually in the mind of the parties, where the fact is that the one desires to sell and the other to buy, the attempt to have the arrangement masquerade in writing as something else is very likely to fail. There are apt terms and provisions for the one, which are inapt and unadaptable for the other, and the result is a nondescript, the different parts of which defeat each other and make manifest the real purpose in view. And this is often also betrayed by the unusual little things which creep in, 'the clausulae inconsoetae' pointed to in *Twyne's case*, 3 Rep. 80, as the sure badges of that which they are intended to hide.' *Taylor v. Taylor*, 8 How. 183, 205, 12 L. Ed. 1040; In *re Baxter* (C. C. A.), 152 Fed. 137, 141. As experience teaches, such instruments are prompted by the desire on the part of the owner of the goods to have the benefit of a sale while escaping its responsibilities, retaining a hold on them so as to be secure of the price, without subjecting them to the claims of creditors by reason of having parted with the possession, although giving credit to the one obtaining them, in their eyes, as the apparent owner thereby. This is not the policy of the law, and there is no occasion for the courts to be astute in helping to get around it. On the contrary, the result cannot but be healthful where attempted evasions of it are brought to nought."

Page 730. Thus, to make it out to be a conditional sale.

Instance, In *re Cohn*, 18 A. B. R. 786 (Ref. Calif.).

Page 730. In *re Geo. O. Hassam & Son* (*Flint v. Buttles*), 18 A. B. R. 745, 153 Fed. 932 (D. C. Vt.): "In the case at bar, there was an attempted lien, absolutely secret, not even made known to the vendee, and never intended to be brought to light unless the vendee should become insolvent. The vendee was put in possession of a large number of wagons, of which he was apparently the absolute owner. There was a secret attempt on the part of the vendor, should the vendee succeed in getting credit by having about him a large amount of unencumbered property and should thereafter be unable to pay debts so incurred, to make time notes given for said property 'immediately due and payable,' and the vendee deliver to the vendor all goods remaining unsold, and all the while they should remain in the name of the vendor. I cannot conceive in what manner the vendor anticipated that the goods could remain in its name when possession was passed to the vendee and no record made of the transaction. It has been repeatedly held that when personal property is delivered to a vendee for sale, or to be dealt with in a way inconsistent with the ownership of the seller, or so as to destroy his lien or right of property, the transaction cannot be upheld as a conditional sale and is fraud upon the creditors of the vendee."

Page 730, note 190. Subsequent "lease" of machinery, originally sold for cash but cash not paid. *Canning Machinery Co. v. Fuller*, 20 A. B. R. 157, 158 Fed. 588 (C. C. A. Ala.). Subsequent lease of property originally transferred to the bankrupt to enable him to acquire credit where credit not ob-

tained thereby. *Nylin v. Am. Trust & Sav. Bank*, 21 A. B. R. 535, 166 Fed. 276 (C. C. A. Ill.). Instance, bailment, not conditional sale. *In re Angeny*, 18 A. B. R. 491, 151 Fed. 959 (D. C. Pa.). Instance "sale on approval" or "sale and return." *In re Landis*, 18 A. B. R. 483, 151 Fed. 896 (D. C. Pa.). Instance, genuine conditional sale. *In re Max Cohen*, 20 A. B. R. 796, 163 Fed. 444 (D. C. N. Y.). Instance of sales on approval, etc., see ante, § 1145, et seq. Instance, valid conditional sale though unrecorded and without power to sell, *In re Gray*, 21 A. B. R. 375, 170 Fed. 638 (D. C. Okla.). Instance, valid conditional sale. *Reardon v. Rock Island Plow Co.*, 22 A. B. R. 26, 168 Fed. 654 (C. C. A. Ill.). Instance, contract held to be genuine bailment and not conditional sale. *Franklin v. Stoughton Wagon Co.*, 22 A. B. R. 63, 168 Fed. 857 (C. C. A. Okla.). Instance, *Walther v. Williams Mercantile Co.*, 22 A. B. R. 328, 169 Fed. 270 (C. C. A. Mich.), wherein the bailment was of an entire stock of merchandise, fixtures and business to be operated by the bailees on condition that they keep the store replenished and pay the bailors certain commissions, the bailors to give the bailees a certain amount on repossession for any excess of value. Bailment, not a transfer. (*Walter A.*) *Wood Co. v. Vanstory*, 22 A. B. R. 740, 171 Fed. 375 (C. C. A. N. Car.).

Subsequent giving of notes by consignee held not to convert consignment into absolute sale, where, notwithstanding, the consignee was required to account for goods sold. *In re Bailey*, 23 A. B. R. 876, 176 Fed. 628, 176 Fed. 990 (D. C. Ga.).

Page 731. Thus, where a contract to furnish certain articles provided that until sold or paid for in cash they should remain the property of the seller, and, when sold, all proceeds of sale including notes, accounts, etc., should be kept separate as a trust fund and be turned over to the seller or be held as collateral security, the court held the seller's rights were unimpaired by the bankruptcy and that he had a right to all such notes, accounts, etc., in such fund.

In re McGhee, 21 A. B. R. 656, 166 Fed. 928 (D. C. Ga.); to similar effect, *Wood Co. v. Eubanks*, 22 A. B. R. 307, 169 Fed. 929 (C. C. A. N. C.); *Corbitt Buggy Co. v. Ricaud*, 22 A. B. R. 316, 169 Fed. 935 (C. C. A. N. C.).

And if the seller retains full control of the disposition of the goods and may direct the goods to be returned to the seller or to be shipped elsewhere as desired, the transaction is deprived of one of the essential elements of a sale.

Franklin v. Stoughton Wagon Co., 22 A. B. R. 63, 168 Fed. 857 (C. C. A. Okla.): "Under these provisions we think the wagon company retained full control of the disposition to be made of the wagons, in that it could direct the goods returned to the house or shipped elsewhere as desired, and in this it lacks one of the necessary elements of a contract of sale, namely, to pay money or its equivalent for the goods delivered with no obligation to return."

Page 731. A bailment is not a transfer, not even under the broad definition of Bankr. Act, § (25), that "transfer shall include the sale and every other and different mode of disposing of or parting with prop-

erty, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security.”

(Walter A.) *Wood v. Vanstory*, 22 A. B. R. 740, 171 Fed. 375 (C. C. A. N. Car.).

The rule of “*noscitur a sociis*” would seem to make plain that a bailment was not of a like class with those expressly enumerated.

Page 731. And the State law controls as to the real character of the transaction.

Page 731. *Bryant v. Swofford Bros. Co.*, 22 A. B. R. 111, 214 U. S. 279: “* * * in bankruptcy, the construction and validity of such a contract must be determined by the local laws of the States. * * * That such a contract is a conditional sale and is valid without record is the law of Arkansas.”

In re Morris, 19 A. B. R. 422, 159 Fed. 591 (D. C. Pa.): “The question is one of local law in which the decisions of the State court control.”

Also, see, *In re Burke*, 22 A. B. R. 69, 168 Fed. 994 (D. C. Ga.).

But it has been held that an attempted conversion of an unrecorded conditional sale into a bailment by a subsequent agreement will be ineffective.

Effect of subsequent acceptance of notes, *In re Gray*, 21 A. B. R. 375 (D. C. Okla.).

Page 731. However, so long as the trustee is held to stand in the bankrupt's shoes [changed by Amendment of 1910, to Bankr. Act, § 47 (a) (2)], an unrecorded conditional sale may, of course, be converted subsequently into an absolute sale, so as to be good against the trustee, provided the State law does not hold the conditional sale, under the circumstances of the case, void for fraud. Thus, it has been held that the subsequent giving of notes by the bankrupt would not operate to change his agency under a consignment contract nor to alter the relation of bailee and bailor, into an absolute sale, where all the evidence shows that the intention among the parties was not to make such change in the relations, where the consignee was required to account fully for the goods actually sold notwithstanding the notes, the trustee standing simply in the bankrupt's shoes in this regard.

In re Bailey, 23 A. B. R. 876, 176 Fed. 628, 176 Fed. 990 (D. C. S. C.).

Of course, where such consignment contracts or conditional sales are held to be void by State law as a fraud upon creditors, such a reaffirmance of the continuance of the relation between the parties would not prevail as against the trustee, even before the Amendment of 1910, for in cases of fraud the trustee never has stood “in the bankrupt's shoes.”

See ante, § 1207¼.

§ 1228½. Disguised Conditional Sales, However, Not Invalid unless "Creditor Armed with Process" Exists.

But even if the transaction does not amount to a pledge, consignment, bailments, etc., but is, in effect, a conditional sale unrecorded and not an absolute sale, the trustee will not [before the Amendment of 1910] get title in most States unless some creditor "armed with process" exists.

See ante, § 1208; post, § 1242.

But where a vendee under such a sale, himself sells to another and the vendor takes a new instrument identical in form, a levy by the first vendee, for the purchase price owed to him by the second vendee, will not invalidate. In re Greek Mfg. Co., 21 A. B. R. 111, 714, 164 Fed. 211 (D. C. Pa.).

In re Fabian, 18 A. B. R. 488, 151 Fed. 949 (D. C. Pa.): "The referee was of opinion that the contract was an agreement of conditional sale, a mere device to retain color of title after a true sale had actually taken place and decided against the claimants. The question thus raised has been variously decided in different jurisdictions and has sometimes been decided differently by the same tribunal. As it seems to me, however, the Supreme Court of the United States has recently laid down a rule which renders it unnecessary to discuss the other cases that have been cited in the briefs of counsel. I refer to the decision in York Mfg. Co. v. Cassell, 201 U. S. 344, 15 Am. B. R. 633, in which the court held, as stated in the syllabus: 'The trustee in bankruptcy is vested with no better right or title to the property than the bankrupt had when the trustee's title accrued; and where, as in the State of Ohio, a conditional sale contract is good as between the parties themselves, although not filed, the vendor of machinery, sold and delivered under such a contract, and payment for which had not been made, may remove the same as against all creditors of the bankrupt who have not fastened upon it by some specific lien.' This case is distinguished in In re Burt, 19 A. B. R. 123, 155 Fed. 267 (D. C. Pa.).

And in some States such contracts are valid even without record.

Bryant v. Swofford Bros., 22 A. B. R. 111, 214 U. S. 279, quoted at § 1140.

However, in some States they are considered to be fraudulent, in which event the trustee would not "stand in the shoes of the bankrupt," but would come within the rule of § 1207¼.

Amendment of 1910.—By the Amendment of 1910 to Bankr. Act, § 47 (a) (2), the trustee is given, in effect, the rights of a creditor "armed with process."

See ante, §§ 1137½, 1144½, 1145½, 1207½.

§ 1229. Liens Void as to Creditors for Want of Record, Void as to Trustee.

Page 731, note 192. See, in addition, In re Southern Textile Co., 23 A. B. R. 172, 174 Fed. 523 (C. C. A. N. Y.); obiter, Crucible Steel Co. v. Holt, 23 A. B. R. 302, 174 Fed. 127 (C. C. A. Ky.), quoted at § 1208; In re McDonald, 23 A. B. R. 51, 173 Fed. 99 (D. C. Mass.).

Recording after Bankruptcy.—Instances, Hanson v. Blake, 19 A. B. R. 325, 150 Fed. 342 (D. C. Me.); In re Burlage Bros., 22 A. B. R. 410, 169 Fed. 1006

(D. C. Iowa); "Of course the record of the instrument after the bankruptcy could avail nothing." But how, under the doctrine of *Cassell v. York*? (See ante, § 1209, note.)

§ 1230. Unrecorded or Unfiled Chattel Mortgages Void.

Page 732, note 193. Compare, citations under analogous propositions as to conditional sales, post, § 1241.

Page 732, note 194. In *re McDonald*, 23 A. B. R. 51, 173 Fed. 99 (D. C. Mass.), in which case a mortgage registered in the place of the mortgagor's business, but not also in that of his residence, as required by the Massachusetts statute, was held void as to the trustee though there was no prior levy by a creditor, the statute making such failure fatal as against "a person other than the parties thereto."

In *re Doran*, 17 A. B. R. 799, 148 Fed. 327 (D. C. Ky.), modified in 18 A. B. R. 760, 154 Fed. 467 (C. C. A.); *Hanson v. Blake*, 19 A. B. R. 325, 150 Fed. 342 (D. C. Me.); obiter, *McElvain v. Hardesty*, 22 A. B. R. 316, 169 Fed. 31 (C. C. A. Mo.); instance, In *re Southern Textile Co.*, 23 A. B. R. 172, 174 Fed. 523 (C. C. A. N. Y.); instance, In *re Burlage Bros.*, 22 A. B. R. 410, 169 Fed. 1006 (D. C. Idaho).

Page 732, note 196. See, in addition, In *re Reynolds*, 18 A. B. R. 666, 153 Fed. 295 (D. C. Ark.).

And where a bankrupt purchases property subject to a chattel mortgage thereon, his trustee cannot attack its validity because of failure to file it.

In *re (Columbia) Fireproof Door & Trim. Co.*, 21 A. B. R. 714 (D. C. N. Y.).

Amendment of 1910.—The qualification that there must exist a creditor already "armed with process" is unnecessary since the Amendment of 1910, for by that amendment the trustee is to be deemed vested with all the rights, powers and remedies of a creditor "armed with process."

See discussion, ante, §§ 1137½, 1144½, 1145½, 1207½.

§ 1232. Meaning of "Required."

And some decisions have held that it means that such recording is essential to validity as to levying creditors, so that if there be no levying creditors in existence, to whose rights the trustee might be subrogated, the situation would be the same as if the requirement of recording did not exist.

See post, for discussion of entire subject, §§ 1382½, 1383.

§ 1233. But, in Most States, Some Creditor Must Already Have Actually Levied or Been "Armed with Process."

Page 733, note 201. **Mistake of Counsel Causing Mortgagee to Relinquish Position as Owner of Goods and to Assume That of Mere Creditor.**—In *re Strobel*, 20 A. B. R. 754, 163 Fed. 380 (D. C. N. Y.).

Amendment of 1910—Trustee Deemed “Armed with Process.”

—By the Amendment of 1910 to § 47 (a) (2), the trustee is to be “deemed vested with all the rights, powers and remedies” of a creditor “armed with process.”

See discussion, ante, §§ 1137½, 1144½, 1145½, 1207½, et seq.

§ 1234. Not Void for Simple Nonrecord in States Where Showing of Damage to Creditors or Other Additional Conditions Also Requisite.

Page 734, note 203. In re Doran, 17 A. B. R. 799, 148 Fed. 327 (D. C. Ky.; modified in 18 A. B. R. 760, 154 Fed. 467). Compare, In re Doran, 18 A. B. R. 760, 154 Fed. 467 (C. C. A., modifying 17 A. B. R. 799, 148 Fed. 327).

And is not void in South Carolina for nonrecord except as to creditors becoming such after the execution of the mortgage and before its filing, and such intervening creditors alone may participate in the fund.

Compare, ante, § 1225¾. See, in addition, *Simmons v. Greer*, 23 A. B. R. 443, 174 Fed. 654 (C. C. A. S. Car.), quoted at § 1225¾.

Obiter (“arming with process” also being required), In re Bailey, 23 A. B. R. 876, 176 Fed. 628, 176 Fed. 990 (D. C. S. Car.).

Page 734, note 205. Compare, analogously as to conditional sales in Georgia, In re Braselton, 22 A. B. R. 419, 169 Fed. 960 (D. C. Ga.).

§ 1236. Taking of Possession Curing Lack of Record.

Page 734, note 208. Compare, *Hanson v. Blake*, 19 A. B. R. 325, 150 Fed. 342 (D. C. Me.). Compare, In re Doran (*Moorman v. Beard*), 18 A. B. R. 760, 154 Fed. 467 (C. C. A. Ky.).

Page 734, note 209. Compare, In re Reynolds, 18 A. B. R. 666, 153 Fed. 295 (D. C. Ark.).

Page 734. Unless the sale is void as containing a power of sale.

In re Barker, 20 A. B. R. 674 (Ref. Colo.); In re Reynolds, 18 A. B. R. 666, 153 Fed. 295 (D. C. Ark.); *Zartman v. First Nat. Bank*, 19 A. B. R. 27, 189 N. Y. 267, quoted, on other points, at § 1238, but even power of sale may not vitiate if not applicable to the particular property so taken possession of, In re Davis, 19 A. B. R. 98, 155 Fed. 671 (D. C. N. Y.).

§ 1237. Whether Lien Begins at Date of Taking Possession or Reverts, Determined by State Law.

The effect of taking possession, as to whether the lien relates back to the date of the original instrument or takes effect as of the date of taking possession, is to be determined by State law.

In re Newton, 18 A. B. R. 567, 153 Fed. 841 (C. C. A. Ark.), quoted at §§ 1263, 1381; also, In re Reynolds, 18 A. B. R. 666, 153 Fed. 295 (D. C. Ark.).

Page 735, note 210. For discussion of *Thompson v. Fairbanks*, see, among others, In re Hickerson, 20 A. B. R. 682, 162 Fed. 345 (D. C. Idaho).

§ 1238. As to After-Acquired Property.

Page 735, note 211. Compare, facts of *Mattley v. Wolfe*, 23 A. B. R. 673, 175 Fed. 619 (D. C. Neb.).

Page 735. Compare, *Zartman v. First Nat. Bank*, 19 A. B. R. 27, 189 N. Y. 267: "As was said in a case upon which both parties rely: 'The right of the mortgagor in the meantime,' that is, until default, 'to the use of the earnings, amounts, practically, to absolute ownership, and hence the mortgage cannot operate as a lien upon such earnings to the prejudice of the general creditors until actual entry and possession taken, and then only upon what is earned after that time. The lien of the mortgage upon future earnings is consummated as against other creditors only by the fact of the possession of the property, and cannot have any retroactive operation, since it would then deprive the unsecured creditor of the fund, upon the faith of which he may have given credit to the mortgagor during the time when the latter was permitted to deal with and use it as its own. The lien upon the earnings, in favor of the bondholders, attaches only upon what is earned after the time when the lien is perfected by entry and possession.' N. Y. *Security & Trust Co. v. Saratoga Gas & El. L. Co.*, 159 N. Y. 137, 143. If a lien was created by the mortgage upon property not in existence at its date, possession after it came into existence was of no importance. If no lien was created by the mortgage upon such property the taking of possession pursuant to its terms did not create one as against general creditors, who are presumed to have dealt with the mortgagor in reliance upon its absolute ownership of the stock on hand. While the record of the mortgage was notice to all, it was notice of all its terms, which included the right of disposition for the use and benefit of the mortgagor, with no duty to apply the avails upon the mortgage indebtedness. If the question had arisen between the parties to the mortgage, equity might recognize a contract to give a lien and treat it as an actual lien, but it arises between the mortgagee and the general, unsecured creditors, who had little, if anything, to rely upon except the shifting stock, which, directly or indirectly, they themselves had furnished. The credit extended by them enabled the mortgagor to carry on business, and if the product of that credit goes to the mortgagee, not only are they helpless, but, if the law so declared, hereafter manufacturing corporations needing credit will be helpless also."

Page 735, note 212. Compare, *Hanson v. Blake*, 19 A. B. R. 325, 150 Fed. 342 (D. C. Me.).

Discussion of *Humphrey v. Tatman*.—*Hanson v. Blake*, 19 A. B. R. 325, 150 Fed. 342 (D. C. Me.).

§ 1239. Permitting Creditors to Levy after Bankruptcy in Order to "Arm with Process."

Amendment of 1910.—The matter is set at rest by the Amendment of 1910 to § 47 a (2) whereby the trustee is "deemed to be vested with all the rights, powers and remedies of a creditor armed with process."

See discussion, ante, §§ 1137½, 1144½, 1145½, 1207½.

§ 1240¼. Filing or Refiling in Wrong Place.

A failure to file, or to refile in the proper place, a chattel mortgage or

other instrument requiring filing, is in most States the equivalent of no filing; and the consequences of such failure in such States are in bankruptcy the same as no filing.

Instance, *In re McDonald*, 21 A. B. R. 358 (Ref. Mass.), also 23 A. B. R. 51, 173 Fed. 99.

§ 1240½. Or in Only One Place Where Statute Requires Two.

Likewise, a filing in only one place where the statute requires two, as, for instance, in the place of the mortgagor's business but not in that of his residence, where the statute requires both, is fatal; and, in Massachusetts, is void as against the trustee, though no creditor "armed with process" exist.

Instance, *In re McDonald*, 23 A. B. R. 51, 173 Fed. 99 (D. C. Mass.).

But such ruling is hardly consistent with the doctrine of *York v. Cassell*.

§ 1240¾. Defective Execution of Mortgages, etc.

Whether the defective execution of a mortgage, or other instrument of transfer where no levy has been made by creditors will render the instrument nugatory as against the trustee, would, on principle, depend on State law, as to whether such defect in execution would render it invalid as to the bankrupt, or as to general creditors.

Instance, held defect fatal for want of due attestation, *In re Moore*, 19 A. B. R. 271 (Ref. Ga.).

Or, since the Amendment of 1910, as to whether State law would render it invalid as to a creditor "armed with process," the trustee, by that amendment, being deemed so armed.

§ 1241. Unrecorded or Unfiled Conditional Sales Contracts, Void.

Page 736, note 218. Compare, ante, § 1147½; also compare citations under similar propositions relative to chattel mortgages, ante, § 1230, et seq.

Void Only as to Subsequent Creditors and Lienholders Relying Thereon.—*In re Braselton*, 22 A. B. R. 419, 169 Fed. 960 (D. C. Ga.).

As to invalidity of conditional sales to retailers with power to resell in the ordinary course of trade, see post, § 1263.

Compare *York Mfg. Co. v. Brewster*, 23 A. B. R. 474, 174 Fed. 566 (C. C. A. Tex.), quoted ante, § 1225½, where the court disregards the corporate form of a transfer from the conditional vendee, and holds the conditional sale contract valid as against the transferee from the conditional vendee, though unrecorded.

§ 1242. Provided There Exist Creditors "Armed with Process."

Page 737, note 219. See, in addition, *Davis v. Crompton*, 20 A. B. R. 53, 158 Fed. 735 (C. C. Pa.), quoted at §§ 1144, 1214; *In re Dunlop*, 19 A. B. R.

361, 156 Fed. 545 (C. C. A. Minn.), quoted at § 1209. Instance, *In re Atlanta News Pub. Co.*, 20 A. B. R. 193, 160 Fed. 519 (D. C. Ga.). Instance, *In re Fabian*, 18 A. B. R. 488, 151 Fed. 949 (D. C. Pa.), quoted at § 1228½. Instance, *In re Pierce*, 19 A. B. R. 662, 157 Fed. 755 (C. C. A. N. Dak.); *Am. Mach. Co. v. Norment*, 19 A. B. R. 679, 157 Fed. 801 (C. C. A. N. Car.). Instance, *Mishawaka Woolen Mfg. Co. v. Smith*, 20 A. B. R. 317, 158 Fed. 885 (D. C. Wis.), reversed sub nom. *In re Bement*, 22 A. B. R. 616, 172 Fed. 98 (C. C. A.); *Crucible Steel Co. v. Holt*, 23 A. B. R. 302, 174 Fed. 127 (C. C. A. Ky.), quoted at § 1208; *In re Bailey*, 23 A. B. R. 876, 176 Fed. 628, 176 Fed. 990 (D. C. S. Car.); *John Deere Plow Co. v. Anderson*, 23 A. B. R. 480, 174 Fed. 815 (C. C. A. Ga.), quoted at § 1209.

Page 737, note 220. Obiter and impliedly, *McElvain v. Hardesty*, 22 A. B. R. 320, 169 Fed. 31 (C. C. A. Mo.).

Page 737. But it is void perhaps now, in New York.

In re Gerstman & Bandman, 19 A. B. R. 147, 157 Fed. 549 (C. C. A. N. Y.), quoted at § 1209, note.

And also in Georgia.

Page 737. *In re Burke*, 22 A. B. R. 69, 168 Fed. 994 (D. C. Ga.): "It seems manifest from these rulings that the Supreme Court of the State has construed the language of the statutes upon conditional sales to mean the same thing as a statute against frauds and perjuries. See the language of Chief Justice Simmons in *Rhode Island Locomotive Works v. Empire Lumber Co.* and in *Merchants' Bank v. Cottrell*, supra. The attestation by a subscribing witness is essential, not only to its admission for record, but for the actual validity of the instrument itself, except as between the parties thereto, and, without strict compliance with the requisites of the statutes, such contracts are absolutely invalid to all third persons. That the general creditors of a bankrupt are third persons in the meaning of the law is scarcely open to question. In the case of *General Fire Extinguisher Co. v. Lamar*, 141 Fed. 353, 72 C. C. A. 501, it was held in this court that, in the absence of notice to the general creditors of the reservation of title, such creditors were not bound by the contract of conditional sale, and the title to the property is vested in the trustee."

Page 737, note 221. See, in addition, *Davis v. Crompton*, 20 A. B. R. 53, 158 Fed. 735 (C. C. A. Pa.), quoted at §§ 1144, 1214; also, *In re Newton* (*Swofford v. Bryant*), 18 A. B. R. 567, 122 Fed. 103 (C. C. A. Ark.); also, contra, *In re Bement* (*Smith v. Mishawaka Woolen Mfg. Co.*), 22 A. B. R. 616, 172 Fed. 98 (C. C. A. Wis.).

Page 737. But a prior assignment for creditors may in some States constitute such an "arming."

In re Fish Bros. Wagon Co., 21 A. B. R. 147, 164 Fed. 553 (C. C. A. Kans.), quoted at §§ 1489, 1663.

Amendment of 1910.—However, by the Amendment of 1910, to the Bankruptcy Act, § 47a (2), the trustee has been effectually "armed with process."

See discussion, ante, §§ 1137½, 1144½, 1145½, 1207½.

§ 1243. But Not, Where Filing or Recording Not "Required."

Page 738, note 222. See, in addition, *In re Grainger*, 20 A. B. R. 166, 160 Fed. 69 (C. C. A. Calif.). Instance, *In re Newton & Co.* (Swofford Bros. Dry Goods *v.* Bryant), 18 A. B. R. 567, 153 Fed. 841 (C. C. A. Ark., affirmed sub nom. *Bryant v. Swofford*, 22 A. B. R. 111); *Bryant v. Swofford Bros. Co.*, 22 A. B. R. 111, 214 U. S. 279, quoted at § 1140; *In re Agnew*, 23 A. B. R. 360 (D. C. Miss.), although seller deprived of his rights because of commingling of goods with other goods and because of no accounting of proceeds.

§ 1243¼. Whether Preservation of Lien for Benefit of Estate Requisite.

It would seem, also, that the lien of the levy, as to which the unrecorded instrument is void, should be preserved for the benefit of the estate.

Page 738. *Davis v. Crompton*, 20 A. B. R. 53, 158 Fed. 735 (C. C. A. Pa.): "Now, § 67f further provides that such lien shall be deemed wholly discharged and released 'unless the court shall on due notice order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate, and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate aforesaid.' The trustee did not attempt to preserve this lien. It was the receiver who, through the restraining order, obtained possession of the property discharged of the lien; no proceedings were then taken to preserve the lien, and it was not until April 4, 1907, in the midst of the controversy arising between the conditional vendor (claimant herein) and the trustee, that the trustee filed a petition praying to be subrogated to the rights of the execution creditor, upon which petition an order of subrogation was entered. An examination of the record shows that the execution creditor no longer had any rights at the time the order of subrogation was made, and therefore the trustee took nothing by virtue of the said order."

See, also post, § 1491.

§ 1243½. Whether Extent of Lien Measures Extent of "Trustee's" Rights.

It would seem to follow, logically, that the extent of such creditor's lien would measure the extent of the trustee's rights in the property levied upon as against the conditional vendor; and that as to any excess of the property, over and above the lien, the rights of the conditional vendor would be paramount to those of the trustee precisely as they would be to those of the bankrupt.

See post, § 1491½.

§ 1244. Distinction between Conditional Sales, as Mere Retentions of Title, and Chattel Mortgages, as "Transfers."

Page 738, note 223. Compare, also, *Mishawaka Woolen Mfg. Co. v. Smith*, 20 A. B. R. 317, 158 Fed. 885 (D. C. Wis.); also, *In re Dunlop*, 19 A. B. R. 361, 156 Fed. 545 (C. C. A. Minn.); also, *Am. Mach. Co.*, 19 A. B. R. 679, 157 Fed.

801 (C. C. A. N. Car.); also compare, suggestively, *In re Millbourne Mills Co.*, 20 A. B. R. 746, 162 Fed. 988 (D. C. Pa., affirmed sub nom. *Fourth St. Nat. Bk. v. Millbourne Mills Co.*, 22 A. B. R. 442, 172 Fed. 177 C. C. A.).

§ 1245. Critical Analysis of State Statutes Requisite to Reconcile Decisions.

Page 738, note 224. *In re Burke*, 22 A. B. R. 69, 168 Fed. 994 (D. C. Ga.), quoted at § 1140; instance, *In re Agnew*, 23 A. B. R. 360 (D. C. Miss.); instance, *In re Atlanta News Pub. Co.*, 20 A. B. R. 193, 160 Fed. 519 (D. C. Ga.); instance, *In re Barker*, 20 A. B. R. 674 (Ref. Colo.); instance, *In re Newton*, 18 A. B. R. 567, 153 Fed. 841 (C. C. A. Ark.); instance, *In re Reynolds*, 18 A. B. R. 666, 153 Fed. 295 (D. C. Ark.); instance, *Zartman v. First Nat. Bank*, 19 A. B. R. 27, 189 N. Y. 267; instance, *In re Pierce*, 19 A. B. R. 662, 157 Fed. 755 (C. C. A. N. Dak.).

§ 1246½. Bills of Sale as Mortgages.

Bills of sale given as security are mortgages, and follow the same rules with regard to filing, powers of sale, etc., as mortgages.

In re Reynolds, 18 A. B. R. 666, 153 Fed. 295 (D. C. Ark.): "It is conceded that the bill of sale was, in fact, a mortgage, and under the decisions of the Supreme Court of Arkansas that concession is correct."

Impliedly, *In re Gerstman & Bandman*, 19 A. B. R. 147, 157 Fed. 549 (C. C. A. N. Y.).

Compare, instance, *Low v. Taylor*, 19 A. B. R. 879, 68 Atl. (N. J.) 128: "Where a bill of sale was given, unaccompanied by the delivery of possession of the property to the vendee and it was shown to have been made merely as security for money loaned and goods purchased, and was not executed and recorded as required by the chattel mortgage act, it will be set aside and declared void as against creditors represented by a trustee in bankruptcy of the party executing the same."

§ 1247. Chattel Mortgages or Conditional Sales Made in State Where Recording Not Required but Contemplating Delivery Where Required and Vice Versa.

Page 740. On the other hand, where such an instrument is made in one State, the statutes of which provide for recording in the county "wherein the property shall be kept," and the property covered by said contract is to be kept at a place in another jurisdiction, the statutes of which provide that where a conditional sale made in one State contemplates or expressly provides that the property is to be delivered or used in another State the law of the latter State governs, and if no law of that State inhibits contracts of conditional sale, the validity of the contract in question is to be tested under the general law upon the subject.

In re Gray, 21 A. B. R. 375, 170 Fed. 638 (D. C. Okla.).

§ 1250. Other Liens and Contracts Not Requiring Record.

Page 740, note 232. See also, §§ 1231, 1243.

§ 1253. Agreement to Insure Operating as Equitable Assignment.

Page 740, note 235. Also, see ante, § 1150.

Similarly an oral agreement to procure fire insurance for the benefit of a mortgagee will operate as an equitable assignment of the proceeds of policies taken out in the mortgagor's own name.

Hanson v. Blake, 19 A. B. R. 325, 150 Fed. 340 (D. C. Me.).

But not of policies taken out by the grantee of the equity of redemption.

Hanson v. Blake, 19 A. B. R. 325, 150 Fed. 340 (D. C. Me.).

§ 1253½. Other Equitable Liens and Assignments and Powers of Sale.

Other equitable liens and equitable assignments, where valid by State law, have been held valid in bankruptcy.

But it was held that a receipt to an auctioneer for advances to the owner and for expenses did not constitute an equitable assignment on the proceeds of the property, where the auction sale was interrupted and the actual sale was made months afterward by the trustee in bankruptcy, *In re Faulhaber Stable Co.*, 22 A. B. R. 381, 170 Fed. 68 (C. C. A. N. Y.).

But the essentials of an equitable lien must exist.

Compare, post, § 1372; compare, *In re Southern Textile Co.*, 23 A. B. R. 170, 174 Fed. 523 (C. C. N. Y.), wherein it was held to be simply a disguised chattel mortgage.

Page 741. *Fourth St. Nat. Bank v. Millbourne Mills Co.*, 22 A. B. R. 442, 172 Fed. 177 (C. C. A. Pa.): "It is, however, contended that, there being an intent to pledge, an equitable lien was at least created, which entitles the certificate holders to the fund. It is difficult to see, how a transaction, which, for want of delivery, is ineffective as a pledge, can be pieced out, so as to make it hold as something else. There would be little left to the established doctrine with regard to pledges, if that was the case; and it is somewhat singular, that in all the litigation, where pledges of personal property have been upset, for want of a delivery, no one should have discovered this easy way out. This is not to say, that an equitable lien, under some circumstances, may not exist; but only that there is nothing to support it here. It never arises or is enforced except against property in the hands of a party to the original transaction out of which it is claimed to grow, or his voluntary representatives, or one who has notice of it and is affected with it as a superior right; within which all the cases cited in support of it will be found to fall. 19 Am. & Eng. Encys. (2 Ed.) 36. It is not good as against a trustee in bankruptcy, taking title, in the interest of creditors, by operation of law, as is the case here."

Thus, where a vendor's lien is claimed the essentials of a vendor's lien must exist.

In re Teter, 23 A. B. R. 223, 173 Fed. 798 (D. C. W. Va.).

An "equitable lien" which involves the apparent ownership in one person who sells in the ordinary course of trade, will not be sustained as against the trustee where it works a fraud upon the law.

In re Bellevue Pipe & F'dy Co., 22 A. B. R. 97, 16 Ohio Dec. 247 (Ref. Ohio).

Page 745. In re Liberty Silk Co., 18 A. B. R. 582, 152 Fed. 844 (D. C. N. Y.): "But, under the authority of the same decision, [*Hewitt v. Berlin Machine Wks.*], it is asserted that, inasmuch as the trustee has no better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues, the contract of August 25, 1905, should be regarded as conferring an equitable lien—a something which is neither a mortgage nor a conditional sale, but a partial reservation of interest on the part of a vendor, not obnoxious to any law of the State of New York, and within the equity of the Bankruptcy Act as interpreted in the case last cited. It must be admitted that no actual fraud is shown or suspected in this transaction, and that the courts of this State have gone far in upholding the validity of hypothecations of personal property even where the goods hypothecated were to be turned into money by the mortgagor, bailee, or conditional vendee, provided it was also agreed that the proceeds of such sale or use were to be applied in diminution of the debt secured by the goods themselves. *Prentiss Tool, etc., Co. v. Schirmer*, 136 N. Y. 304, 32 N. E. 849, 32 Am. St. Rep. 737. But I am not aware that it has been doubted since *Southard v. Benner*, 72 N. Y. 424, that where a right existed in a chattel mortgagor to sell the mortgaged property and use the proceeds thereof generally in his own business is (however honest in intent) a fraud upon the law. The wholesome rule is summarily stated in *Re Garcewich*, 8 Am. B. R. 149, 115 Fed. 87, that when property is delivered to a vendee for consumption or sale, or to be dealt within any way inconsistent with the ownership of the seller, the transaction cannot be upheld as a conditional sale and is a fraud upon the creditors of the vendee. That rule in my judgment applies to this case. While I think as above indicated that the transaction is really a mortgage, and as such void for want of filing, yet it makes no difference whether it be denominated in one way or another, it still remains true that the filatures in question were delivered to the bankrupt with obvious intent that they should be used and consumed in the ordinary course of that bankrupt's business, and for the benefit thereof. Secret liens are to be discouraged, and where, even innocently, vendors seeking to create such liens permit so obvious a badge of fraud as here appears to exist in their contracts, they must take the legal consequences, and the matter is not bettered by a name. An equitable lien which involves a fraud upon the law is none the less obnoxious because so different in form from the better known mortgage or conditional sale as hardly to fall under either well-known category."

§ 1256. Recording, Where Lien on Both Real and Personal Property.

Page 741, note 238. Compare, In re Reynolds, 18 A. B. R. 666, 153 Fed. 295 (D. C. Ark.).

§ 1257. Liens Invalid under State Law for Other Reasons Than Lack of Record, Void.

Page 741, note 239. Chattel mortgages not valid as against creditors unless on certain specified articles named in statute, but good between parties on others, good as against the trustee as to both, where no previous levy made, *In re Grainger*, 20 A. B. R. 166, 160 Fed. 69 (C. C. A. Calif.). But compare effect of Amendment of 1910, ante, § 1207½.

This section of statute referred to in *Mattley v. Wolfe*, 23 A. B. R. 673, 175 Fed. 619 (D. C. Neb.).

§ 1258. Chattel Mortgages with Power of Sale, When Void.

Page 741, note 240. *In re Tucker*, 20 A. B. R. 404, 161 Fed. 584 (D. C. N. Car.); *Knapp v. Milw. Trust Co.*, 20 A. B. R. 671, 162 Fed. 675 (C. C. A. Wis., affirming *In re Standard Tel. Co.*, 19 A. B. R. 491, 157 Fed. 106); *In re Barker*, 20 A. B. R. 674 (Ref. Colo.); *In re Hickerson*, 20 A. B. R. 682, 162 Fed. 345 (D. C. Idaho); *In re Davis*, 19 A. B. R. 98, 155 Fed. 671 (D. C. N. Y.); impliedly, *In re Bellevue Pipe & Fdy. Co.*, 22 A. B. R. 97, 16 Ohio Dec. 247 (Ref. Ohio); *Mitchell v. Mitchell*, 17 A. B. R. 389, 147 Fed. 280 (D. C. N. Car., affirmed in *In re Tucker*, 20 A. B. R. 404).

Page 742. *Zartman v. First Nat. Bank*, 19 A. B. R. 27, 189 N. Y. 267: " * * * because an agreement permitting the mortgagor to sell for his own benefit renders the mortgage fraudulent as matter of law as to the creditors represented by the plaintiff."

Page 743. *In re Standard Tel. Co.*, 19 A. B. R. 491, 157 Fed. 106 (D. C. Wis., affirmed sub nom. *Knapp v. Milw. Tr. Co.*, 20 A. B. R. 671, 162 Fed. 675 (C. C. A.): "The question of law arising in this case involves the construction of a Wisconsin statute. It is therefore a local question, as the federal court in such a case adopts the ruling of the highest judicial tribunal of the State. This proposition is so familiar as to require the citation of no authorities. The Wisconsin Supreme Court has consistently held that a chattel mortgage, which upon its face stipulates that the mortgagor may retain possession of the mortgaged property, sell and dispose of the same in the usual course of business, and appropriate any part of such proceeds to his own use and benefit, is fraudulent and void as to creditors. * * * Under these cases it is not a question of intent, because such an arrangement necessarily tends to hinder, delay, and defraud creditors. The mischief that called forth this stringent doctrine was the hardship imposed upon the general creditor who found between him and his debtor a chattel mortgage on a stock of goods which allowed the mortgagor to retain possession, and to appropriate to his own use, the avails of the business, while such creditor was remediless. As against such creditor, such a mortgage under Wisconsin decisions is void as matter of law without regard to the question of the intention of the parties to the mortgage. The mortgage in suit expressly allows the mortgagor the privilege of disposing of the avails of the business to its own uses and purposes, provided only: (a) The interest on the bond is paid; (b) the sinking fund, amounting to \$500 per quarter, or \$2,000 per annum, is provided for. Beyond this the power of sale and appropriation is unrestrained. But the mortgage under consideration contains another more obnoxious provision. By express terms it is stipulated that if and when the mortgagee shall consent to waive the requirements as to the sinking fund, then and in that case

the mortgagor is simply required to keep up the interest on the bonds, and is at liberty to apply all the balance of the proceeds of the business to its own uses and purposes. Thus a secret agreement between the parties may result in continuing the lien of the mortgagee indefinitely, and furnish a cover to protect the mortgagor from attacks of creditors while using the proceeds of the business as though the same were his own."

And it is void, even where the mortgagee has actually seized the goods before bankruptcy, in some states.

In *re Reynolds*, 18 A. B. R. 666, 153 Fed. 295 (D. C. Ark.): "These decisions strike down the mortgage in controversy, in so far as it applies to chattels left in the hands of the bankrupt with the right to sell in the usual course of business. The mortgage on the stock of merchandise left in the possession of the bankrupt with the right to sell in the usual course of business, and to buy and add new stock in the same manner, was void as to creditors ab initio, and continued void even after the possession was taken, for the reason that it was a fraud upon creditors under the Arkansas decisions."

Also see, In *re Barker*, 20 A. B. R. 674 (Ref. Colo.).

And is void whether the mortgage is recorded or not.

In *re Bellevue Pipe & Fdy. Co.*, 22 A. B. R. 97, 16 Ohio Dec. 247 (Ref. Ohio).

§ 1260. And Mere Remaining in Possession and Selling for Short Period without Reservation of Power of Sale, Does Not Vitiate.

Page 743. See, in addition, In *re Standard Tel. Co.*, 19 A. B. R. 491, 157 Fed. 106 (D. C. Wis.), quoted at § 1258; *Knapp v. Milw. Tr. Co.*, 20 A. B. R. 671, 162 Fed. 675 (C. C. A. Wis., affirming In *re Standard Tel. Co.*, 19 A. B. R. 491, 157 Fed. 106). Perhaps, In *re Tucker*, 20 A. B. R. 404, 161 Fed. 584 (D. C. Ga.).

§ 1262. Whether Power of Sale Mortgage Void Only as to Goods to Be Sold or Void in Toto.

Page 744. But is, perhaps, void as to the whole, in New York, by the State court rulings, though not by the federal rulings.

Compare, *Zartman v. Nat. Bank*, 16 A. B. R. 155, 106 App. Div. 406, affirmed in 19 A. B. R. 27, 189 N. Y. 267. Also, compare, In *re Davis*, 19 A. B. R. 98, 155 Fed. 671 (D. C. N. Y.).

Also, it is perhaps void as to the whole in Colorado.

Dodge v. Norlin, 13 A. B. R. 176, 133 Fed. 363 (C. C. A. Colo.).

§ 1263. Conditional Sales Contracts with Power of Sale, Subject to Same Rules as Chattel Mortgages.

Page 744, note 251. Instance, In *re Newton & Co.*, 18 A. B. R. 567, 153 Fed. 841 (C. C. A. Ark.); In *re Geo. O. Hassam & Son*, 18 A. B. R. 745, 153

Fed. 932 (D. C. Vt.), quoted at § 1228; In re Perkins, 19 A. B. R. 134, 155 Fed. 237 (D. C. Me.), quoted at § 1222½.

Page 744. But in some States, they are valid; are valid even as against assignees in insolvency; also are valid whether they be recorded or not, and so, in such States, they are good against the trustee.

Page 744. *Bryant v. Swofford Bros. Co.*, 22 A. B. R. 111, 214 U. S. 279, " * * * but in bankruptcy the construction and validity of such a contract must be determined by the local law of the State. * * * That such a contract is a conditional sale and is valid without record is the law of Arkansas. * * * The trustee has no higher rights in this regard."

In re *Newton* (*Swofford Bros. Dry Goods Co. v. Bryant*), 18 A. B. R. 567, 153 Fed. 841 (C. C. A. Ark.): "Whether the contract under which appellant claims is one of conditional sale or is a chattel mortgage, and, as between the parties thereto, whether it is valid, and what the effect of the failure to record it may be, are questions to be determined exclusively by the local law. *Thompson v. Fairbanks*, 196 U. S. 516, 13 Am. B. R. 437; *Humphrey v. Tatman*, 198 U. S. 91, 14 Am. B. R. 74; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 15 Am. B. R. 633. Whatever may be the law in some jurisdictions it is authoritatively settled in Arkansas, that a contract of conditional sale is valid notwithstanding it contains a provision that the vendee may sell the property in the usual course of his business. *Triplett v. Implement Co.*, 68 Ark. 230, 57 S. W. 261, involved a contract of that character, and the conditional vendor was allowed to recover the goods from the vendee's assignee in insolvency who had taken possession of them." Quoted further at § 1381.

In re *Dunlop*, 19 A. B. R. 361, 156 Fed. 545 (C. C. A. Minn.): "A stipulation that the purchaser may sell the merchandise in the regular course of business, and that he shall apply the proceeds to his debt as a credit or as collateral security, at the option of the vendor, does not render such a contract fraudulent or voidable against creditors. It does not make it a chattel mortgage with a secret lien."

In re *Pierce*, 19 A. B. R. 662, 157 Fed. 755 (C. C. A. N. Dak.): "But the trustee says the sale was absolute, not conditional, because the bankrupt, a merchant, was authorized to resell the property in the usual course of his business. The prevailing rule, however, is that this does not destroy the title reserved by a vendor, at least before there has been a resale to a third party. The title to the articles unsold remains in the vendor until the purchase price is paid. *Lewis v. McCabe*, 49 Conn. 141, 44 Am. Rep. 217; *Rogers v. Whitehouse*, 71 Me. 222; *Armington v. Houston*, 38 Vt. 448, 91 Am. Dec. 366. In the latter case the understanding was that the vendee might use the goods for family consumption. See, also, *Swofford Bros. Dry Goods Co. v. Bryant* (C. C. A.), 18 Am. B. R. 567, 153 Fed. 841, and cases cited. Our attention has not been called to any contrary rule in North Dakota, where this controversy arose."

In re *Gilligan* (*Troy Wagon Works v. Hancock*), 23 A. B. R. 668, 152 Fed. 605 (C. C. A. Ind.): "With these cases before it—the only ones tending to support appellant's contention—and with other cases of the Supreme Court of Indiana, notably *Winchester v. Carman*, 109 Ind. 31, 9 N. E. 707, 58 Am. Rep. 382, in which the court indicates, though perhaps by obiter dicta, that the possession of property held by the retailer, for sale, would be inconsistent with continued ownership by the vendor, the Appellate Court of Indiana in *West*

v. Fulling (Ind. App.), 76 N. E. 325, passed squarely upon the proposition under review, holding that an alleged contract under which the vendor sold groceries to another, authorizing the buyer to sell the same in the ordinary course of business, but reserving title until the goods were paid for, was fraudulent—the court reviewing all the Indiana cases, and some of the New York cases on the subject.” This case is quoted further at § 1140.

Also, *In re Gray*, 21 A. B. R. 375, 170 Fed. 638 (D. C. Okla.).

§ 1265. Peculiar Rights or Remedies of Creditors by Special Statute, Trustee Succeeds Thereto.

Page 745, note 253. 5. See, in addition, *Wright v. Gansevoort Bank*, 18 A. B. R. 363, 118 App. Div. 281; *Gill v. Bells' Knitting Mills Co.*, 21 A. B. R. 282 (N. Y. Ct. App.). Bona fide purchaser for value protected. *Perry v. Van Norden Trust Co.*, 20 A. B. R. 190 (N. Y. Ct. App.).

5½. **Unfiled Bill of Sale under New York Personal Property Law.**—*In re Schlessel*, 18 A. B. R. 434 (Ref. N. Y.).

6½. **Void as to “Interested Parties.”**—Trustee held to be “interested.” *In re Hickerson*, 20 A. B. R. 682, 162 Fed. 345 (D. C. Idaho).

8. **Intermediate Creditors' Rights Where Chattel Mortgage Withheld from Record.**—Chattel mortgages eventually filed but meanwhile withheld from record are void as to simple contract creditors becoming such in the interval before the filing, in New York, and in Missouri, and are hence void as to the trustee where such creditors exist. *In re Metropolitan Co.*, 15 A. B. R. 119 (Ref. N. Y.). See, in addition, *In re Martin*, 23 A. B. R. 151, 173 Fed. 597 (C. C. A. Mo.).

Likewise in South Carolina, *Simmons v. Greer*, 23 A. B. R. 443, 174 Fed. 654 (C. C. A. S. Car.), quoted at § 1225½.

9. And where such a mortgage has eventually been filed, though thus improperly withheld for a time, only creditors becoming such in the meantime may share in the proceeds, the mortgage being good as to all others. *Simmons v. Greer*, 23 A. B. R. 443, 174 Fed. 654 (C. C. A. S. Car.), quoted at § 1225½.

9¼. **Transfer Set Aside, All Creditors to Participate, Not Simply Those Existing at Time of Transfer.**—In Ohio, on the setting aside of the transfer, all creditors are to participate in the proceeds; not simply those existing at time of the transfer. *In re Kohler*, 20 A. B. R. 89, 159 Fed. 871 (C. C. A. Ohio), quoted at § 1225½.

9½. **Unrecorded Chattel Mortgage Void as to Intervening General Creditors—When Set Aside in Bankruptcy Intervening Creditors Alone Participate.**—In Missouri a chattel mortgage withheld from record for a period but filed before bankruptcy, is void as to intervening creditors whether “armed” or not and hence is void as to the trustee; but on being set aside, the proceeds are distributed among the intervening creditors.” *In re Martin*, 23 A. B. R. 151, 173 Fed. 597 (C. C. A. Mo.).

12½. **Resident Creditors' Claims Having Priority Over Claims of Foreign Corporation.**—The Tennessee statute gives priority, in the distribution of the assets of a foreign corporation, to the claims of resident creditors over the claims of other foreign corporations which have not complied with the statutory regulations for the doing of business by foreign corporations; and this priority has been recognized in bankruptcy, as conferring substantive rights,

not dependent upon resort to special remedies. In *re Standard Oak Veneer Co.*, 22 A. B. R. 883, 173 Fed. 103 (D. C. Tenn.), quoted at § 2196.

13. **Sales of Merchandise "in Bulk."**—Such sales, where the purchaser is innocent of participation in any fraudulent intent, will not be void (in the absence of any statute regulating the same). *Shelton, Trustee, v. Price*, 23 A. B. R. 431, 174 Fed. 891 (D. C. Ala.).

14. **Conditional Sale Becoming Absolute on Failure to Record Within Ten Days.**—Where a State statute makes a conditional sale absolute as to subsequent creditors for failure to register within a certain time, the trustee has been held to succeed to the rights of subsequent creditors. In *re American Machine Works (Chilberg v. Smith)*, 23 A. B. R. 483, 174 Fed. 805 (C. C. A. Wash.).

15. **Consent of Two-Thirds of Stockholders to Renewal of Chattel Mortgage.**—By statute, in New York, a renewal of a chattel mortgage for money borrowed, not for purchase price, by a corporation, is invalid without the consent of two-thirds of the stockholders, and it has been held that the trustee succeeds to the rights of these creditors, though the corporation may be estopped. In *re Laundry Co.*, 23 A. B. R. 859, 176 Fed. 740 (D. C. N. Y.), which would be, perhaps, good law if occurring since the Amendment of 1910, whereby the trustee has been given the rights of creditors holding executions, but is doubtful law as applied to the situation before the Amendment of 1910, when the trustee was held simply to stand in the shoes of the bankrupt and to be bound by the bankrupt's estoppels, § 1149.

§ 1266. But Where Special Rights Dependent on Special Remedies Not Available Because of Bankruptcy.

Page 746, note 254. See post, §§ 2196, 2197.

Statute Requiring Tender Back of Part of Purchase Price on Retaking Possession under Conditional Sale.—It has been held in Ohio that the statute requiring the conditional vendor to refund a part of the purchase price before taking possession of conditionally sold property, does not apply where the conditional vendor does not seek to regain possession thereof from the bankruptcy court, but asks the bankruptcy court merely to sell the property and pay him his lien from the proceeds or to compel the trustee to complete the contract. In *re Max Goldman*, 23 A. B. R. 497, 174 Fed. 579 (C. C. A. Ohio).

§ 1267. Maintaining Statutory Suits, to Perfect Special Rights, but for Benefit of All.

Page 747, note 255. But compare, §§ 1225½, 1738.

§ 1268. And Where Bankruptcy Court Not in Custody of Property Involved.

And it has been held that where a transfer is not preferential as against the Bankrupt Act, but is preferential by State law, the trustee may intervene in behalf of all creditors in the pending suit in the State court, and the lien of such suit may be preserved for the benefit of the estate in bankruptcy though annulled as to the particular creditors instituting the suit, such being the holding in a State where the State

law declares a transfer by an individual member of a partnership, of his individual property, to be a preference as against partnership creditors of an insolvent partnership, contrary to the rule in bankruptcy.

Miller v. Acid & Fertilizer Co., 21 A. B. R. 416, 211 U. S. 496, quoted at §§ 1441, 1489, 1491.

§ 1269. Fraudulent or Preferential Transfers by State Law Inuring to Benefit of All Creditors, Whether So Inure in Bankruptcy.

Page 749. In re Kohler, 20 A. B. R. 89, 159 Fed. 871 (C. C. A. Ohio): "Sections 6343 and 6344 of the Revised Statutes of Ohio regulate the recovery and distribution of property conveyed in fraud of creditors. Section 6343 provides that every sale or transfer procured by a debtor to be rendered with intent to hinder, delay or defraud creditors, shall be declared void as to creditors of such debtor at the suit of any creditor or creditors 'as hereinafter provided,' and shall operate as an assignment and transfer of all the property and effects of such debtor, and shall inure to the equal benefit of such creditor or creditors in proportion to the amount of their respective demands, including those which are unmatured. Section 6344 provides that any creditor, as to whom any of the acts prohibited in § 6343 are void, 'whether the claim of such creditor has matured or will thereafter mature,' may commence an action to have such act declared void, and such court shall appoint a trustee, who shall proceed by due course of law to recover possession of all property so sold, etc., 'and to administer the same for the equal benefit of all creditors,' as in other cases of assignment to trustees for the benefit of creditors. These sections appear to us to provide clearly that where property is conveyed in fraud of creditors, it may be recovered by a trustee 'for the equal benefit of all creditors,' and we understand this to mean for the equal benefit of all creditors, not part of them, not simply those existing at the time the transfer was fraudulently made."

Clingman v. Miller, 20 A. B. R. 360, 160 Fed. 326 (C. C. A. Kans.): "The law of Kansas does not prohibit preferences, but it does say that if a debtor makes a deed of general assignment for the benefit of his creditors he must treat all alike, and that he cannot evade this prohibition of the statute by making simultaneously with the deed of assignment a separate transfer which creates a preference. The preference would be void if contained in the deed of assignment, and it is no less so because made outside of it, but at the same time and as a part of the same transaction. The intent of Pendleton is the true and guiding principle. As was said in Lumber Co. v. Ott, supra, at page 630: 'With what intent did Ott in this case execute the various instruments prior to the general assignment? Was he intending a general assignment, and seeking to evade the statute, and to give preferences by other instruments? Or was he, finding himself involved and likely to be closed out by some of his creditors, simply preferring some, uncertain as to what disposition he should make of the balance of his property after they had been secured?' The knowledge, or want of knowledge, of the purpose and intent of Pendleton at the time of the transfer by Miller & Co. is immaterial under the laws of Kansas; otherwise, the prohibition of the statute would be rendered useless."

Thus, preferential transfers under the New York Stock Corporation Law have repeatedly been held available to creditors in bankruptcy.

Wright v. Gansevoort Bank, 18 A. B. R. 363, 118 App. Div. 281; *Perry v. Van Norden Trust Co.*, 20 A. B. R. 190 (N. Y. Ct. App.), where bona fide purchaser for value protected; *Wright v. Skinner Mfg. Co.*, 20 A. B. R. 527, 162 Fed. 315 (C. C. A. N. Y.); *Wright v. Gansevoort Bank*, 17 A. B. R. 326.

Again, where State law declares to be preferential a transfer which is not preferential under the Bankrupt Act, the trustee in bankruptcy may succeed to the rights of any creditor who has already instituted proceedings under the State law, and the lien of such proceedings may be preserved for the benefit of all creditors who instituted them; for example, where by State law the transfer of individual property by one member of a partnership, not himself adjudged bankrupt, is held to be preferential as to the firm creditors.

Miller v. Acid & Fertilizer Co., 21 A. B. R. 416, 211 U. S. 496 (quoted at §§ 1441, 1489, 1491).

§ 1270. **Prior General Assignment—Whether Effective to Avoid Liens Recorded before Bankruptcy But Not until After Assignment.**

Where a prior general assignment is, by State law, effective to avoid unrecorded liens, it will be likewise effective in bankruptcy if the lien be preserved for the benefit of the estate. This proposition is fully discussed post, at § 1489.

§ 1270½. **Anti Bulk Sales Laws.**

Most of the states have, in recent years, adopted legislation regulating the sales of entire stocks in bulk. In general the trustee succeeds to these rights of creditors, under § 67.

In *re Rosenberg*, 22 A. B. R. 900 (Ref. N. Y.). Also, see post, §§ 1494, 1495, 1496.

§ 1274. **"Trust Fund" Theoretical Basis of Peculiar Titles Conferred by Bankruptcy Act.**

Page 754. Compare, (1867) In *re Reiman & Friedlander*, 11 Nat. Bankr. Reg. 34: "The principle upon which the law of bankruptcy has, in legislation, been founded, is that when a man becomes insolvent, the property then remaining to him rightfully belongs to his creditors, and ought to be distributed ratably among them towards the satisfaction of their claims."

§ 1275. **Efficiency of Facts to Create Passing of Title and Nature of Title Passing, Determined by State Law.**

The law of the State determines the nature or name of the transaction and the time of the passing of title thereby, whereupon the Bankruptcy

Act steps in and declares that, having such name and title thus passing, it is or is not a voidable transaction.

Compare, post, § 1364½.

In speaking of the law of the State, general law recognized in the State is included, as well as statutory law. Thus, by general law, in the absence of the recording statute, an equitable assignment of a debt or other chose in action is complete at the time of giving notice to the debtor.

In *re Wilson*, 23 A. B. R. 814 (D. C. Hawaii): "The question arising under this reference is whether such assignments were effective without notice having been given to the board of supervisors by the assignees before the beginning of the four months previous to the filing of the petition in bankruptcy. * * * Being for choses in action, the assignments can only be considered as equitable. * * * Although an agreement to pay out of a particular fund is not an equitable assignment, yet an order on it or a transfer of it in such words that the holder of the fund would be authorized to pay it after notice to the person in whose favor the order or transfer is drawn, and would be compellable to do so, even though forbidden by the drawer or assignor, is a valid assignment in equity. 'A bill of exchange or check is not an equitable assignment pro tanto of the funds of the drawer in the hands of the drawee. But an order to pay out of a specified fund has always been held to be a valid assignment in equity and to fulfill all the requirements of the law. *Christmas v. Russell*, 81 U. S. 69, 84."

§ 1277. "Preferences," "Voidable Preferences" and "Preferences" That Are "Acts of Bankruptcy," to Be Distinguished.

Page 755, note 261. **Elements of a Preference.**—Also, in *Painter v. Napoleon Township*, 19 A. B. R. 412, 156 Fed. 289 (D. C. Ohio), quoted at § 1385.

McDonald v. Clearwater R. Co., 21 A. B. R. 182, 164 Fed. 1007 (U. S. C. C. Idaho): "Upon his own theory, therefore, before plaintiff can succeed in avoiding the alleged preference, the existence of four conditions must be made to appear: First, that the lumber company was insolvent when the assignment was made; second, that the assignment was made upon account of an antecedent indebtedness; third, that the bank had reasonable cause to believe that, by the assignment, it was intended to give a preference; and, fourth, that the effect of the assignment was to enable the bank to obtain a greater percentage of its debt than other creditors of the same class."

Wright v. Skinner Mfg. Co., 20 A. B. R. 527, 162 Fed. 315 (C. C. A. N. Y.): "It is necessary for the trustee in order to recover under § 60, to establish the following propositions: First: That the payments were made within four months before the filing of the petition. Second: That at the time of the payments the bankrupt was insolvent within the meaning of subd. 15, § 1, of the act. Third: That the effect of the payments was to give the defendants a greater percentage of their debts than other creditors of the same class. Fourth: That the defendants had reasonable cause to believe that it was intended by such payments to give them a preference."

Tumlin v. Bryan, 21 A. B. R. 319, 165 Fed. 166 (C. C. A. Ga.): "The burden of proof is on the complainant, and, unless he shows by sufficient evidence

the elements of a voidable preference, he is not entitled to recover. He must prove that the bankrupts (1) while insolvent, (2) within four months of the bankruptcy, (3) made a transfer of their property, i. e., a payment of money, (4) and that the creditor receiving the payment was thereby enabled to obtain a greater percentage of his debt than other creditors of the same class; and it must also be proved (5) that the person receiving the payment, or to be benefited thereby, had reasonable cause to believe that it was thereby intended to give a preference. Bankruptcy Act, § 60, cls. 'a' and 'b.'"

In *re* Leech, 22 A. B. R. 599, 171 Fed. 622 (C. C. A. Ky.): "In order to establish that there was an unlawful preference, it must be alleged and proven that at the time of the transfer the party making it was insolvent, that the property transferred was such as his creditors had a right to have subjected to their claims, that he intended a preference, and that the transferee had reasonable cause to believe that the transferer had such an intention."

Taylor v. Nichols, 23 A. B. R. 310, 134 App. Div. 787: "Two facts were required to be proven in order to justify the judgment rendered: First, that at the time of the transfer William H. Nichols was insolvent; and, second, that this defendant had reasonable ground to believe that the transfer was made with intent to give him a preference."

§ 1278. First Element of a Preference.

Page 756. *Naylon & Co. v. Christiansen Co.*, 19 A. B. R. 789, 158 Fed. 290 (C. C. A. Mich.): "The bankrupt must have transferred some part of his property to his creditors. * * * The record shows beyond doubt that the alleged bankrupt transferred some of its property to some of its creditors and that it had other creditors."

Mason v. Herkimer Co. Bk., 22 A. B. R. 733, 172 Fed. 529 (C. C. A. N. Y.): "The one thing absolutely essential to a preference is that the bankrupt transfer some portion of his property to the creditor. If the creditor receive none of the bankrupt's property, there is no preference."

§ 1279¼. Transferring Worthless Equity.

The transfer of an equity of redemption, where the lien exceeds the value of the property, is not a preference—the estate is not depleted.

(1867) *Catlin v. Hoffman*, 9 Nat. Bank. Reg. 342.

§ 1279½. Trivial Transfers.

The court sometimes will disregard a transaction alleged to be a preferential transfer, because of its triviality, thus, the payment by a grocery firm, of a bill of \$3.00 to a creditor a week before the bankruptcy.

Obiter, In *re* Stovall Grocery Co., 20 A. B. R. 537, 161 Fed. 882 (D. C. Ga.).

Likewise, the payment by an old bachelor, of 60 cents for soda water, coca cola and a bar of soap, and \$2.15 for a "dressed doll."

Macon Grocery Co. v. Beach, 19 A. B. R. 558, 156 Fed. 1009 (D. C. Ga.).

§ 1280. Performance of Labor in Payment of Debt.

Page 757, note 262. Also, *In re Adams*, 22 A. B. R. 613, 171 Fed. 599 (D. C. N. Y.).

"Good will," transfer of, when a preference, compare, *McElvain v. Hardesty*, 22 A. B. R. 320, 169 Fed. 31 (C. C. A. Mo.).

§ 1286. Return of Loan Made for Specific Purpose, Not Preference.

But by this is not meant that the repayment of a loan made for a specific purpose, where the borrower has used it for another purpose, is not preferential; the identical property or fund must be that which is returned, else a preference may exist.

In re Kearney, 21 A. B. R. 721, 167 Fed. 995 (D. C. Pa.): "Upon the foregoing facts, it is clear, I think, that the payment on May 25th to the bankrupt's brother was preferential. Even if it was intended at the time when the loan was made that the money should be used for the specific purpose of paying for the license, and, if not so used, that it should be returned, the testimony seems to show plainly that this intention was not carried out, but that the bankrupt used the money for some other purpose. No effort was made on his behalf to prove what he had done with it. * * * Since, therefore, the money was not traced into a particular fund or deposit, or earmarked in any other way, the inevitable inference is that the check of May 25 was drawn against the general funds of the bankrupt, and was intended to prefer."

§ 1286½. Return of Bailed Property, Not Preference.

The return of bailed property to the bailor of course is not a preference—the bailee's estate has not been depleted.

Compare, cases cited under § 1228; also, see *Walther v. Williams Mercantile Co.*, 22 A. B. R. 328, 169 Fed. 270 (C. C. A. Mich.), wherein the bailment of an entire business was upheld and the bailor's repossessing himself of it held not to be a preference, the bailment being on the terms that the bailees should keep the stock replenished and pay the bailor's commissions on gross sales, the bailors on their part to pay any excess of value over original value on repossession.

§ 1288. Payments by Sureties and Endorsers of Bankrupt, Not Preferences.

Page 759. *Mason v. Herkimer Co. Bank*, 22 A. B. R. 733, 172 Fed. 529 (C. C. A. N. Y.): "The one thing absolutely essential to a preference is that the bankrupt transfer some portion of his property to the creditor. If the creditor receive none of the bankrupt's property, there is no preference. And that is the primary difficulty with the complainant's case. The defendant bank received no property or money of the Newport Company. The Sheard Company as indorser of the note took up and paid its own funds therefor—funds in which the Newport Company had no interest whatever. It is true that the Sheard Company at the time it paid the note was indebted to the Newport Company [the bankrupt], but that in no sense made its funds the

property of the latter. An unsecured creditor has no interest in his debtor's property until he has sequestered it. The money, which the defendant received belonged to the Sheard Company [the indorser], and not to the bankrupt. It follows, then, that there was no preference unless that which was actually done can be treated as the equivalent for something else. And that is the theory of the District Court. It is pointed out that, if the Newport Company [the bankrupt] had collected its claim from the Sheard Company [the indorser], and had itself paid the note, there would have been a transfer from the Newport Company [the bankrupt] to the bank. And it is said that it was merely a short cut for the Sheard Company to pay the note and charge the amount paid upon its account against the Newport Company—that the effect of the two transactions was the same. There would be much force in this argument if the Sheard Company stood in the transaction merely as a debtor of the Newport Company. It may well be that when a debtor with the approval of his creditor takes up the latter's note at a bank, and offsets the amount paid upon his debt, the payment to the bank will be treated as having been made by the creditor; the debtor being really his agent in the transaction. But that was not the situation here. The Sheard Company was the indorser of the note, and had pledged its own property as security therefor. In taking up the note and collateral it acted in its own behalf, and in no sense as the agent of the Newport Company. The note was not discharged. The Sheard Company as against the Newport Company became the holder instead of the bank. Upon no permissible theory in law or equity can it be said that the note was paid by the Newport Company. But it is further urged that the effect of the transaction was to appropriate certain assets of the Newport Company, to wit, its demand against the Sheard Company, to the payment of this note to the exclusion of other creditors. * * * But it cannot be conceded that the result claimed would follow. If the Sheard Company, knowing the Newport Company to be insolvent, acquired the note with a view to using it as a set-off or counterclaim against its debt, it could not legally do so. * * * [Section 68.] And, if the Sheard Company could not offset the note against the account * * * there was no transfer or appropriation of such account, and much less a preference. The debt could still be collected by the trustee of the bankrupt."

§ 1289. Payment, by Maker, of Note Discounted by Bankrupt.

Where a third person's note not belonging to the bankrupt is nevertheless discounted at the bank and placed in the bankrupt's account, the maker's payment of it when due does not constitute a preference; the bankrupt's estate is not depleted.

Dressel v. North State Lumber Co., 9 A. B. R. 541, 107 Fed. 255 (D. C. N. Car.).

But if the insolvent fund is depleted by the payment or other transfer, it is a preference; as would be the case where a customer's paper is discounted; and this is so, although third parties bound as sureties for the same debt would have paid the debt anyway.

Swarts v. Fourth Nat'l Bk., 8 A. B. R. 673, 117 Fed. 1 (C. C. A. Mo.).

§ 1290. Depletion of Partnership Assets, Whether Preference in Individual Bankruptcy of Member.

Page 759, note 274. Compare, in addition, *Miller v. Acid & Fertilizer Co.*, 21 A. B. R. 416, 211 U. S. 496. Also, compare, same proposition under "Second Element of a Preference," post, § 1312½.

§ 1291. Conversely, Depletion of Individual Estate, Whether Preference in Partnership Bankruptcy.

Page 759, note 275. But, for instance of depletion of individual estate where both firm and individuals in bankruptcy, see *Brewster v. Goff Lumber Co.*, 21 A. B. R. 106, 164 Fed. 124 (D. C. Pa.).

A transfer by one member of a partnership of his individual property, within four months of the bankruptcy of the partnership, is not a preference in the partnership bankruptcy.

Compare same proposition under "Second Element of a Preference," post, § 1312½; obiter, *Mills v. Fisher & Co.*, 20 A. B. R. 237 (C. C. A. Tenn.); *Miller v. Acid & Fertilizer Co.*, 21 A. B. R. 416, 211 U. S. 496.

Nevertheless, the property of the partner is sub modo a fund for firm creditors; and a transfer of it to a firm creditor may operate as an individual preference, for a firm creditor may prove against the individual estate.

See post, §§ 2268½, 1387½; ante, §§ 171, 217.

Page 759. *Mills v. Fisher & Co.*, 20 A. B. R. 237, 159 Fed. 897 (C. C. A. Tenn.): "There remains the question as to whether John H. Fisher can be individually adjudicated a bankrupt upon the averments of this petition. If we construe the averments to be that Fisher has applied his individual property to the payment of a joint debt, and we think we must, intending to prefer that debt over other firm debts, we are confronted with the question as to whether that is not a preference for which he may be adjudicated a bankrupt? He was individually liable for every partnership debt, as well as liable for his individual debts. In equity, and in bankruptcy, his individual creditors are entitled to be paid out of his individual property before his partnership creditors. Manifestly, if the claim of the Watts Mills is an individual debt against J. H. Fisher, there would be no doubt but that such a preference of one creditor over another of the same class would be an act justifying an adjudication in bankruptcy. That is too plain to need discussion. But that is not the case. The claim of the Watts Mills is against the firm and the preference was not given out of the firm property, but out of the separate property of J. H. Fisher. The utmost right of such a joint creditor against the individual assets of John H. Fisher was to share in them equally with other joint creditors after individual debts had been paid. If, therefore, the debt preferred was an individual debt, it was not a preference of which a partnership creditor can complain, for the debt paid was entitled to a preference over every partnership debt, including, of course, the petitioner's claim. A preference under § 60a of the Bankrupt Act is only such when it will enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.' This is the principle upon which

the payment of labor claims is not a preference; provided only that the general assets are enough to pay all other labor claims as great a percentage. * * * While the averments of the petition in respect to the character of the debt preferred are not as clear as they should be, we nevertheless regard the petition as resting the claim to an adjudication against J. H. Fisher upon the fact that he has transferred practically and substantially his entire separate estate, being insolvent at the time, in payment of a debt of the firm of J. H. Fisher and Company, intending to prefer that debt over other debts of the same class. It is no answer to say that partnership creditors are benefited and not injured by such an application of the individual property of one of the members. If the fact be as averred, that there were no joint or firm assets applicable to joint debts, and that neither of the partners had any separate property, other than that transferred to one of the joint creditors, it would seem that the one joint creditor had been very substantially preferred over every other creditor of the same class. That the members of the firm were each liable in solido for the joint debts is not disputable. Undoubtedly the individual creditors of John H. Fisher would be preferred over the joint creditors out of his individual estate. But if there were none, then the whole of that separate property would have been subject to the demands of the joint creditors. If there were such separate creditors, then the right of the joint creditors to the surplus, after paying the other class of debts, is not deniable. That this preference of the individual creditor exists independently of the existence of partnership assets under the Bankrupt Act of 1898, may be conceded upon the reasoning and authority of *In re Wilcox*, 2 Am. B. R. 117, 94 Fed. 84; *In re James*, 13 Am. B. R. 341, 133 Fed. 912; and *Euclid Nat. Bank v. Union Trust and Deposit Co.*, 17 Am. B. R. 834, 149 Fed. 975. Nevertheless, the right of a partnership creditor to share in the separate estate of the members of the co-partnership, gives him such an interest in the separate property of its members as to entitle him to prove his claim against the separate estate and to make such a claim the basis for an adjudication of bankruptcy against a member of a firm who has given a preference out of his estate. This was well settled under former acts and in this respect the present law has not changed the rule. *In re Melick*, Fed. Cas. No. 9,399; *In re Jewett*, Fed. Cas. No. 7,306; *In re Redmond*, Fed. Cas. No. 11,632; *In re Loyd*, Fed. Cas. No. 8,429; *In re McLean*, Fed. Cas. No. 8,879; *Hartman v. Peters*, 17 Am. B. R. 61, 146 Fed. 82. Upon the facts stated in this petition it is obvious that when one member of a firm which is insolvent and without assets, applies his whole separate estate in satisfaction of one joint liability, that creditor will receive a greater percentage of his debt than other creditors of the same class. This, at last, is the supreme test of a preference."

§ 1292. Whether Liens upon or Other Transfers of Exempt Property, Preferences.

It has been held that liens upon or other transfers of exempt property do not constitute preferences, since they do not diminish the creditors' assets, title to exempt property not passing to the trustee.

In re Bailey, 24 A. B. R. 201, 176 Fed. 990 (D. C. Utah): "A mortgage constituting an unlawful preference, where it includes both exempt and non-exempt property, is only voidable by the trustee as to the non-exempt property, and remains a valid mortgage as to the exempt property."

Compare, obiter, *Mills v. Fisher & Co.*, 20 A. B. R. 239, 159 Fed. 897 (C. C. A. Tenn.): "So the transfer of a homestead exemption is not a preference, since it is not subject to the demands of creditors."

Vitzthum v. Large, 20 A. B. R. 666, 162 Fed. 685 (D. C. Iowa): "If a part of the property transferred by the bankrupt to the bank was exempt, or the proceeds of exempt property, under the Iowa statute, the creditors generally would have no right thereto, nor the trustee, to recover the same for their benefit."

Contra, *In re Soper*, 22 A. B. R. 868, 173 Fed. 116 (D. C. Neb.): "The effect of the surrender of the preference [chattel mortgage on exempt and non-exempt property, which creditor claimed to be still good on the exempt property] was to restore the property of the bankrupt to his estate as if no mortgage had ever been made upon the property. The bankrupt has not lost his right to claim his exemptions unless it is because of the mortgage given by him. The trustee did not obtain the property under the mortgage but in hostility to it. It came into his hands unburdened by the mortgage, and as if the mortgage had never been given. Therefore neither the trustee nor the bankrupt are estopped by the terms of the mortgage. From the time the trustee took the property until such time as the bankrupt should assert his claim of exemptions, the trustee had the title to all the property, and the mortgage was no lien upon any portion of it. Upon the assertion of the right of the bankrupt to his exemptions, the mortgage was not revived upon the articles selected as exempt."

Page 760, note 276. Compare, obiter, *In re Tollett*, 5 A. B. R. 404, 106 Fed. 866 (C. C. A. Tenn.), wherein the court held that on recovery of property fraudulently or preferentially conveyed the debtor might have his exemptions therefrom, giving as one reason that since it was exempt it could not have depleted the estate anyway. Such argument, however, proceeds in a circle, for if the transfer did not deplete creditors assets, then it was not fraudulent nor preferential, hence the property was not recoverable by creditors. A better basis should be found than such argument, it would seem. Compare, also, *In re Leech*, 22 A. B. R. 599, 171 Fed. 622 (C. C. A. Ky.). Also, compare, § 1033½, note, and § 1095.

Page 760. It is to be observed, at any rate, that if the questions of the exemptability of the property transferred and, consequently, of the preferential character of the transfer, are to be determined as of the date of each transfer, then the rule of the cases cited would afford a convenient means, by making successive transfers of exempt property, of actually perpetrating preferences with impunity. If each transfer be only small enough to come within the exemption right at the particular time, the entire estate might, by successive transfers, be distributed among a few favored creditors.

§ 1294. Property Transferred to Be Such as Otherwise Would Have Belonged to Estate.

The property transferred must have been such as otherwise would have belonged to the bankrupt's estate, else there can be no depletion of the trust fund.

In re Leech, 22 A. B. R. 599, 171 Fed. 622 (C. C. A. Ky.), quoted at § 1277.

§ 1294½. **Property in Foreign Countries.**

Doubtless, transfers of property in foreign countries could be preferences, though, if real estate, the only way to reach the case would probably be by such process as could operate on defendants or claimants found in this country, since the title could not pass by operation of law under § 70 (a).

Compare, § 1450½; also see, analogously, *In re Pollman*, 19 A. B. R. 474, 156 Fed. 221 (D. C. N. Y.), quoted at § 1450½.

§ 1295. **Mere Exchanges of Property, Changes in Form and Transfers Based on Present Consideration, Not Preferences.**

Page 760. *McDonald v. Clearwater R. Co.*, 21 A. B. R. 182, 164 Fed. 1007 (U. S. C. C. Idaho): "Property transferred by a borrower at the time of receiving a loan and for the purpose of making the lender safe, is security; its validity, if unaccompanied by positive fraud, is recognized and enforced in bankruptcy. Transfers which do not diminish the estate of the bankrupt, but which constitute only a fair exchange of property, are not preferences."

Page 760, note 278. See, in addition, *Cook v. Tullis*, 85 U. S. 332.

§ 1296. **Net Result after Becoming Insolvent and within Four Months, the Test.**

Page 761, note 279. Impliedly, *Wild & Co. v. Provident Life & Trust Co.*, 22 A. B. R. 109, 214 U. S. 292, quoted at § 1419.

§ 1297. **Deposits in Bank Subject to Check.**

Page 762, note 280. See ante, § 1180. In addition, see *Irish v. Citizens Trust Co.*, 21 A. B. R. 39 (D. C. N. Y.); *Booth v. Prete*, 22 A. B. R. 579, 81 Conn. 636, 71 Atl. 938.

Page 763. Likewise they would amount to preferences if they were simply devices for obtaining payment of the bank's claim by indirect means.

See § 1300.

§ 1300. **Any Method of Depleting Assets, Sufficient; Indirect Preferences.**

Page 763, note 284. Instance, *Mason v. Nat. Herk. Co. Bk.*, 21 A. B. R. 98, 163 Fed. 920 (D. C. N. Y.); instance, *Pratt v. Columbia Bk.*, 18 A. B. R. 406, 157 Fed. 137 (D. C. N. Y.).

§ 1301¼. **Or to Pay Off Bankrupt's Debt.**

Likewise, where the purchaser from the bankrupt, as part of the consideration, pays off a debt owed by the bankrupt to another creditor, it may be a preference.

Rogers v. Fidelity Sav. Bank & Loan Co., 23 A. B. R. 1, 172 Fed. 735 (D. C. Ark.); *Opp v. Hakes*, 15 A. B. R. 696, 142 Fed. 364 (C. C. A. Ills.).

§ 1301½. Proceeds of Mortgages, etc., Used to Make Preferences.

It has been held that a mortgage given for money with which to make preferences is voidable as a preference, though given for presently passing consideration, if the mortgagee be cognizant of the purpose.

In re Beerman, 7 A. B. R. 431, 112 Fed. 663 (D. C. Ga.).

Such was held to be the case where an insolvent debtor, on the eve of the bankruptcy, gave a mortgage on all his assets for a loan from a third party, giving a demand note therefor, the money then being deposited in a bank which was the largest creditor and which had acted as the lender's agent in the transaction.

In re Lynden Mercantile Co., 19 A. B. R. 444, 156 Fed. 713 (D. C. Wash.).

Likewise, it has been held that a creditor, instrumental in effecting a sale of the bankrupt's business, who procures the assumption of his own debt by the purchaser as part of the transaction, receives an indirect preference.

Opp v. Hakes, 15 A. B. R. 696, 142 Fed. 364 (C. C. A. Ill.); In re Beerman, 7 A. B. R. 431, 112 Fed. 663 (D. C. Ga.). Compare post, § 1504.

But the fact that the mortgagee knew the proceeds were to be used in paying off existing creditors does not, in and of itself, make the mortgage void.

Stedman v. Bank of Munroe, 9 A. B. R. 4, 117 Fed. 237 (C. C. A.); In re Soudan Mfg. Co., 8 A. B. R. 45, 113 Fed. 804 (C. C. A.); In re Kullberg, 23 A. B. R. 758, 176 Fed. 585 (D. C. Minn.). Compare, In re Pease, 12 A. B. R. 66, 129 Fed. 446 (D. C.).

§ 1303. Transfers to Indemnify Sureties and Other Indirect Preferences.

Page 765, note 286. 13. Mortgage on all assets of insolvent debtor given within four months, for a present loan, a demand note being given and the money being deposited in a bank which was the largest creditor, and which acted as the lender's agent, is a preference to the bank. In re Lynden Mercantile Co., 19 A. B. R. 444, 156 Fed. 713 (D. C. Wash.).

Page 766, note 286. 6. Note of bankrupt paid by endorser, who released collateral which he had given to the creditor at the time of endorsement, not an indirect preference to the creditor receiving the payment notwithstanding endorser indebted to bankrupt and claims right to offset the right of indemnity against the bankrupt's claim. Mason v. Herkimer Co. Nat. Bank, 22 A. B. R. 733, 172 Fed. 529 (C. C. A. N. Y., reversing 21 A. B. R. 98, 163 Fed. 920).

7. Surrender by bankrupt father of daughter's note, their mutual debts being about equal. Taylor, trustee, v. Nichols, 23 A. B. R. 306, 134 App. Div. (N. Y.) 783.

Page 766, note 287. See, in addition, In re Bailey & Son, 21 A. B. R. 911, 166 Fed. 982 (D. C. Pa.).

Page 766. Likewise, the setting apart and marking of goods as security to an accommodation endorser or maker of a promissory note may be a preference.

In re Bailey & Son, 21 A. B. R. 911, 166 Fed. 982 (D. C. Pa.).

§ 1304. Second Element of a Preference.

Page 766. In re Kayser (ex parte Weisbrod v. Hess), 24 A. B. R. 174, 177 Fed. 383 (C. C. A. N. J.): "As we think, one requirement of this definition has not been met by the foregoing facts. It is true that the bankrupt was insolvent when the \$2,600 was paid. It is also true that the money was his, and that the effect of paying it to Weisbrod & Hess will be to reduce the percentage that would otherwise be paid to the petitioning creditor; but it is not true that Weisbrod & Hess were creditors of the bankrupt. On the contrary, the undisputed testimony shows that they were creditors of his wife, and that the loans upon which the \$2,600 was paid and credited were made to her and upon the credit of her separate property. In this essential particular the facts do not fit the statutory definition of a preferred creditor."

§ 1305. Preferential Transfer to Be Distinguished from Fraudulent Transfer.

Page 766, note 289. See ante, §§ 113, 1221; post, § 1397.

And an apparently merely preferential transfer may be shown to be in reality a fraudulent transfer by proof of the existence of a secret trust in the bankrupt's favor.

(Van Iderstine) trustee, v. Nat'l Discount Co., 23 A. B. R. 345, 174 Fed. 518 (C. C. A. N. Y.).

§ 1307¼. Return of Goods to Bailor, Not Preference.

Of course the return of bailed goods to the bailor cannot be a preference, for the relation of debtor and creditor does not exist.

Compare, cases cited ante, under § 1228; also, see ante, § 1286½. Also, see *Walther v. Williams Mercantile Co.*, 22 A. B. R. 328, 169 Fed. 270 (C. C. A. Mich.), wherein the bailment of an entire business was upheld and the bailors' repossessing themselves of it held not a preference.

§ 1307½. Payment for Goods Converted, Preference.

But the payment for goods wrongfully converted by the bankrupt—not the mere return of the same goods in specie—is a payment upon a provable debt and may constitute a preference.

Impliedly, *Clingman v. Miller*, 20 A. B. R. 360, 160 Fed. 326 (C. C. A. Kans.). Compare, "Embezzlement from Bankrupt Corporation," § 1333½.

Mistake of counsel causing mortgagee to relinquish rights of ownership and to claim simply as creditor for goods converted. In re Strobel, 20 A. B. R. 754, 163 Fed. 380 (D. C. N. Y.).

§ **1309. Payments or Other Transfers on Claims for Personal Injury, etc., Not Preferences.**

Page 767, note 295. Compare, *McNaboe v. Columbian Mfg. Co.*, 18 A. B. R. 684, 153 Fed. 967 (C. C. A. N. Y.).

§ **1310. Payments or Other Transfers Enuring to Benefit of Sureties, Endorsers, etc., of Bankrupt, Even before Principal's Default or before Payment by Sureties—Preferences.**

Page 767, note 297. See, in addition, *Kobusch v. Hand*, 19 A. B. R. 379, 156 Fed. 660 (C. C. A. Mo.); *In re Bailey & Son*, 21 A. B. R. 911, 166 Fed. 982 (D. C. Pa.). Compare, *In re Farmers Supply Co.*, 22 A. B. R. 460, 170 Fed. 502 (D. C. Ohio); *Brown v. Streicher*, 24 A. B. R. 267, 177 Fed. 473 (D. C. R. I.).

§ **1311. Payment or Other Transfer to Present Owner of Claim, Preference to Both Present Owner and Also to Transferrer, if Transferrer Remains Bound as Surety or Endorser.**

Page 769. *Kobusch v. Hand*, 19 A. B. R. 379, 156 Fed. 660 (C. C. A. Mo.): "Where the surety is the president of the bankrupt, and with knowledge of its insolvency directs the payment to the holder of the obligation with intent to relieve himself from liability and to secure an advantage over other creditors, a preference arises which may be recovered from him by the trustee."

§ **1312. Partner Selling Out to Remaining Partner, Not Preference to Individual Creditors.**

See post, § 2269, et seq

§ **1312¼. Transfers of Individual Property Whether Preferences in Partnership Bankruptcies.**

In general, transfers by one member of an insolvent partnership of his individual property within four months of the bankruptcy of the partnership are not preferences in the partnership bankruptcy [unless the individual member be also adjudged bankrupt in the same proceedings].

Miller v. (New Orleans) Acid & Fertilizer Co., 21 A. B. R. 416, 211 U. S. 496, affirming 117 La. 821.

Obiter, *Mills v. Fisher & Co.*, 20 A. B. R. 237, 159 Fed. 897 (C. C. A. Tenn.): "But it is not an act of bankruptcy for which a firm may be adjudged a bankrupt, that one of its members, out of his individual estate, prefers one of his own or one of the firm's creditors. * * * The application by one partner of his individual property to the payment of one firm creditor would be an individual act, and not the joint act of the firm, and, therefore, not an act for which the firm could be adjudged bankrupt."

Compare corresponding proposition under "First Element of a Preference," ante, §§ 1290, 1291; also, compare post, § 1387½.

But a transfer of individual assets by one member to pay a firm creditor a greater percentage than another firm creditor would get from the same individual estate, may be a preference, since the individual estates constitute, sub modo, funds to which partnership creditors are entitled to resort, in proper order of priority after individual creditors are satisfied in full, so that a transfer to one firm creditor without a like transfer to other firm creditors would be the giving of a greater percentage to one creditor than to another of the "same class" in the order of priority.

Mills v. Fisher & Co., 20 A. B. R. 237, 159 Fed. 897 (C. C. A. Tenn.).

And such an individual transfer may be a voidable preference in a partnership bankruptcy by state law, of which the trustee may avail himself by subrogation to the rights of any creditor who has already instituted proceedings.

Miller v. New Orleans Acid & Fertilizer Co., 21 A. B. R. 416, 211 U. S. 496 (affirming 117 La. 821).

§ 1312½. **Transfers of Partnership Property, Whether Preference in Individual Bankruptcies.**

Page 769. Bankruptcy proceedings against one partner do not affect the validity of a transfer made by the partnership.

McNair v. McIntyre, 7 A. B. R. 638, 113 Fed. 113 (C. C. A. N. Car.).

Thus, preferences given by a partnership on partnership property that is being administered in the individual bankruptcy proceedings of one of the partners, are not affected.

McNair v. McIntyre, 7 A. B. R. 638, 113 Fed. 113 (C. C. A. N. Car.).

§ 1313. **When Stock Broker's Customer Becomes "Creditor."**

The various relations into which stock brokers and their customers get themselves by their different transactions have given rise to considerable discussion. As to a broker buying and selling stock on margin for customers, it has been held in Massachusetts and in some other states that his relation to customers is that of debtor and creditor and not that of fiduciary and beneficiaries, and that a payment upon a running account between them may be a preference.

For Massachusetts cases, see citations in *Richardson v. Shaw*, 19 A. B. R. 717, 209 U. S. 365.

On the other hand, it has been held in New York, and by the United States Supreme Court, and it is the weight of authority, that where a stock broker pledges his customer's stocks in general loans, the customer for whom stocks are carried by the broker is not a creditor and does

not receive a voidable preference, although he knows the broker to be insolvent, when he closes the transaction, pays the balance owing the broker and receiver stocks worth more in the market than the sum paid to take them up. The customer simply redeems his stock from the broker's lien by "paying up."

Page 770, note 305. See, in addition, *Richardson v. Shaw*, 19 A. B. R. 717, 209 U. S. 365 (affirming 16 A. B. R. 876, also 147 Fed. 59). Also compare, analogously, *In re Berry & Co.*, 17 A. B. R. 468 (C. C. A. N. Y.), affirmed sub nom. *Thomas v. Taggart*, 19 A. B. R. 710, 209 U. S. 385.

§ 1313¾. Public Corporations as Creditors.

There seems to be no reason for exempting public corporations, except of course when acting in their governmental capacity, from the ordinary rules pertaining to preferential transfers; and no State law can exempt them therefrom.

Thus, a preferential transfer to a township may be set aside.

Painter v. Napoleon Tp., 19 A. B. R. 412, 156 Fed. 289 (D. C. Ohio), quoted at § 1414.

§ 1313½. One Bankrupt Estate as Preferred Creditor of Another.

The act in § 57 (m) provides that "the claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors."

Where a trustee himself became bankrupt, a preference was charged in the later bankruptcy against the former estate as a creditor.

Block, trustee, v. Rice, trustee, 21 A. B. R. 691, 167 Fed. 693 (D. C. Pa.).

1313¾. Delivery to Purchaser Who Has Paid in Advance, Whether Preference.

Where a purchaser from the bankrupt has paid partly in advance, the delivery of the goods purchased has been held not to be a preference, if the transaction be bona fide; for the purchaser is not a "creditor" but is, rather, a debtor for the balance due.

Templeton, trustee, v. Kehler, 23 A. B. R. 41, 173 Fed. 574, 575 (D. C. Pa.): "But here there was no antecedent debt, and therefore no preferential payment could be made. The defendant was buying cattle from the bankrupt in the usual course of business, and had advanced money in part payment. The cattle were delivered (the price being concededly fair) and the defendant became the bankrupt's debtor for the balance of the price. * * * He was not the bankrupt's creditor in any proper sense, but is rather to be regarded as the bankrupt's debtor."

Yet such could not be the rule unless title to the goods had already vested in the purchaser, since, if it were simply a payment in advance

then the purchaser was a creditor to the amount theretofore paid, the bankrupt fulfilling his obligation by delivery of goods instead of money.

§ 1314. Third Element of a Preference—Creditor's Claim Must Have Been Pre-Existing Debt.

Page 770, note 306. *Simmons v. Greer*, 23 A. B. R. 443, 174 Fed. 654 (C. C. A. S. Car.), quoted, on other points, § 1225½.

Definition of "Pre-Existing Debt."—The term "pre-existing debt" is used interchangeably with "antecedent debt." The term refers to the date of the creation of the debt with relation to the date of the transfer of the property by which the debt is satisfied or secured in whole or in part. In *re Fletcher*, 136 Mass. 342: "The words 'pre-existing debt,' in their natural meaning, include all debts previously contracted whether they have become payable or not. The term has such meaning in general statute, chapter 118, § 78, which provides that an insolvent shall forfeit his right to a discharge in insolvency by the payment of pre-existing debts." Also compare, *McDonald v. Ry. Co.*, 21 A. B. R. 182; compare, *Templeton v. Kehler*, 23 A. B. R. 41, D. C. Pa. Also compare the various citations under this "Third Element of a Preference."

Page 770. In *re Wood & Henderson*, 20 A. B. R. 1, 210 U. S. 246: "This [payment of attorney in advance for services to be rendered in bankruptcy] is not a case of preference, where part of the estate is transferred to a creditor so as to give him more of the estate than to others of the same class, under § 60. * * * It is a transfer in consideration of future services, to be reduced if found unreasonable in amount."

Page 773. *McDonald v. Clearwater R. Co.*, 21 A. B. R. 182, 164 Fed. 1007 (U. S. C. C. Idaho): "It is further conceded that a preference is not voidable unless it is given in satisfaction of an antecedent debt—that is, a debt which existed at the time the transfer was made."

Page 773. The term "antecedent debt" is sometimes used instead of "pre-existing debt." In bankruptcy law, with regard to preferences, antecedent debt refers to the time of the transfer of the property by which the debt is secured or satisfied in whole or in part.

See also, *Mills v. Virginia, etc., Co.*, 20 A. B. R. 750; *Templeton v. Kehler*, 23 A. B. R. 41, 173 Fed. 574, 575 (D. C. Pa.), wherein the terms "antecedent" and "pre-existing" are used interchangeably. Compare, In *re Marstiburn v. Dannenberg*, 117 Ga. 567. Compare, *McDonald v. Clearwater R. Co.*, 21 A. B. R. 182, 164 Fed. 1007 (U. S. C. C. Idaho), quoted *supra*.

§ 1316. Bona Fide Sales, Whether for Cash or on Credit, Not Preferences.

Page 773, note 307. Impliedly, *Ohio Valley Bank Co. v. Mack*, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio). Also impliedly, *contra*, *Sargent v. Blake*, 20 A. B. R. 115, 160 Fed. 57 (C. C. A. Mo.).

Partner Selling Out to Co-Partner When Firm Insolvent.—For this entire subject, see post, § 2269, et seq.

Thus, where there exists a bona fide contract of purchase of the entire output of the bankrupt's lumber mill, the delivery of lumber thereunder,

within the four months period, and when the seller was known to be insolvent, has been held not to be a preference, though part of the purchase price had already been advanced.

Mills v. Virginia Carolina Lumber Co., 20 A. B. R. 750, 164 Fed. 168 (C. C. A. N. Car.): "There was no suggestion that the contract made between the Lumber Company and Franklin for the purchase of the entire output of Franklin's mill was not a fair one and one that the law would enforce. The contract was still existing at the time of the adjudication and whatever lumber was on hand as the produce of the mill the Lumber Company had a right to claim, provided it complied with the terms which had been agreed upon. If there had been no payment upon the contract of purchase in advance, the Lumber Company would have been entitled to require the trustee to surrender to it the lumber produced at the mill, provided it complied with the terms of purchase. Having advanced money upon the contract of purchase, the Lumber Company thereby became entitled to at least as much of the product of the mill as it had paid for and it could have recovered so much from the trustee, even after the bankruptcy. It is our opinion that at most the taking of the thousand dollars worth of lumber under a claim by the Lumber Company that it was entitled to that specific property by virtue of the contract of purchase cannot be construed into a payment upon an existing debt such as to constitute a preference under the bankruptcy law."

Again, where a purchaser from the bankrupt has paid part of the purchase price in advance, the delivery of the goods to a corresponding amount within the four months period will not constitute a preference; for the delivery is not pro tanto a "transfer" upon a pre-existing debt, the purchaser being a debtor rather than a creditor all the time.

Templeton, trustee, v. Kehler, 23 A. B. R. 41, 173 Fed. 574, 575 (D. C. Pa.). Compare, ante, § 1313¾.

But it would seem that it must always appear that title to the goods purchased has already passed or that the money paid in advance is to be kept intact as a distinct fund to become the bankrupt's only on delivery of the goods purchased, otherwise the purchaser is really a creditor.

§ 1319½. Payment of Attorney in Advance Not Preference.

Payment of an attorney for services to be rendered in bankruptcy is not a preference.

In re *Wood & Henderson*, 20 A. B. R. 1, 210 U. S. 246, quoted at § 2094.

Nor is the securing of the attorney's fees and costs of going into bankruptcy, by way of mortgage or otherwise, a preference; the consideration is a presently passing one, and both items would be entitled to priority of payment out of the estate, in any event.

In re *Blanchard*, 20 A. B. R. 417, 161 Fed. 793 (D. C. N. Car.). Also, see post, § 1504.

§ 1320. Mere Exchanges of Property or Security, Not Preferences.

Page 775. *McDonald v. Coldwater R. Co.*, 21 A. B. R. 182, 164 Fed. 1007 (U. S. C. C. Idaho): "Transfers which do not diminish the estate of the bankrupt, but which constitute only a fair exchange of property, are not preferences."

§ 1325. Payment of Secured Debt, Thereby Releasing Securities.

Page 776. Obiter and merely inferentially, *Page v. Rogers*, 21 A. B. R. 496, 211 U. S. 575: "The defendant therefore contended that, so far as the payments from the purchase money of the coal lands were applied to the indebtedness secured by the trust deed, they were payments for the extinguishment of a valid, subsisting lien upon the land, fixed upon it more than four months before bankruptcy, and therefore not a preference. It may be assumed, without decision, that the payment within four months of a bankruptcy of a mortgage older than four months, and valid inter partes, though unrecorded, cannot be a preference. There is no such case here."

Page 776, note 318. Inferentially, *Wright v. Bank*, 18 A. B. R. 363, 118 N. Y. App. 281. But compare, peculiar instance: payment to creditor having inchoate statutory lien for the purchase price of mine material, notwithstanding acceptance of chattel mortgage, the lien itself not being waived, obiter, *In re Lynn Camp Coal Co.*, 22 A. B. R. 60, 168 Fed. 998 (D. C. Ky.).

§ 1325½. Security Surrendered, However, Must Be on Bankrupt's Property, Else Preference.

The security surrendered, by way of exchange or payment, must have been, of course, on the bankrupt's property, and the surrender of the property of a third person will not constitute the "fair exchange" protected by bankruptcy law.

Compare, ante, § 1278. Compare, on the facts, though the case did not turn upon this point, *In re Evans Lumber Co.*, 23 A. B. R. 881, 176 Fed. 643 (D. C. Ga.).

§ 1326. Liens or Other Transfers, Partly on Present Consideration, Partly on Past, Not Wholly Void but Valid Pro Tanto.

Page 777, note 319. See, in addition, *In re Hersey*, 22 A. B. R. 863, 171 Fed. 1001 (D. C. Iowa). Instance, *In re White*, 22 A. B. R. 200 (Ref. R. I.).

Page 777, note 319. Compare, *In re Bartlett*, 22 A. B. R. 891, 172 Fed. 679 (D. C. Pa.), where a bill of sale was given within the four months period partly for money paid at the time and partly for pre-existing indebtedness, but where the creditor had not "reasonable ground for believing a preference," so that the transfer was upheld in toto.

Amendment of 1910.—Some decisions having apparently held that § 67d, protecting liens given on presently passing consideration, would protect the lien as a whole where given partly upon presently passing

consideration and partly for a pre-existing debt, the Amendment of 1910 was passed to set the question at rest and to make positive the rule that such protection would not extend any further than to the presently passing consideration.

Bankruptcy Act, § 67d, as amended in 1910: "Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this act." Also, see post, §§ 1500, 1501.

§ 1326¼. Agreements for Liens or Other Transfers Where Lien Not Given until Later.

It is the date of the actual transfer that governs; and the fact that the transfer was in fulfillment of an agreement which itself was based on a valuable consideration passing between the parties previously will not cause the transfer to relate back to the time of the passing of the original consideration to make it a transfer on a presently passing consideration. It is a transfer on a pre-existing obligation; and may, if the other elements coexist, constitute a preference.

See discussion post, §§ 1370, 1506. But compare, *McDonald v. Clearwater R. Co.*, 21 A. B. R. 182, 164 Fed. 1007 (C. C. A. Idaho).

§ 1326½. Ratification within Four Months, of Prior Ineffectual Transfer.

Likewise, a ratification, within the four months period, of an unauthorized or ineffectual transfer made before, it would seem would, on the same principle, take effect as of the date of the effectual transfer; and if then the consideration had already passed, the transfer would be upon a pre-existing indebtedness.

Compare, facts and holding somewhat to this effect, *In re Mills Co.*, 20 A. B. R. 501, 162 Fed. 42 (D. C. N. Car.).

§ 1326¾. Perfecting of Pre-Existing Liens or Rights.

The mere perfecting within the four months period, of liens or rights in the property existing before, does not constitute a preference.

· *Sexton v. Kessler*, 21 A. B. R. 807, 172 Fed. 535 (C. C. A. N. Y.); also, see post, §§ 1370, 1372.

§ 1327½. Amendment of 1910, Whether Debt "Pre-Existing" Determined by Date of Transfer or Recording.

Whether the debt, in the paying or securing whereof the transfer is made, is to be deemed a pre-existing debt, is to be determined as of

the date of the transfer itself or, if effected by an instrument requiring recording by State statute, then it may be determined as of the date of such recording.

Bankr. Act, § 60 (b), as amended 1910. See post, § 1334½.

§ 1328. Fourth Element of a Preference.

Page 778. *Tumlin v. Bryan*, 21 A. B. R. 319, 165 Fed. 166 (C. C. A. Ga.): "He must prove that the bankrupts * * * (3) made a transfer of their property, i. e., a payment of money."

Page 778. *Irish v. Citizens' Trust Co.*, 21 A. B. R. 39 (D. C. N. Y.): "If the furniture company [the bankrupts] in due course of business had deposited this money with the trust company, and it or any part of it had remained there, the simple relation of debtor and creditor would have arisen, and, in the absence of fraud or collusion or intent to give and receive a preference, there would have been mutual demands which could have been set off, the one against the other, even though the deposits were made within the four months preceeding the filing of the petition. * * * But such is not this case. The furniture company checked out the money, all of it so far as involved here, and by checks on the account transferred it to the trust company as a payment of notes with intent to prefer and it was accepted as payment of such notes."

Inferentially, *Coder v. Arts*, 18 A. B. R. 513, 152 Fed. 943 (C. C. A. Iowa): "The transfer specified in Bankruptcy Act 1898, § 60 (a), includes a mortgage or a lien voluntarily created by the debtor."

Similarly, where an instrument is left in escrow or where there is a mere written agreement to make a transfer not acted upon at all before bankruptcy, the fact of the obligation itself and that it arose before the four months period will not excuse a payment made upon the strength of the obligation nor bring the payment within the category of transfers not preferential because of their releasing a corresponding value of property from a lien. *

Page *v. Rogers*, 21 A. B. R. 496, 211 U. S. 575, quoted at § 1370.

§ 1329. Voluntary Action of Debtor Requisite to Preference by Way of "Transfer."

Page 778. Likewise, where it is stolen or embezzled and turned over to the creditor.

Compare, *McNaboe v. Columbian Mfg. Co.*, 18 A. B. R. 684, 153 Fed. 967 (C. C. A. N. Y.).

Thus, a bank's appropriation of a deposit to the payment of a loan made to the depositor lacks the element of the debtor's assent and is not a preference: it is not a "transfer."

Page 778. *Lowell v. International Trust Co.*, 19 A. B. R. 853, 158 Fed. 781 (C. C. A. Mass.): "In no sense, however, is a deposit like the deposit here payment, or intended as payment. This is the first condition of the decision

in *New York Bank v. Massey*, and a vital one; because, if a deposit in the usual course of business may be in the nature of a payment, an unlawful preference would necessarily be involved under the circumstances of either *New York Bank v. Massey* or the case at bar, a suggestion of a possibility which the Supreme Court was compelled to negative."

Page 779, note 323. But compare, *Irish v. Citizens Trust Co.*, 21 A. B. R. 39 (D. C. N. Y.).

§ 1331. Payments of Money "Transfers."

Page 780, note 327. See, in addition, *Tumlin v. Bryan*, 21 A. B. R. 319, 165 Fed. 166 (C. C. A. Ga.), quoted at § 1277, note, and § 1328.

§ 1332. "Transfer" Includes, Also, Pledge, Mortgage, Gift, Security, etc.

Page 781, note 329. 6. Orders drawn by bankrupt on third persons for debts owing operate, when accepted and assigned, as transfers sufficient to constitute preferences. *McDonald v. Clearwater R. Co.*, 21 A. B. R. 182, 164 Fed. 1007 (U. S. C. C. Idaho). Also, when they amount to assignments of the fund. In *re Hines*, 16 A. B. R. 495, 144 Fed. 543 (D. C. Penn.).

Page 781. *McDonald v. Clearwater R. Co.*, 21 A. B. R. 182, 164 Fed. 1007 (U. S. C. C. Idaho): "Undoubtedly the assignment under consideration (order by bankrupt seller on buyer, accepted by buyer, assigned to bank) was a 'transfer' of 'property.'"

Obiter, Coder v. Arts, 18 A. B. R. 513, 152 Fed. 943 (C. C. A. Iowa): "The transfer specified in Bankr. Act, § 60 (a), includes a mortgage or a lien voluntarily created by the debtor."

§ 1333½. Embezzlements from Bankrupt Corporations.

Where money is embezzled or stolen from a bankrupt corporation, the element of voluntary action on the part of the debtor is lacking, and there is no "transfer," hence no preference.

Instance, though placed rather on ground of lack of reasonable cause for belief on creditor's part, *McNaboe v. Columbian Mfg. Co.*, 18 A. B. R. 684, 153 Fed. 967 (C. C. A. N. Y.).

§ 1334. When "Transfer" Consummated, Where Recording "Necessary."

Page 782, note 331. See, in addition, *First Nat'l Bk. v. Connett*, 15 A. B. R. 662, 142 Fed. 33 (C. C. A. Mo.), quoted at § 1379; also, see post, § 1379; also, contra, *Claridge v. Evans*, *Evans v. Claridge* (Wis.), 118 N. W. 198, quoted at § 1379.

Page 782. *McElvain v. Hardesty*, 22 A. B. R. 320, 169 Fed. 31 (C. C. A. Mo.): "* * * the effect of the transfer to McElvain is to be judged as if made on the 7th day of July, 1905, when it was recorded. If C. & C. were then insolvent and the effect of the enforcement of the transfer was to enable McElvain to obtain a greater percentage of his debt than any other of their simple contract creditors, the transfer constituted a

preference within the meaning of the bankruptcy law. * * * As, for the purposes of this case, the transfer is to be treated as made on the date the agreement was recorded, so the transferee's belief or cause for belief concerning it must relate to that time."

In re Hickerson, 20 A. B. R. 682, 162 Fed. 345 (D. C. Idaho): "By the Amendment of 1903, it is provided that, to constitute a preference, the period during which the transfer is made shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required. The mortgage 'transfer' must therefore be deemed to have been made on the 11th day of February 1907, only five days before the filing of the petition in bankruptcy."

§ 1334¼. Where Recording "Not Necessary."

As noted elsewhere (§§ 1139, 1275, 1373) local or general law, as distinguished from bankruptcy law, determines when a "transfer" shall be considered as consummated where recording is "not necessary." Thus, in the absence of a recording statute to cover the case, general law will control as to the time an assignment of a chose in action will be considered as consummated.

In re Wilson, 23 A. B. R. 814 (D. C. Hawaii): "There is no requirement in the Hawaiian statutes that bills of sale of chattels must be recorded in order to be valid. * * * In view of these facts and considerations, I find that the assignments in question were not complete until notice thereof was given to the county of Kauai, which notice, in both cases, was within four months of the date when the petition for adjudication was filed. But as it appears from all the evidence that the transfers were initiated before the four months began to run, were such transfers preferences under the Bankruptcy Act, § 60a, which makes a transfer by an insolvent person within the four months, a preference? Does the act of the insolvent, in order to make it a preference, require its effectuation by notice according to the above finding? I think not. The transfer is complete when the assignment is made, so far as the assignor can complete it. These transfers, therefore, not having been made within the four months, are not preferences; and this would seem to require the affirmative answer to the submitted question." Quoted also at § 1275.

§ 1334½. Amendment of 1910—Transfer Consummated at Date of Recording.

The Amendment of 1910 to § 60b adopts the date of recording, where recording is required by State law, as the effective date of the consummation of the transfer.

See post, § 1379½. See Bankr. Act, § 60b, as amended in 1910: "If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a prefer-

ence, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

§ 1335. "Procuring or Suffering" Judgment.

Page 782. In re Nusbaum, 18 A. B. R. 598, 152 Fed. 835 (D. C. N. Y.): "When the alleged bankrupt * * * being insolvent, voluntarily confessed judgment in favor of certain of his creditors * * * with the intent to prefer such creditors over his other creditors, and permitted them, as he knew they would and as they did, to issue executions thereon and levy upon and sell all his property by virtue thereof, and put the proceeds of such sale of such property in their pockets in payment and satisfaction of their respective debts, as he knew they would and intended they should, be transferred while insolvent * * * with intent to prefer the creditors in whose favor he confessed such judgments, it was not a sale by him in form, but it was a different mode of disposing of or parting with property, or the possession of property absolutely, and 'as security' first, and second 'as a payment' to such preferred creditors. * * * It was a 'transfer' within the plain definition of the term found in cl. 25 of § 1 of the act."

§ 1336. Warrants of Attorney to Confess Judgment, Continuing Consents.

Page 783, note 337. See, in addition, *Wilson v. Nelson*, 183 U. S. 191, 7 A. B. R. 142.

§ 1337. Debtor's Voluntary Action Not Implied in Cases of Preferences by Way of Judgments.

The debtor's positive action perhaps is not implied in case the preference be by way of legal proceedings. Mere passive nonresistance is all that is requisite.

Page 783, note 338. (Act of bankruptcy, *Bogen & Trummel v. Protter*, 12 A. B. R. 288, 129 Fed. 533 (C. C. A. Ohio); apparently pro but consistent with contra, *Wilson v. Nelson*, 183 U. S. 191, 7 A. B. R. 142.

§ 1338. Payment of Proceeds of Execution Sale to Creditor Sufficient without Debtor's Voluntary Action.

Page 784, note 339. Also, compare, post, § 1478.

§ 1341. Bankrupt's Deposit in Bank.

Page 785, note 341. See also, ante, §§ 1180, 1297; impliedly, *Irish v. Citizens Trust Co.*, 21 A. B. R. 39 (D. C. N. Y.), quoted ante, § 1328; instance of offset of deposit, *Booth v. Prete*, 22 A. B. R. 579, 81 Conn. 636, 71 Atl. 938.

Page 785. *Lowell v. International Trust Co.*, 19 A. B. R. 853, 158 Fed. 781 (C. C. A. Mass.): "Undoubtedly the District Court, in ordering a verdict for the defendant, felt compelled thereto by *New York Bank v. Massey*, * * * We are unable to perceive how we can substantially distinguish the two

cases, * * * The plaintiff calls to our attention *Traders' Bank v. Campbell*, 14 Wall. 87, * * * but that was distinguished in *New York Bank v. Massey*, as follows: * * * 'In *Traders' Bank v. Campbell*, * * * the right of set-off was not relied upon, but a deposit was seized on a judgment which was a preference.' * * * In other words, the bank clearly did not rely at all on its relations to the bankrupt as its customer, but it put itself entirely on its rights as an execution creditor, which rights, as the law then stood, were under the circumstances ineffectual. The plaintiff also urges on us that, in *New York Bank v. Massey*, the bank took no action formally or otherwise, but merely left it to the law to offset the deposit made by the bankrupt against his indebtedness, while in the case at bar we must accept the statement that the defendant charged up its demand loans against the deposit, or, in other words, went through the formalities of certain alleged journal entries. This, however, was ineffectual either way, whether to benefit or prejudice the International Trust Company. It only gave expression to what the law itself would accomplish, that is, it cleaned up the set-off and left it where the law itself would have left it. At law, it takes two parties to accomplish an effectual payment, both a payor and a payee. Sometimes, of course, the law appropriates moneys in payment, or permits the creditor to do it; but that is in consequence of some express or implied understanding between the parties. In such instances an intention on the part of both parties to make payment on some indebtedness underlies what the law accomplishes, and the law is called in only because, while payment is intended, the particular item of indebtedness to which it shall be appropriated is not specifically pointed out. In no sense, however, is a deposit like the deposit here payment, or intended as payment. This is the first condition of the decision in *New York Bank v. Massey*, and a vital one; because, if a deposit in the usual course of business, may be in the nature of a payment, an unlawful preference would necessarily be involved under the circumstances of either *New York Bank v. Massey* or the case at bar, a suggestion of a possibility which the Supreme Court was compelled to negative."

Page 785. But where the deposit was itself made precisely for the purpose of permitting checks to be drawn to create preferences, the situation would be different.

Irish v. Citizens Trust Co., 21 A. B. R. 39 (D. C. N. Y.).

Likewise,* where a bank, being the largest creditor, acted as agent of a lender who loaned the insolvent money, which was deposited in the bank and later "offset" or appropriated by the bank, the loan being on a demand note, a chattel mortgage given to the lender at the time has been held voidable as a preference.

In re Lynden Mercantile Co., 19 A. B. R. 444, 156 Fed. 713 (D. C. Wash.).

§ 1342. Sixth Element of Preference.

Page 785, note 342. *Naylon & Co. v. Christiansen Co.*, 19 A. B. R. 789, 158 Fed. 290 (C. C. A. Mich.); *Tumlin v. Bryan*, 21 A. B. R. 319, 165 Fed. 166 (C. C. A. Ga.); *In re Lynn Camp Coal Co.*, 22 A. B. R. 60, 168 Fed. 998 (D. C. Ky.); *In re Neill-Pinckney-Maxwell Co.*, 22 A. B. R. 401, 170 Fed. 481 (D. C. Pa.); *Taylor v. Nichols*, 23 A. B. R. 310, 134 App. Div. (N. Y.) 787; *Harder v. Clark*, 23 A. B. R. 756 (City Court of New York).

§ 1343. Definition of Insolvency under Present Act.

Page 787, note 344. See, in addition, *In re Crenshaw*, 19 A. B. R. 502, 156 Fed. 638 (D. C. Ala.); *Tumlin v. Bryan*, 21 A. B. R. 319, 165 Fed. 166 (C. C. A. Ga.); *Harder v. Clark*, 23 A. B. R. 756 (City Court of New York).

§ 1344. Property Fraudulently Disposed of, Not to Be Counted as Assets.

Page 788, note 346. Inferentially, *Acme Food Co. v. Meier*, 18 A. B. R. 550, 153 Fed. 74 (C. C. A. Mich.); *In re Crenshaw*, 19 A. B. R. 502, 156 Fed. 638 (D. C. Ala.); to same effect in fraudulent transfer cases, *Phillips Tr. v. Kleinman*, 23 A. B. R. 266 (Pa. Com. Pleas).

Page 788. The transfer may itself create the insolvency.

Phillips, trustee, v. Kleinman, 23 A. B. R. 266 (Pa. Com. Pleas). Compare, ante, § 1218½.

Page 788. But property which might be, but is not, claimed by third parties to be recoverable by them as having been transferred to the bankrupt in fraud of such third parties' rights, is not to be excluded.

In re Aschenbach Co., 23 A. B. R. 95, 174 Fed. 396 (C. C. A. N. Y.).

§ 1345. But Equity of Redemption Counted, if Fraudulent Conveyance by Way of Security.

Page 788. *Acme Food Co. v. Meier*, 18 A. B. R. 550, 153 Fed. 74 (C. C. A. Mich.): "Upon the issue that these conveyances were intended as preferences and, therefore, acts of bankruptcy under subdivision 2 of § 3 of the act it was admissible to show that these deeds were intended only as securities and the value of the equity of redemption at the date of each such conveyance. In *Lansing Boiler Works v. Ryerson*, cited above, we held that the interest of a mortgagor might be taken into account in determining whether when the mortgage was made insolvency existed so as to constitute the security a preference. * * * Thus construed, there was no error in directing the jury to estimate the value of the equity of redemption in determining solvency at the date of each such conveyance. We know of no authority which will justify the exclusion of equitable interests belonging to a debtor when we come to the question of his solvency or insolvency in a bankrupt proceeding."

§ 1346. Property Preferentially Conveyed as Security Not to Be Excluded.

Page 788, note 349. See, in addition, *Acme Food Co. v. Meier*, 18 A. B. R. 550, 153 Fed. 74 (C. C. A. Mich.).

§ 1347. Exempt Property Counted.

Page 788, note 350. See, in addition, *In re Crenshaw*, 19 A. B. R. 502, 156 Fed. 638 (D. C. Ala.).

§ 1348. Partnership Not Insolvent, unless All Parties Insolvent.

Page 789. *Tumlin v. Bryan*, 21 A. B. R. 319, 165 Fed. 166 (C. C. A. Ga.): "And besides, we find no evidence showing what property was owned by

the individual members of the bankrupt firm in July, 1906. * * * As each member of the partnership is liable individually for the partnership debts, it seems to follow that, to show such insolvency as to entitle the trustee to recover, the insolvency of the members of the firm should be proved. If a condition exists whereby all diligent creditors may obtain payment in full, it seems useless and unjust to sustain a suit against a defendant who has only collected what was due to him. It is true that a partnership may be treated as an entity, separate from its individual members, for the purpose of its adjudication as a bankrupt * * * but, in a suit to recover a preference, it is not only the insolvency of an intangible entity, but the insolvency of its responsible component parts, that lies at the foundation of the right to relief. If the component parts of the firm may be made to pay the firm's debts, the suit lacks reason and substance, and it cannot be held that the defendant has obtained a greater percentage of his debt than other creditors of the same class. If the members of the firm are solvent, all creditors may be paid in full. If the individual members of the partnership are not shown to be insolvent at the date of the payments, the preference is not voidable."

§ 1350. "Fair Valuation" Not Value at Sacrifice Sale.

Nor may such valuation be what the assets actually brought at the sale by the trustee in bankruptcy.

Rutland Co. Nat. Bk. *v.* Graves, 19 A. B. R. 446, 156 Fed. 168 (D. C. Vt.).

§ 1351. Market Value, as "Fair Valuation."

Page 790, note 355. The market value, the value which the bankrupt itself could have gotten for the assets, is the "fair" valuation, so it is held in *In re Marine Iron Works*, 20 A. B. R. 390, 159 Fed. 753 (D. C. N. Y.).

§ 1353½. "Good Will" as an Asset.

Doubtless "good will" is an asset which may be taken into account in arriving at "fair valuation;" indeed, such may often be the chief asset. However, its value is very difficult, ordinarily, to determine, and great abuse is likely to creep into an estimate of it.

Compare, *M'Elvain v. Hardesty*, 22 A. B. R. 320, 169 Fed. 31 (C. C. A. Mo.): "The trial court also allowed a recovery of the sum of \$600 for the good will of the business of C. & C., claimed to have been transferred to McElvain. Without expressing any opinion as to when and under what circumstances, if at all, the good will of a business may be 'property' within the meaning of § 60a and b of the Bankruptcy Act, we content ourselves by stating the conclusion reached that, if the saloon ever had any good will of value known to the law, it had been utterly destroyed by the methods pursued and the results achieved by the bankrupts and McElvain during the seven months of their relationship to it. The evidence satisfies us that there was no good will of value at the time of the transfer, and that the allowance of anything in favor of the trustee on that account was erroneous."

§ 1359. Referee's Allowance of Claims, Whether Admissible.

This involves quite a different principle from that of the admissibility of the proofs of debt filed by the various creditors.

Compare, *Jacobs v. United States*, 20 A. B. R. 550, 161 Fed. 694 (C. C. A. Mass.), quoted at § 2329¾.

§ 1362. Adjudication of Bankruptcy as Res Adjudicata on Question of Insolvency.

Page 793, note 371. See *Whitwell, Trustee, v. Wright*, 23 A. B. R. 747 (N. Y. Sup. Ct. App. Div.), but this case is not to be commended for its reasoning.

§ 1364. Date of Insolvency and "Fair Valuation," Date Immediately Preceding Transfer.

Amendment of 1910.—The amendment of 1910 to § 60 (b), expressly brings down to the date of transfer, or, to the date of recording where recording is "required," the proof of the insolvency.

See Bankruptcy Act, § 60 (b), as amended in 1910.

§ 1364½. Date, Where Recording Necessary.

McElvain v. Hardesty, 22 A. B. R. 320, 169 Fed. 31 (C. C. A. Mo.): "The effect of the transfer to McElvain is to be judged as if made on the 7th day of July, 1905, when it was filed for record. If C. & C. were then insolvent, and if the effect of the enforcement of the transfer was to enable McElvain to obtain a greater percentage of his debt than any other of their simple contract creditors, the transfer constituted a preference within the meaning of the bankruptcy law. * * * As, for the purposes of this case, the transfer is to be treated as made on the date the agreement was recorded, so the transferee's belief or cause for belief concerning it must relate to that time."

Where the transfer is made by means of an instrument which the State law requires to be recorded in order that it may be effective against levying creditors, the date at which the insolvency must be proved to have existed is, doubtless, the date of such recording, for not until recording is there an effective transfer, as against other creditors, under State law.

§ 1366. Whether Contingent Liabilities Counted in Determining Insolvency.

It does not appear to have been finally settled, however, whether contingent liabilities, as distinguished from debts owing but not yet due, are to be included in the computation.

Where the bankrupt is a surety or guarantor, the obligation is to be counted as a liability; and such has been the holding even where the

guaranty is oral, the fact that it is not in writing affecting merely the proof, not the validity.

Huttig Mfg. Co. v. Edwards, 20 A. B. R. 349, 160 Fed. 619 (C. C. A. Iowa): "A surety or indorser for a bankrupt has been held to be a creditor within the meaning of the bankruptcy law * * * and upon the same principle a guarantor liable upon a fixed liquidated demand as this was, is a debtor to him who holds it, and his liability is to be counted in determining his financial status. That the guaranty may have been oral and therefore within the statute of frauds of Iowa where the transaction occurred is immaterial. The Iowa statute relates merely to the evidence or proof of the undertaking, and not to its validity."

§ 1367. Seventh Element of a Preference.

Page 794, note 376. See, in addition, *Tumlin v. Bryan*, 21 A. B. R. 319, 165 Fed. 166 (C. C. A. Ga.), quoted at § 1277, note; *Allen v. Gray*, 21 A. B. R. 828 (N. Y. Sup. Ct.).

§ 1368. Preferences Obtained before Four Months, Not Voidable.

Page 794, note 377. See, in addition, *Manning v. Patterson*, 19 A. B. R. 224, 156 Fed. 111 (D. C. N. J.); *Allen v. Gray*, 21 A. B. R. 828 (N. Y. Sup. Ct.).

§ 1370. Agreements for Liens or for Other Transfers Not Effective until within Four Months, Voidable.

Page 795. Agreements for liens or for other transfers, made before the four months period, or at the time of the passing of the original consideration, but not effective until within the four months period are voidable as preferences, if the other elements of a preference co-exist.

"Equitable assignment," found to be merely a promise to pay a debt when in receipt of certain expected funds, *Speckman v. Smedley*, 18 A. B. R. 717, 153 Fed. 771 (D. C. A. Pa., affirmed in 19 A. B. R. 694, sub nom. *Smedley v. Speckman*).

Page 796, note 380. See, in addition, *In re White*, 22 A. B. R. 200 (Ref. R. I.). Apparently contra, [1867] *In re Jackson*, 15 Nat. Bankr. Reg. 431; apparently contra, [1867] *Burdock v. Jackson*, 15 Nat. Bankr. Reg. 318; apparently contra, [1867] *Douglass v. Vogeler*, 12 Nat. Bankr. Reg. 493, Fed. Cas. No. 5271.

Under the law of 1867, on the basis that the assignee in bankruptcy stood in the bankrupt's shoes, and that equity would consider that done which was intended to have been done, it was held that an agreement to execute a chattel mortgage not executed at the time of the original consideration but executed within the four months period, if not purposely withheld from execution, was valid. *In re Jackson*, 15 N. B. Reg. 438; *Burdock v. Jackson*, 15 N. B. Reg. 318; *Douglass v. Vogeler*, 12 N. B. Reg. 493, Fed. Cas. No. 5271.

Thus, agreements at the time of making a loan or sale, to give a mortgage later, not executed until within the four months period, are voidable.

Page 797. In re Smith (preference as act of bankruptcy) 23 A. B. R. 864, 176 Fed. 426 (D. C. N. Y.): "So, if the giving of the mortgage or deed was within the four months and the effect will be as stated in § 60, and the one receiving it had reasonable cause to believe a preference was intended, the fact that it was executed and delivered within the four months in execution of a prior oral agreement to execute it does not change the result or prevent the transfer being held a preference."

Obiter and merely inferentially, Page *v. Rogers*, 21 A. B. R. 496, 211 U. S. 575: "It is further said that I. B. Merriam agreed in writing, on November 15, 1902, to convey the coal lands to Thomas Merriam in satisfaction of the debts due to him or for which he was liable. It is, therefore, argued that, as the conveyance, on June 1, 1903, was in performance of this agreement, which antedated the bankruptcy proceedings by more than four months, it cannot be regarded as a preference. The facts, however, do not raise the question which was argued. Upon a proper interpretation of the evidence we need not determine whether an insolvent debtor may make an agreement to convey a substantial portion of his assets to a favored creditor, keep that agreement secret for more than four months, and then execute it in fraud of the rights of his other creditors, in favor of a creditor who then has reasonable cause to believe that he is receiving a preference. * * * The trust deed was not delivered unconditionally, and the parties to it intended that it should go into effect as a lien only when it was registered, which was never done. The instrument, though actually written, was never delivered as a present, valid, and subsisting obligation. It was executed and held in the possession of the grantor, to be delivered and to become operative as a conveyance at some future time, which never arrived. It was written and held ready for instant use, but never actually used until brought forward to excuse a payment which otherwise would be an unlawful preference. In other words, the paper was not as much as an unrecorded deed; it was not a deed at all."

Page 797, note 381. Compare, *Speckman v. Smedley Bros.*, 18 A. B. R. 717, 153 Fed. 771 (D. C. Pa.): "There was some loose testimony about an 'arrangement' by which the defendants were to be paid their full claim of \$5,400 when the United States paid the final balance due to the bankrupt, but it is clear that no definite amount was agreed upon that the 'arrangement' was not recognized by the United States; and that the bankrupt never lost his control over the fund. Evidently, the bankrupt merely promised to pay the defendants when he received this balance, and the disbursing officer of the government merely promised to notify the defendants when the settlement was to be made, so that they might be present at that time. A check for \$5,000 was made payable to the bankrupt, who refused to pay more, and it is, I think, quite clear that the 'arrangement' was nothing more than the usual promise of a debtor to pay when he shall be in funds, followed by the creditor's effort to hold him up to his promise, and by the debtor's effort to get off with as small a payment as possible. Such an 'arrangement' falls short of being an enforceable equitable assignment. When the defendants really set out to obtain a valid assignment, the testimony in reference to another claim against the bankrupt shows that they knew what they needed."

Page 797. *Smedley v. Speckman*, 19 A. B. R. 694, 157 Fed. 815 (C. C. A. Pa.): "This testimony falls far short of evidencing the absolute appropriation by the assignor of the fund sought to be assigned, which is a funda-

mental requisite of a valid assignment, nor is there any evidence of that surrender by the assignor of all control over the fund that the law requires. A mere promise, though of the clearest and most solemn kind, to pay a debt out of a particular fund, is not an assignment of the fund, even in equity. To make an equitable assignment, there should be such an actual or constructive appropriation of the subject-matter as to confer a complete and present right in the party meant to be provided for, even where the circumstances do not admit of its immediate exercise. If the holder of the fund retain control over it, it is fatal to the claim of the assignee. "The transfer must be of such a character, that the fund holder can safely pay, and is compellable to do so, though forbidden by the assignor." *Christmas v. Russell*, 14 Wall. 69, 20 L. Ed. 762."

Page 798, note 385. *Contra*, *In re Automobile Livery Service Co.*, 23 A. B. R. 799, 176 Fed. 792 (D. C. Ala.), quoted at § 1372.

Page 798, note 386. See *ante*, §§ 1150, 1253.

Page 799. Likewise, an agreement entered into within the four months to give a lien or make any other transfer, not acted upon until later, may constitute a transfer as of the date of the actual fulfillment of the agreement and be a preference within four months.

See *ante*, § 1326½.

Vitzthum v. Large, 20 A. B. R. 666, 162 Fed. 685 (D. C. Iowa): " * * * if it was transferred to the bank within the four months immediately preceding the bankruptcy, to apply upon a prior debt of the bankrupt, though in pursuance of an agreement made with him prior to said four months that he would do so, it would seem to fall within the rule held by the Court of Appeals, in *Long v. Farmers Bank* (*supra*) and *In re Great Western Mfg. Co.* (*supra*)."

Page 800. But where there exists a bona fide contract of purchase of the entire output of the bankrupt's lumber mill, the delivery of lumber thereunder, within the four months, and when the seller was known to be insolvent, is not a preference, even though part of the purchase had greatly been advanced.

Mills v. Virginia-Carolina Lumber Co., 20 A. B. R. 750, 164 Fed. 168 (C. C. A. N. Car.).

Again, the mere transmitting of actual possession within the four months where there has been a previous sufficient setting apart (though on the debtor's own premises), to constitute a pledge or mortgage or declaration of trust before the four months, will not bring the "transfer" within the four months period.

Sexton v. Kessler & Co., 21 A. B. R. 807, 172 Fed. 535 (C. C. A. N. Y.): " * * * it [the Supreme Court] also states this underlying and controlling distinction: The exercise of a pre-existing right well founded in equity is not a preference, although occurring within the prescribed period; 'the bald creation of a lien within four months' is a preference. The application of the principle involved in this distinction is decisive here in favor of the Manchester house. It had an equitable right to the securities which

were held 'in escrow' for its benefit, its rights and equities were created years before the bankruptcy; it could at any time have enforced its right to the possession of the securities; no element of fraud and no intervening rights of purchasers or attaching creditors appear; the securities were not property, the possession of which would be visible to third persons and afford a basis of credit. It is my opinion that possession was taken pursuant to a pre-existing right, and that equitable principles support such right. I think that this is in no aspect a case of the bald creation of a lien within four months of bankruptcy. The case of *Zartman v. First National Bank*, 189 N. Y. 273, 19 Am. B. R. 27, * * * is not in conflict with these views. In that case there was merely a contract to give a mortgage upon after-acquired property. There was no lien which could have been enlarged or perfected by taking possession."

Page 800. And where the transaction is a present lien and not an agreement to give a lien it will be supported, so far as this element of a preference is concerned.

Compare, *In re First Nat'l Bk. of Louisville*, 18 A. B. R. 766, 155 Fed. 100 (C. C. A. Ky.).

§ 1370¼. Ratification within Four Months of Prior Ineffectual Transfer.

Perhaps the ratification, within the four months, of a prior ineffectual transfer would follow the same principle, for the title is not actually parted with until within that period, and the doctrine of reverter to the original date is no stronger, as against creditors, than in the case of agreements for liens. However, this point has not clearly been decided as yet.

See ante, § 1326¾.

§ 1370½. Assignment of Accounts before but Collections within Four Months.

Where an assignment of accounts was made by an insolvent debtor to a creditor before the four months period, the transaction will not be a preference because of the fact that the accounts are collected within the four months period.

Lowell v. International Trust Co., 19 A. B. R. 853, 158 Fed. 781 (C. C. A. Mass.): "One of the counts of the declaration is based on the receipt by the International Trust Company within four months of the filing of the petition in bankruptcy, of funds coming from certain accounts which had been assigned to it before that period commenced. It is difficult to perceive on what ground this claim rests, because the substantial rights of the parties were fixed at the time the assignment was made, and the collections were only incidents thereof."

§ 1371. "After-Acquired Property" Taken Possession of by Mortgagee within Four Months.

Page 800, note 389. In *Rhode Island* an equitable lien or charge upon

after-acquired property arises as soon as the property is acquired, *In re Chantler Cloak & Suit Co.*, 18 A. B. R. 498, 151 Fed. 952 (D. C. R. I.).

But compare, *In re White*, 22 A. B. R. 200 (Ref. R. I.).

§ 1372. **Equitable Liens Not Requiring to Be Recorded, Good.**

Page 801, note 390. **Equitable Lien Defined.**—*In re Max Goldman*, 23 A. B. R. 497, 174 Fed. 579 (C. C. A. Ohio), quoted at § 1878.

See ante, §§ 1150, 1253, 1253½, 1298, 1370; compare, § 1146.

Compare, as to "equitable assignment," *In re Faulhaber Stable Co.*, 22 A. B. R. 381, 170 Fed. 68 (C. C. A. N. Y.), wherein it was held that a receipt given to an auctioneer for moneys advanced to the owner and for expenses incurred and authorizing the auctioneer to deduct the same from the proceeds of sale did not constitute an equitable assignment, where the auction sale never took place and the actual sale was made several months afterwards by the trustee in bankruptcy, the court saying: "It is quite plain that the petitioner had no right in the chattels as pledgee, because there was no change of possession, nor as mortgagee, because no mortgage was filed, as is required by § 90 of the Lien Law (chapter 418, p. 536, Laws N. Y. 1897), regulating chattel mortgages. Nor had it any equitable lien on the actual proceeds of sale. If the authority given in the receipt to the petitioner to deduct the advances from the proceeds of sale could be construed as assignment cognizable in equity, rather than as a promise to pay to be enforced at law, still no such fund ever came into existence. The actual sale was made six months later by order of a different person, viz., the trustee, through another auctioneer. If it were within the power of a court of equity to impress the proceeds of sale *inter partes* with an equitable lien, such a power would not be exercised to the prejudice of creditors. In bankruptcy, equality is equity."

Also compare, *In re Farmers Supply Co.*, 22 A. B. R. 460, 170 Fed. 502 (D. C. Ohio). Also compare, where an equitable assignment was upheld, *Godwin v. Murchison Nat'l Bk.*, 22 A. B. R. 703, 145 N. Car. 320.

Compare, as to "equitable" liens, *Warehousing Co. v. Hand*, 16 A. B. R. 63, 143 Fed. 32 (C. C. A. Wis., affirmed sub nom. *Security Warehousing Co. v. Hand*, 19 A. B. R. 291, 206 U. S. 415); also, *Fourth St. Nat'l Bk. v. Millbourne Mills Co.*, 22 A. B. R. 442, 172 Fed. 177 (C. C. A. Pa.), quoted at § 1146.

On the other hand, equitable liens not required to be recorded, made by oral or written contract on present consideration, or before the four months period, upon choses in action or other property, may be good although actual delivery to the creditor be not made until within the four months period, even if there be not the equivalent of a delivery.

Compare, to same effect, *Hanson v. Blake*, 19 A. B. R. 325, 150 Fed. 342 (D. C. Me.).

Page 802. Such was the holding where a New York house had set apart in its own vaults securities in favor of a foreign concern as a basis for drafts, with the stipulation to keep the amount of them continually good, by substitution, and then, within the four months

before its bankruptcy and under circumstances indicating plainly to the foreign concern that disaster was impending, had delivered the securities to the foreign concern, part of the court so holding on the theory that a declaration of trust had been made by the New York house, the remainder of the court on the theory that the securities had been both pledged and mortgaged and that the sending of the securities to the foreign house within the four months period did not create a lien but merely enlarged or perfected one already pre-existent.

Sexton v. Kessler & Co., 21 A. B. R. 807, 172 Fed. 535 (C. C. A. N. Y.), quoted at § 1372.

Such also was the holding as to an oral agreement made before the four months period that the bankrupt's timber and timber contracts should stand as security for advances and supplies, and the equitable lien so created was held to attach also to the proceeds of sale.

Goodnough Stock Co. v. Galloway, 22 A. B. R. 803, 171 Fed. 940 (D. C. Ga.).

The giving of a mortgage within the four months period for a pre-existing debt, in pursuance of an agreement to give it made anterior to the four months period and at the time the debt was created, cannot be sustained on the doctrine of an "equitable lien" succeeded by a mortgage, where the other elements of a preference exist.

In *re White*, 22 A. B. R. 200 (Ref. R. I.). Also, see ante, § 1370.

It has been sought to express the doctrine of the consummating of equitable liens within the four months period as follows: The exercise of a pre-existing right, well founded in equity, is not a preference, although occurring within the prescribed period, it being the "bald assertion" of a lien within the four months that is a preference.

Sexton v. Kessler & Co., 21 A. B. R. 807, 172 Fed. 535 (D. C.): "While the Supreme Court in the cases referred to treats the validity of the mortgages and the rights of the mortgagees thereunder to be matters of local law, in my opinion it also states this underlying and controlling distinction: The exercise of a pre-existing right well founded in equity is not a preference, although occurring within the prescribed period; 'the bald creation of a lien within four months' is a preference."

In *re Automobile Livery Service Co.*, 23 A. B. R. 799, 176 Fed. 792 (D. C. Ala.): "If the decisions of the State court hold transactions to create valid liens in cases in which delivery is made subsequent to the agreement to give the lien but before the right of intervening creditors has been fastened upon the property, the delivery of the property, under such circumstances, will not constitute an illegal and voidable preference under the bankruptcy law. * * * In view of the principle asserted by these cases, it seems to me that the exercise of the right to take possession of the pledged property, within the four months, did not constitute an illegal preference, because it was done pursuant to a valid agreement to pledge

for which a present consideration moved to the bankrupt, and therefore related back to such agreement, except as against intervening claimants who had perfected liens on the pledged property in the interim, of whom there were none."

§ 1373. State Law Governs as to Time Agreements for Liens, and Taking of Possession or Recording or Acquisition of Property Take Effect as Liens or Other Transfers.

Page 802, note 391. See, in addition, *In re Newton*, 18 A. B. R. 567, 153 Fed. 841 (C. C. A. Ark.), quoted at §§ 1263, 1381; *In re Reynolds*, 18 A. B. R. 666, 153 Fed. 295 (D. C. Ark.), quoted on other points at §§ 1246½, 1381. Compare discussion in *Hanson v. Blake*, 19 A. B. R. 325, 150 Fed. 342 (D. C. Me.).

Compare, *In re Automobile Livery Service Co.*, 23 A. B. R. 799, 176 Fed. 792 (D. C. Ala.), quoted at § 1372, wherein the court applies the doctrine of § 1373 in such a way as to make a mere agreement to give a pledge, not consummated by delivery until within the four months, "revert" to the date of the agreement, which, it is considered by the author, is a misapplication of the principle.

Likewise, it governs as to the time the lien attaches to after-acquired property.

In re Chantler Cloak & Suit Co., 18 A. B. R. 498, 151 Fed. 952 (D. C. R. I.): "The latter case [*Thompson v. Fairbanks*, *supra*] also decides that, on the question of the validity of a mortgage upon after-acquired property, the federal court will follow the decisions of the State court. Under Rhode Island decisions, an equitable lien or charge upon the after-acquired property arose as soon as the property was acquired."

Compare, *Hanson v. Blake*, 19 A. B. R. 325, 150 Fed. 342 (D. C. Me.).

§ 1377. Preferences Made after Filing Petition if before Adjudication.

Page 803, note 397. Compare, peculiar facts in *Pratt v. Columbia Bank*, 18 A. B. R. 406, 157 Fed. 137 (D. C. N. Y.), wherein the transfer was made after a void petition in involuntary bankruptcy had been filed and before a supplemental valid one was filed.

§ 1379. Preferences as Affected by Recording.

Page 804, note 400. Bankr. Act, § 60 (a). Compare, *ante*, §§ 1334, *post*, § 1507.

Page 807. Compare, suggestively and obiter, *Page v. Rogers*, 21 A. B. R. 496, 211 U. S. 575 (reversing on other grounds *Rogers v. Page*): "The facts, however, do not raise the question which was argued. Upon a proper interpretation of the evidence we need not determine whether an insolvent debtor may make an agreement to convey a substantial portion of his assets to a favored creditor, keep that agreement secret for more than four months, and then execute it in fraud of the rights of his other creditors, in favor of a creditor, who then has reasonable cause to believe he is receiving a preference."

Proof of insolvency, reasonable cause of belief and of all the other elements of a voidable preference, should be made as of the date of the recording—the date of the “transfer.”

See ante, § 1334. To same effect before the Amendment of 1903, obiter, *Matthews v. Hardt*, 9 A. B. R. 373, 76 N. Y. Supp. 134, quoted at § 402, note.

Page 808. In re *Hickerson*, 20 A. B. R. 682, 162 Fed. 345 (D. C. Idaho): “The mortgage was not recorded for nearly a year after it was executed and delivered and then just a few days before the petition in bankruptcy was filed. * * * Does the mortgage transaction, as disclosed by the record, constitute a preference under § 60a of the Bankruptcy Act? By the Amendment of 1903 * * * it is provided that, to constitute a preference, the period during which the transfer is made shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required. The mortgage ‘transfer’ must therefore be deemed to have been made on the 11th day of February, 1907, only five days before the filing of the petition in bankruptcy. *Humphrey v. Tatman*, 198 U. S. 91, 14 Am. B. R. 74.”

McElvain v. Hardesty, 22 A. B. R. 320, 169 Fed. 31 (C. C. A. Mo.): “* * * the effect of the transfer to McElvain is to be judged as if made on the 7th day of July, 1905, when it was filed for record. If C. & C. were then insolvent, and if the effect of the enforcement of the transfer was to enable McElvain to obtain a greater percentage of his debt than any other of their simple contract creditors, the transfer constituted a preference within the meaning of the bankruptcy law. * * * As, for the purposes of this case the transfer is to be treated as made on the date the agreement was recorded, so the transferee’s belief or cause for belief concerning it must relate to that time.”

First Nat’l Bk. v. Connett, 15 A. B. R. 662, 142 Fed. 33 (C. C. A. Mo.): “The bankrupt was insolvent when he executed the mortgages and when they were recorded. The mortgages constituted a transfer of his property, and their effect was to enable the bank to obtain a greater percentage of its claims than other creditors. They were recorded within four months of the filing of the petition in bankruptcy. Therefore, assuming that a recording is required by the law of Missouri, it follows that a preference arose under § 60 (a). And, in our opinion, it also follows that the preference arose when the mortgages were recorded and not as of the date they were given. In other words, the Amendment of 1903 was intended to remedy the evil resulting from secret instruments of transfer of the bankrupt’s property, the withholding of them from record until shortly before the institution of bankruptcy proceeding, and the then assertion of them as of the prior date of their execution and delivery. And this was accomplished by making the rights of a creditor thus favored determinable by the conditions existing when he caused the transfer to him to be recorded as required by the State law rather than by those existing at the time he secured it. Under the Act of 1867 not only the question of requirement to record a chattel mortgage, but also the effect of noncompliance therewith, were exclusively controlled by the law of the State. The same construction has been applied to the original Act of 1898. Unless there has been some departure from this construction in its relation to voidable preferences, the Amendment of 1903 of § 60 (a), upon which subdivision ‘b’ thereof depends, is wholly without significance. Contrary to

a presumed intent in legislative amendments it serves no purpose and performs no office whatever. Such result can be reasonably avoided by this construction of the amendment: It affects only those instruments of transfer which the State law requires to be registered or recorded; and, as to those, where there is delay, it provides that upon the question of voidable preference they shall speak as of the day of compliance with the local law and not as of the day they were given. This would preclude the application of the doctrine of relation, and it would entail a consequence upon a failure to record that might not be imposed by the law of the State; but we deem it to be not only within the letter of the amendment, but also within the intention to correct an evil which flourished under the construction of the original act."

But see, *contra*, *Claridge v. Evans* and *Evans v. Claridge* (Wis.), 118 N. W. 198.

§ 1379½. Amendment of 1910.

Section 60b, relating to preferences created by instruments requiring recording, was amended in 1910, so as to make the date of the recording, wherever recording is required, to be the date at which all the various elements of the preference are to be proved.

As the law stood, even after the Amendment of 1903, as that amendment was construed in many jurisdictions, the debtor might, if solvent at the time, or if presently passing consideration had been then received, have given a chattel mortgage or other lien upon his property requiring recording or registering by the State law, and the creditor receiving it might have kept this lien off the record for months or even years (if not done by collusive agreement) and have filed it within a few days of bankruptcy, and yet the lien would have been held perfectly good, the courts, under these rulings, having declared that the insolvency of the debtor, the existence of a pre-existing debt, and all the other elements of the preference were to be determined as of the date of the transfer between the parties. The Amendment of 1903, by declaring the four months period should not begin to run until the date of the recording, where the recording was "required" by state law, evidently attempted to make the date of the recording in such instances the date at which the existence of insolvency, of a pre-existing consideration, of "reasonable cause for belief" and of all the other elements of the preference, should be taken. Nevertheless, the Amendment of 1903 did not effectually accomplish this object. As the amended law was construed, even if the recording were not done until within the four months period, on the very eve, maybe, of bankruptcy, yet if at the time of the original transfer, which might have occurred a year beforehand, the debtor was solvent, or the lien have been given upon a then presently passing consideration, the transfer was held not to be voidable as a preference, the date of the "transfer" under any theory always being necessarily the date at which all the elements of the preference must be proved to have existed.

The confusion is to be explained in this way: There are, in reality, two times of transfer in such cases. As between the transferrer and transferee, obviously the time of the transfer is the time of the original execution and delivery of the instrument to the grantee or transferee, regardless of its registration; but as to creditors, or the rest of the outer world, the "transfer" is, by the policy of the State recording statutes, not a complete "transfer" at all until recorded, until delivery to the public recorder—then, and not until then, the debtor signifying to outside parties, to all others who might become interested in his assets, the effectual separation of the lien property from the rest of his assets. This, it must be conceded, is the basic principle upon which rest the recording statutes of the different States. It is also the basic principle of the right to legislate against secret liens. Likewise, in a rightly constructed bankruptcy preference statute, the great object should be to make clear that the "transfer," so far as outside parties becoming interested in the estate are concerned, is not complete or perhaps is not even to be considered a "transfer" at all, in cases where State laws require recording as against creditors, until delivery of the instrument to the recorder for registration.

Report No. 691 of Senate Judiciary Committee of the 61st Congress, Second Session.

Page 808. In re Wilson, 23 A. B. R. 814 (D. C. Hawaii): "There is no requirement in the Hawaiian statutes that bills of sale of chattels must be recorded in order to be valid. The old common law that a bill of sale of chattels was fraudulent and void unless followed by the delivery of the property, is now so modified that continued possession by the vendor only raises a presumption of fraud. Such presumption is removed by registration. The principle of law as found in the rule of the common law and the practice under statutes of registration, appears to be that some kind of public notice is essential in all transfers of property so far as the interests of third parties are concerned. Such notice may be by delivery of the chattels or registry of the bill of sale, or, in the case of transfers of real property, by registration of the conveyance. The transfer of a chose in action or any other property to a creditor is a matter of interest to other creditors, who are likely to be closely watching the course of events in the business of the debtor and who may be prejudiced through ignorance of such a transaction; for instance, through failing to file a petition for adjudication within four months thereafter, where there is insolvency."

Under the decisions, even after the Amendment of 1903, before the Amendment of 1910, creditors were required to prove that, at the time of the "transfer" (that is to say, the transfer between the parties) perhaps several years beforehand, the debtor was then insolvent, the debt was then a past, a pre-existing debt, which was a practical impossibility, indeed, an unreasonable requirement, since it is always the present insolvent fund of the debtor that is rightly involved and not some ancient fund existing years beforehand.

The Amendment of 1910 makes the date of the recording, where recording is required under State law, the date at which the creditor is to prove the existence of all the elements of a preference—truly the right date, for, as above noted, it is the present insolvent fund with which creditors are concerned, not the debtor's estate in the condition which might have existed several years beforehand.

Report No. 691 of Senate Judiciary Committee of the 61st Congress, Second Session.

In cases of preferences effected by instruments required to be recorded but which are not recorded at all, the date of the effective "transfer" becomes immaterial as to property in the custody or coming into the custody of the bankruptcy court, since, as to such property, the Amendment of 1910 to Bankr. Act, § 47a (2), gives the trustee the rights of a levying creditor, whereby such lien is avoided without proof of its being a preference. However, preferences effected by instruments requiring to be recorded but which are not recorded at all, where the property concerned does not come into the custody of the bankruptcy court, must still be proved to have been preferences at the date of the transfer between the parties, except where the State law does not require actual seizure of the property but is satisfied with the existence merely of a creditor holding an execution returned unsatisfied; in which latter event the unrecorded lien may be void by operation of Bankr. Act, § 47 (a) (2), as amended in 1910.

Compare, phraseology of Bankr. Act, § 60b, as amended in 1910.

§ 1380. Where Recording, etc., Not "Required," Preference Dates from Actual Transfer.

Page 808, note 407. **Whether Assignment of Real Estate Mortgage "Required" to Be Recorded.**—In re Coffey, 19 A. B. R. 148, (Ref. N. Y.); In re Wilson, 23 A. B. R. 814 (D. C. Hawaii); *Mattley v. Wolfe*, 23 A. B. R. 673, 175 Fed. 619 (D. C. Neb.). Also, see ante, §§ 1139, 1232, 1275, 1334½. This rule is not changed by the Amendment of 1910 to Bankruptcy Act, § 47 a (2).

§ 1381. Whether, Where Not "Required," Preference Dates from Taking of Notorious and Exclusive, etc., Possession.

Page 808. In re Newton & Co. (*Swofford v. Bryant*), 18 A. B. R. 567, 153 Fed. 841 (C. C. A. Ills.): "And further that, under the doctrine obtaining in Arkansas, it would have remained such owner even had an assignee in insolvency of the vendee first secured possession of them. There is no law in Arkansas requiring a contract of conditional sale to be filed or recorded in any public office. Notwithstanding the views which this and other courts have at times entertained as to the effect of an adjudication in bankruptcy, and the right and title of the trustee resulting therefrom, it has been definitely settled by the Supreme Court that the trustee is vested with no better right or title than belonged to the bankrupt; that

he stands simply in the shoes of the bankrupt, and as between them he has no greater right. *York Mfg. Co. v. Cassell*, 201 U. S. 344, 15 Am. B. R. 633. The right of appellant in this case did not first come into existence when it took possession of the property in controversy on the eve of the bankruptcy proceedings. On the contrary, it was secured by the contract which was executed almost a year before, and it is that date which we must regard rather than the date when possession was taken." Quoted further at § 1263.

Page 810. In *re Reynolds*, 18 A. B. R. 666, 153 Fed. 295 (D. C. Ark.): "It was held by the United States Court of Appeals for the Seventh Circuit in *In re Antigo Screen Door Company*, 10 Am. B. R. 306, 123 Fed. 249, that in the absence of fraud such a mortgage is valid under the laws of Wisconsin, as against the trustee under the Bankrupt Act of 1898. An examination of the cases cited in that opinion will show that other courts, notably Massachusetts, have held the same. The evidence does not disclose any fraud when the mortgage was executed as to the property now under discussion, or even that the mortgagor was then insolvent. It was executed for a loan then made. It took nothing away from creditors. The loan was made in good faith, and the mortgagee got possession under it before any liens attached, and before bankruptcy proceedings began, but within four months of the institution of bankruptcy proceedings. I do not find such a mortgage is void as to creditors under the Arkansas decisions, and if not void as to creditors under the Arkansas decisions, it is not invalid under the Bankrupt Act as to the trustee, unless made void by some positive provision of the act. Is the mortgage void, as against the trustee, by any positive provision of the Bankrupt Act? This question, I think, has been answered conclusively by the Eighth Circuit Court of Appeals in the case of *First National Bank of Buchanan County St. Joseph v. Connett*, reported in 15 Am. B. R. 662, 142 Fed. 33. That case is, to all intents and purposes, on all-fours with the case at bar. Indeed, the only difference is that, in that case, the mortgagor was insolvent when the mortgage was given, but the mortgagee was not aware of it. In the case at bar the testimony does not show whether the mortgagor was insolvent when the mortgage was given, or not. But he was insolvent, and the mortgagee knew it, when she took possession. The difference is immaterial, in the opinion of the court; and, therefore, the two cases are on all-fours. * * * The conclusion reached is that the mortgage is void in toto under § 60a of the Bankrupt Act of 1898, as amended by § 13 of the Act of February 5th, 1903. An order will be entered disallowing the claim of *Mrs. Poynter* in toto until she has surrendered all the property covered by the mortgage in controversy, in her possession or under her control. Upon a compliance with this order her claim will be allowed as an unsecured claim."

§ 1382. Where "Required" Only as to Bona Fide Purchasers and Encumbrances.

Page 810, note 411. See ante, § 1232.

§ 1382½. Or as to Levying Creditors.

Some courts have held that, since "required" refers to creditors, then, in States where recording or registering is not "required" in order to be valid against any other creditors than levying creditors, the date

of the preference is not to be taken as of the date of recording, unless there be such a levying creditor in existence to whose rights the trustee might succeed.

In effect, *Mattley v. Wolfe*, 23 A. B. R. 673, 175 Fed. 619 (D. C. Neb.), quoted at § 1383.

But were the reasoning of the case of *Mattley v. Wolfe* to be accepted as valid as the law then stood, it would probably be obviated by the Amendment of 1910 to § 47 (a) (2) of the Bankr. Act, by which the trustee is to be deemed vested with all the rights, powers and remedies of a creditor levying an execution.

§ 1383. Where State Law Does Not "Require" Recording, but Merely "Permits" It.

Page 812. But see *Mattley v. Wolfe*, 23 A. B. R. 673, 175 Fed. 619 (D. C. Neb.): "It is contended that the mortgages must be regarded as preferences, under the rule laid down in *McElvain v. Hardesty* (C. C. A.), 22 Am. B. R. 320, 169 Fed. 31-35, and *First Nat. Bank v. Connett* (C. C. A.), 15 Am. B. R. 662, 142 Fed. 33-35, 5 L. R. A. (N. S.) 148. The cases cited are founded on the construction of the law relating to mortgages, as determined by the courts of Missouri. The rule in Nebraska, as determined by the Supreme Court, differs from the holding in Missouri. As has been shown, a mortgage is not here required to be recorded, within § 60a of the Bankruptcy Act, as against creditors having no lien prior to the taking possession of the mortgaged property by the mortgagee, even though there is an agreement that the mortgagor may remain in possession and continue to sell in the usual course of business. Therefore, such a mortgage, if given for a present consideration, speaks from its date, and not from the date of its record."

The distinction sought to be made in the case of *Mattley v. Wolfe*, quoted supra, would not, perhaps, prevail since the Amendment of 1910, even were its reasoning otherwise to be approved.

Page 810, note 412. See ante, § 1232.

§ 1384. Preferences as Affected by Taking Possession within Four Months under Unfiled Mortgages or Mortgages Covering After-Acquired Property.

Effect of Amendment of 1910.—Perhaps the Amendment of 1910 to Bankr. Act, § 47 a (2), whereby the trustee is to be deemed vested with all the rights, remedies and powers of a creditor armed with process, would affect the rules laid down by the decisions referred to in § 1384.

§ 1385. Eighth Element of a Preference.

Page 815, note 415. See also, ante, § 128; *Tumlin v. Bryan*, 21 A. B. R. 319, 165 Fed. 166 (C. C. A. Ga.); *Harder v. Clark*, 23 A. B. R. 756 (City Court of New York).

Trivial Transfers.—The court sometimes will disregard an alleged per-

ferential transfer because of its triviality; thus (on petition for adjudication) a payment of \$3.00 by a grocery firm a week before the bankruptcy petition was filed, *obiter*, *In re Stovall Grocery Co.*, 20 A. B. R. 537, 161 Fed. 882 (D. C. Ga.).

Page 816. *Painter v. Napoleon Township*, 19 A. B. R. 412, 156 Fed. 289 (D. C. Ohio): "The bill does not aver that the enforcement of the transfer alleged will be to enable the board of trustees to obtain a larger percentage of its debt than any other creditor of the same class. Such an averment is essential to the statement of a cause of action. Section 60a of the Bankrupt Act as amended. 'The test of a preference, under the Act, is the payment, out of the bankrupt's property, of a larger percentage of the creditor's claim than other creditors of the same class receive.' *Swarts v. Fourth Nat. Bank of St. Louis*, 8 Am. B. R. 673, 117 Fed. 1, 4, 54 C. C. A. 387. To recover, the bill must allege and the proof must sustain four statutory elements constituting a preference: 'First, the insolvency of the debtor at the time the judgment was entered or the transfer made in favor of the creditor; second, that this was done within four months of bankruptcy; third, that the effect of which was that the defendant obtained a greater percentage of his debt than any other creditor of the bankrupt of the same class; and, fourth, that the defendant or his agent had reasonable grounds to believe that it was intended by such transfer of property (or judgment) to give a preference to the defendant within the meaning of the acts of Congress relating to bankruptcy. If the trustee fails to allege any one of these claims, his bill, declaration or petition is bad on demurrer. If he fails to prove all of these elements, judgments should be entered for the defendant.' * * * 'The bill having failed to allege the third of the foregoing statutory requirements, the demurrer is for this reason sustained.'"

Thus, deposits in bank, or transfers made to a trustee with which to pay all creditors of the same class an equal percentage, do not constitute voidable preferences.

Lowell v. International Trust Co., 19 A. B. R. 853, 158 Fed. 781 (C. C. A. Mass.).

Although such transfers might be voidable as constituting assignments for the benefit of creditors within four months preceding bankruptcy.

Similarly, where the creditor receiving the transfer assumes all the debtor's other debts and is a responsible party, a preference will not exist.

Missouri Elec. Co. v. Hamilton Brown Co., 21 A. B. R. 270, 165 Fed. 283 (C. C. A. Mo.), quoted at § 128.

§ 1387. Who Are in "Same Class."

Page 818, note 417. *Obiter*, *Mills v. Fisher & Co.*, 20 A. B. R. 237, 159 Fed. 897 (C. C. A. Tenn.); inferentially, *In re Andrews*, 19 A. B. R. 441 (Ref.).

§ 1387½. Firm and Individual Creditors Belong to Different Classes.

Firm and individual creditors belong to different classes; for they

each have certain rights reciprocally in the other's estate; so that, in due order of priority, firm creditors are also creditors of each individual and vice versa. Thus it is that an individual transfer to pay a firm debt may constitute individual preference, if other firm creditors (the "same class") do not get a like transfer. Upon this subject, see the full discussions of §§ 171, 1291, 1303¼, 1312¼, 1312½, 2268½.

§ 1390. Modes of Proving This Element.

It has been held that proof of its being a preference over others may be established by showing that other creditors of the same class had received nothing on account during the same period.

In re Mayo Contracting Co., 19 A. B. R. 551, 157 Fed. 469 (D. C. Mass.): "If there is any other creditor of the same class who, by the enforcement of the transfer in question, will obtain a less percentage of his debt than the petitioner, I think that the transfer was a preference under § 60 (a) of the Bankruptcy Act, and that it was none the less a preference, even though it be true that some creditors can be found who have received larger percentages though other payments made to them within the four months."

Or by showing that the creditor receiving the transfer received full pay or full security, while not sufficient was left to pay or secure all remaining creditors in full.

Coder v. McPherson, 18 A. B. R. 523, 152 Fed. 951 (C. C. A. Iowa): "As Armstrong was insolvent when he gave the mortgages, their necessary effect was to enable one of his creditors to obtain a greater percentage of its debt than others of the same class, and they therefore created a preference under § 60a."

Of course, unless the debtor were insolvent the transfer could not operate to give the creditor a greater percentage.

McDonald v. Clearwater R. Co., 21 A. B. R. 182, 164 Fed. 1007 (C. C. Idaho): "Not only is there no proof of the aggregate of the lumber company's property at a fair valuation upon the date of the assignment, but the record is also silent as to the value of the bankrupt's assets at any time after the bankruptcy proceedings were instituted. That being the case, upon what basis can the court make a finding that the effect of the assignment was to enable the bank to obtain a greater percentage of its debt than other creditors of the same class?"

§ 1391. Transfer Not Necessarily to Creditor nor Agent if Benefit Accrues to Creditor.

The transfer need not be to the creditor nor to his agent, so long as the effect of it is to enable the creditor to receive out of the debtor's estate a larger percentage of his claim than others of the same class.

See ante, §§ 1300, 1301, 1301½, et seq.

§ 1394. Voidable Preferences.

Page 822, note 425. **Effect of Amendment of 1903 in the Particular of "Reasonable Cause of Belief."**—In *re Tindal*, 18 A. B. R. 773, 155 Fed. 456 (D. C. S. Car.): "The main object of the Bankrupt Act and one of its most beneficial results, was an equal distribution among his creditors of the estate of the bankrupt. The effect of the amendment referred to is in most cases to practically defeat this beneficial intent, for it becomes necessary now to prove that the party receiving the preference had reasonable cause to believe that it was intended thereby to give the preference."

§ 1395. Ninth Additional Element Requisite to Make Preference Voidable.

Page 822, note 426. See, in addition, *Brewster v. Golf Lumber Co.*, 21 A. B. R. 106, 164 Fed. 124 (D. C. Pa.), quoted at § 1410.

Page 823, note 426. See, in addition, *Curtiss v. Kingman*, 20 A. B. R. 95, 159 Fed. 880 (C. C. A. Mass.); In *re Tindal*, 18 A. B. R. 773, 155 Fed. 456 (D. C. S. Car.), quoted at § 1394, note; In *re Pfaffinger*, 18 A. B. R. 807, 154 Fed. 528 (D. C. Ky.), quoted at § 1399; *Rutland County Natl. Bk. v. Graves*, 19 A. B. R. 446, 156 Fed. 168 (D. C. Vt.); *Tumlin v. Bryan*, 21 A. B. R. 319, 165 Fed. 166 (C. C. A. Ga.); In *re Lynn Camp Coal Co.*, 22 A. B. R. 60, 168 Fed. 998 (D. C. Ky.); In *re Neill-Pinckney-Maxwell Co.*, 22 A. B. R. 401, 170 Fed. 481 (D. C. Pa.); In *re Burlage Bros.*, 22 A. B. R. 410, 169 Fed. 1006 (D. C. Iowa); In *re Leech*, 22 A. B. R. 599, 171 Fed. 622 (C. C. A. Ky.); *Taylor, trustee, v. Nichols*, 23 A. B. R. 310, 134 App. Div. (N. Y.) 787; In *re Wolf Co.*, 21 A. B. R. 73, 164 Fed. 448 (D. C. Pa.); In *re Kulberg*, 23 A. B. R. 758, 176 Fed. 585 (D. C. Minn.); In *re Bartlett*, 22 A. B. R. 891, 172 Fed. 679 (D. C. Pa.); *Whitwell, Trustee, v. Wright*, 23 A. B. R. 747, 136 A. D. N. Y. 246; In *re Peacock*, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.).

Page 823. *Coder v. Arts*, 18 A. B. R. 513, 152 Fed. 943 (C. C. A. Iowa): "If such a mortgage or lien creates a preference under § 60a, it is nevertheless not voidable under section 60b unless the creditor who receives it or is benefited thereby, had reasonable cause to believe that it was intended to give a preference by it."

Coder v. Arts, 22 A. B. R. 1, 213 U. S. 223: "Manifestly this conveyance could not be set aside under the provisions of section 60b. For, while it is true that, under the facts found, the conveyance might be deemed a preference, as a transfer of property which would have the effect of enabling one creditor to obtain a larger percentage of his debt or claim than other creditors of the same class, yet, as it is distinctly found that neither the mortgagee nor his agent had any reasonable cause to believe that it was intended to give a preference, the same could not be avoided under § 60b."

§ 1396. Existence of Reasonable Cause, Question of Fact.

Page 823. *Rutland County Nat'l Bk. v. Graves*, 19 A. B. R. 446, 156 Fed. 168 (D. C. Vt.): "We are to look at these parties at the time this payment was made, as viewing the situation with ordinary common sense. What did they understand the condition and financial standing of the payee to be?"

Page 823, note 427. See, in addition, In *re Pfaffinger*, 18 A. B. R. 807, 154 Fed. 528 (D. C. Ky.).

Page 823, note 427. **Decisions Negating Existence of "Reasonable Cause" under Act of 1867, Additionally Strong under Act of 1898.**—Decisions under the Act of 1867, wherein the court has found "reasonable cause" not to have existed, are additionally strong under the present act because insolvency, formerly, consisted in the inability to meet claims as they matured, while by the present act a much broader test is prescribed, on the other hand those which find reasonable cause existed are now weaker as precedents against the preferred creditor. *Getts v. Janesville Wholesale Grocery Co.*, 21 A. B. R. 9, 163 Fed. 417 (D. C. Wis.).

Further instances where facts have been held sufficient to indicate a "reasonable cause for believing."

Each partner deeding his residence to importunate creditor of firm, although firm claims to have several thousand dollars outstanding on building contracts, formerly, uncollectible. *Brewster v. Goff*, 21 A. B. R. 239, 164 Fed. 127 (D. C. Pa.).

Persistent failure to meet obligations, careful abstinence of creditor from making enquiries when getting the transfer, etc. *Huttig Mfg. Co. v. Edwards*, 20 A. B. R. 349, 160 Fed. 619 (C. C. A. Iowa).

Short of funds, unable to raise money, drafts being protested at bank, tells creditor so at time of transfer, makes general assignment same day as transfer. *Clingman v. Miller*, 20 A. B. R. 360, 160 Fed. 326 (C. C. A. Kans.).

Receiving pay on eve of bankruptcy, after repeated dunning; always receiving, as response to calls, "Mr. — is out;" pledging of equity of redemption in stock already pledged, knowledge of rumors of debtor's precarious financial condition. *Wright v. Skinner Mfg. Co.*, 20 A. B. R. 527, 162 Fed. 315 (C. C. A. N. Y.).

Mortgage to bank, withheld from record by agreement, filed within 5 days of bankruptcy, along with other facts. *In re Hickerson*, 20 A. B. R. 682, 162 Fed. 345 (D. C. Idaho).

Bank receiving \$3,000 from attorneys of bankrupt after he had absconded and after a void involuntary bankruptcy petition had been filed against him, having loaned to him originally on pledges of accounts of a customer which were repudiated by the customer as not owing because the goods were not ordered. *Fratt v. Columbia Bank*, 18 A. B. R. 406, 157 Fed. 137 (D. C. N. Y.).

President of bankrupt corporation, who had signed note as surety causing corporation to pay note to relieve himself from liability. *Kobusch v. Hand*, 19 A. B. R. 379, 156 Fed. 660 (C. C. A. Mo.).

Settlement of creditor's bill within the four months, where statement of debtor's financial condition drawn from the books by an expert accountant was inspected by creditor's attorney during negotiation. *In re Mayo Contracting Co.*, 19 A. B. R. 551, 157 Fed. 469 (D. C. Mass.).

Creditor, a corporation, intrusting large sums to bankrupt, its treasurer, to invest, facts showing existence of reasonable cause, *Dulany v. Waggaman*, 22 A. B. R. 36 (D. C. Sup. Ct.).

See, in addition, *In re Tindal*, 18 A. B. R. 773, 155 Fed. 456 (D. C. S. C.); *Stevens v. Oscar Holway Co.*, 19 A. B. R. 399, 156 Fed. 90 (D. C. Me.); *Nat'l Bank v. Abbott*, 21 A. B. R. 436, 165 Fed. 852 (C. C. A. Mo.).

Page 825, note 427. Further instances where facts held insufficient to establish "reasonable cause of belief." Taking debtor, as surety on note, not-

withstanding suspicious circumstances. *Getts v. Janesville Wholesale Grocery Co.*, 21 A. B. R. 5, 163 Fed. 417 (D. C. Wis.).

Bankrupt had a fire; got insurance money; creditor, a bank, knowing such facts, procured payment of notes out of insurance money, desiring to secure pay before complications arose. *Irish v. Citizens Trust Co.*, 21 A. B. R. 39, (D. C. N. Y.).

Lumber company needing funds, borrows, but real cause of failure seizure of timber by United States government. *McDonald v. Clearwater R. Co.*, 21 A. B. R. 182, 164 Fed. 1007 (U. S. C. C. Idaho).

Unrequested repayment of loan with letter stating money can no longer be used. *Wright v. Sampter*, 18 A. B. R. 355, 152 Fed. 196 (D. C. N. Y.).

Debtor reputed to be wealthy farmer had made financial statements year before showing net worth \$100,000, transfer not inclusive of all property. *Coder v. Arts*, 18 A. B. R. 513, 152 Fed. 943 (C. C. A. Iowa).

Merely reasonable cause of belief that debtor insolvent, not enough. In re *First Nat'l Bk. of Louisville*, 18 A. B. R. 766, 155 Fed. 100 (C. C. A. Ky.).

Fire insurance policies transferred, circumstances insufficient. In re *Neill-Pinckney-Maxwell Co.*, 22 A. B. R. 401, 170 Fed. 481 (D. C. Pa.).

Creditor relinquishing personal endorsement of stockholder in exchange for mortgage on bankrupt corporation's assets, but without knowledge of the insolvent condition of the debtor. In re *Evans Lumber Co.*, 23 A. B. R. 881, 176 Fed. 643 (D. C. Ga.).

Cotton merchants receiving security from local cotton broker who becomes bankrupt. In re *Peacock*, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.).

Other instances, miscellaneous, In re *Tindal*, 18 A. B. R. 773, 155 Fed. 456 (D. C. S. Car.); *Stevens v. Oscar Holway Co.*, 19 A. B. R. 399, 156 Fed. 90 (D. C. Me.).

§ 1397. Preferential Transfer Not Necessarily Fraudulent.

Page 825, note 432. See, in addition, *Manning v. Evans*, 19 A. B. R. 217, 156 Fed. 106 (D. C. N. J.); In re *Kullberg*, 23 A. B. R. 758, 176 Fed. 585 (D. C. Minn.).

Page 826. *Coder v. Arts*, 22 A. B. R. 1, 213 U. S. 223: "A consideration of the provisions of the bankruptcy law as to preferences and conveyances shows that there is a wide difference between the two, notwithstanding they are sometimes spoken of in such a way as to confuse the one with the other. A preference, if it have the effect prescribed in § 60, enabling one creditor to obtain a greater portion of the estate than others of the same class, is not necessarily fraudulent. Preferences are set aside when made within four months, with a view to obtaining an equal distribution of the estate, and in such cases it is only essential to show a transfer by an insolvent debtor to one who, himself or by his agent, knew of the intention to create a preference. In construing the Bankruptcy Act this distinction must be kept constantly in mind. As was said in *Githens v. Shiffler*, 112 Fed. 505: 'An attempt to prefer is not to be confounded with an attempt to defraud, nor a preferential transfer with a fraudulent one.' In re *Maher*, 144 Fed. 503-505, it was well said by the district court of Massachusetts: 'In a preferential transfer the fraud is constructive or technical, consisting in the infraction of that rule of equal distribution among all creditors which it is the policy of the law to enforce when all cannot be fully paid. In a fraudulent transfer the fraud is actual—the bankrupt has secured an advantage for himself out of what in law should belong to his creditors, and not to him.'"

§ 1398. Creditor Need Not Actually Know, nor Actually Believe.

Page 826, note 434. See, in addition, *In re Mills Co.*, 20 A. B. R. 501, 162 Fed. 42 (D. C. N. Car.); *Rogers v. Fidelity Sav. Bank & Loan Co.*, 23 A. B. R. 1, 172 Fed. 735 (D. C. Ark.); *Brewster v. Goff Lumber Co.*, 21 A. B. R. 106, 164 Fed. 124 (D. C. Pa.), quoted at § 1410; (1867) *Burfee v. First Nat'l Bk.*, 9 N. B. Reg. 314.

Nor is it necessary to prove the creditor himself actually believed.

Page 826. *Pratt v. Columbia Bank*, 18 A. B. R. 406, 157 Fed. 137 (D. C. N. Y.): "The meaning of the words 'reasonable cause to believe' has been too often the subject of decision to require extended citation of authority. Knowledge is not necessary, nor even belief, but only reasonable cause to believe, which is a very different thing."

Page 826, note 435. See, in addition, *Rogers v. Fidelity Sav. Bk. & Loan Co.*, 23 A. B. R. 1, 172 Fed. 735 (D. C. Ark.).

Thus, the mere fact that the creditor was a young lady, unacquainted with business affairs, who did not appreciate the significance of the facts, was held to be no excuse; the real test being what deduction or inference the ordinary business man would have drawn from the same facts.

Obiter, *Wright v. Sampter*, 18 A. B. R. 355, 152 Fed. 196 (D. C. N. Y.): "The peculiarity of this case is that the mind to be affected is that of a confiding niece, wholly unacquainted with business knowledge, and however intelligent and prudent in matters within her own experience, incapable of comprehending the significance of business facts, which would have been more than enlightening to men of the business world. It is therefore urged by the defendants that *Barbour v. Priest*, 103 U. S. 293, justifies the proposition that not only must the facts exist and be sufficiently impressive to make inquiry in such minds as are catalogued in the cases above cited, but they must be sufficient to impress their significance upon the mind of the person to be affected—in this case a woman leading a life apart from the world of business. It was indeed said in the case last cited (one inducing great sympathy for the preferred creditor) that it is 'necessary to prove the existence of this reasonable cause of belief * * * in the mind of the preferred party' (p. 296). But these words must be taken in conjunction with the whole opinion, which was written in express consonance with *Grant v. Bank*, supra, and the phrase quoted. I take to assume in 'the preferred party' the mind of 'an ordinarily intelligent man.' It would be intolerable that the voidability of a preference should depend not upon the effect of facts admittedly or by proof known to a defendant, but upon the degree of intelligence or experience which such defendant was capable of exercising in respect thereto; such a rule would put a premium upon ignorance and encourage the assumption thereof. The rule here applicable is therefore; would an ordinarily intelligent and prudent business man have had reasonable cause to believe upon any facts known to Miss Sampter that her uncle intended to prefer herself, her sister and mother? I think not." This case is further quoted at § 1399.

§ 1399. Sufficient if Circumstances Such as to Raise Inference of Belief on Creditor's Part.

Page 826, note 437. See, in addition, *In re Hickerson*, 20 A. B. R. 682, 162 Fed. 345 (D. C. Idaho); *In re Mills Co.*, 20 A. B. R. 501, 162 Fed. 42 (D. C. N. Car.); *Wright v. Skinner Mfg. Co.*, 20 A. B. R. 527, 162 Fed. 315 (C. C. A. N. Y.); *Brewster v. Goff Lumber Co.*, 21 A. B. R. 106, 164 Fed. 124 (D. C. Pa.), quoted at § 1410; *Whitwell, trustee, v. Wright*, 23 A. B. R. 747 (N. Y. Sup. Ct. App. Div.).

Page 827. The test is, What inference would the ordinarily intelligent business man draw from the facts?

Wright v. Sampter, 18 A. B. R. 355, 152 Fed. 196 (D. C. N. Y.): "The rule is equally well established that it is sufficient if the facts brought home to the person sought to be affected are such as would produce action and inquiry on the part of 'an ordinarily intelligent man' (*Grant v. Bank*, 97 U. S. 80); 'a prudent business man' (*Bank v. Cook*, 95 U. S. 343; *Toof v. Martin*, 13 Wall. 40); 'a person of ordinary prudence and discretion' (*Wager v. Hall*, 16 Wall. 584); 'an ordinarily prudent man' (*In re Eggert*, 4 Am. B. R. 449); 'a prudent man' (*Dutcher v. Wright*, 94 U. S. 553)." This case further quoted at § 1398.

Coder v. McPherson, 18 A. B. R. 523, 152 Fed. 951 (C. C. A. Iowa): "Notice of facts which would incite a man of ordinary prudence to an enquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would disclose."

Compare, *In re Pfaffinger*, 18 A. B. R. 807, 154 Fed. 528 (D. C. Ky.): "The test is whether the creditor who is charged with having received a voidable preference had at the time of receiving it such information as ought to have led a reasonably prudent man to the conclusion that a preference was thereby intended, and this includes, as we have seen, the necessary element of sufficient information of the affairs of the debtor as ought to lead a reasonably prudent man to the conclusion that he was then insolvent. Mere suspicion of insolvency is not sufficient, nor is mere unwillingness to trust further. Some authorities, indeed, fix a test to the effect that the creditor must be regarded as having been preferred if at the time of the transfer or payment he had information sufficient to put a reasonably prudent man upon inquiry, which if made and pursued would lead to a full knowledge of the debtor's condition. Such a rule must have a reasonable construction, and to make it operate justly, must relate to information of the financial condition and property of the debtor, and not merely to whether he had already borrowed from the creditor quite as much or more money than the latter thought it was best to lend to him for other and different reasons."

Page 827, note 438. See, in addition, *Wright v. Skinner Mfg. Co.*, 20 A. B. R. 527, 162 Fed. 315 (C. C. A. N. Y.), which was a case of pledging equity of redemption in stock already pledged; *In re Bailey & Son*, 21 A. B. R. 911, 166 Fed. 982 (D. C. Pa.), where goods were set apart and marked to secure an accommodation endorser.

Similarly, the taking of a mortgage or other transfer of substantially all of a debtor's property, knowing it to be such, and that other creditors existed, will constitute a preference "with reasonable cause of belief."

Page 828. *McElvain v. Hardesty*, 22 A. B. R. 320, 169 Fed. 31 (C. C. A. Mo.): "Moreover, if *McElvain* did not have actual knowledge of the insolvent condition of his debtors, we think in the circumstances of this case he is constructively chargeable with that knowledge. He took a transfer of all his debtors' property—of a going concern—in satisfaction of a debt. This, in itself, was an unusual thing, and the reasons which actuated it must have sprung from a fear or suspicion of danger."

Page 828. Likewise, the sale of an entire stock of merchandise is a suspicious circumstance.

Compare, §§ 1216, 1494.

§ 1400. Cause for Belief Not Simply That Preference Given, but Intended.

The belief, of which the existence of reasonable ground is to be proved, was [before the Amendment of 1910] not simply belief that a preference in fact was given, or that the debtor was insolvent, but also belief that the debtor intended to give a preference.

Pratt v. Columbia Bank, 18 A. B. R. 406, 157 Fed. 137 (D. C. N. Y.): "Under previous statutes that which the creditor might be said to have reasonable cause to believe, was insolvency. Under this statute, it is the intent to give a preference, but such difference in statutory language does not affect the judicial interpretation of the phrase 'reasonable cause to believe.'"

In re *First National Bank of Louisville v. Holt*, 18 A. B. R. 766, 155 Fed. 100 (C. C. A. Ky.): "But to make the reception of payment a preference, the creditor must have had reasonable cause to believe that the debtor was intending to give him a preference over other creditors. * * * But it is enough to say that a belief that a debtor is insolvent is a very different thing from a belief that he intends a preference. For it would often, and probably, generally, happen that a person though in fact insolvent would while continuing his business in the usual way make payments without a thought of disparagement of other creditors and with confidence in his ability to pay them all. And upon like considerations the creditor may share in the confidence of his debtor, and may well suppose that the debtor while paying him his debt in the common course of business is acting without any purpose of giving special favor. Such considerations have often been adverted to by the courts as the basis of decision and were the principle motive for the Amendment of 1903. *Grant v. National Bank*, 97 U. S. 80; *Stucky v. Masonic Savings Bank*, 15 Am. B. R. 696, 108 U. S. 74; In re *Eggert*, 4 Am. B. R. 449, 102 Fed. 735; *Off v. Hakes*, 142 Fed. 364; *Hardy v. Gray*, 16 Am. B. R. 387, 144 Fed. 922; *J. W. Butler Paper Co. v. Goemmel*, 16 Am. B. R. 26, 143 Fed. 295." Quoted further at § 1405.

Tumlin v. Bryan, 21 A. B. R. 319, 165 Fed. 166 (C. C. A. Ga.): "But a belief that a debtor is insolvent is a very different thing from the belief referred to by the statute—'reasonable cause to believe that it was intended' by the payments to give a preference."

Dissenting opinion *Stuart v. Farmers Bk. of Cuba City*, 21 A. B. R. 403, 137 Wis. 66, 117 N. W. 820: "Besides, reasonable cause to believe that a person is insolvent is a different proposition from reasonable cause to believe that it was intended thereby to give a preference. The former is rea-

sonable cause to believe in the existence of a condition of inadequacy of assets or inability to pay. The latter is reasonable cause to believe in the existence of a mental condition. The latter could only be established by inference from facts and circumstances, except, perhaps, in these impossible cases where the payor would make express confession of his mental condition."

Page 828, note 440. See, in addition, *Tumlin v. Bryan*, 21 A. B. R. 319, 165 Fed. 166 (C. C. A. Ga.); *In re Leech*, 22 A. B. R. 599, 171 Fed. 622 (C. C. A. Ky.).

The Amendment of 1910 obviates the necessity of proof of existence of the debtor's intent.

Bankr. Act as amended in 1910, § 60b; also, see post, § 1401½.

§ 1401. Belief of Existence of Intent May Be Presumed.

Page 829. *Coder v. McPherson*, 18 A. B. R. 523, 152 Fed. 951 (C. C. A. Iowa): "In the face of this knowledge, it took these mortgages which, in the aggregate, covered substantially all the unexempt property the debtor owned except a few hogs and horses. The real estate was already mortgaged according to Armstrong's second statement for \$147,500, and it took mortgages upon this land and a chattel mortgage upon his tools, machinery, and crops. The inevitable effect of these incumbrances was to deprive the unsecured creditors of every means of collecting their debts; for these mortgages withdrew from attachment and execution substantially all the debtor's unexempt property. The legal presumption is that parties intend the inevitable effect of their acts, and, in view of all these facts, the conclusion is irresistibly borne in upon our minds that * * * the bank * * * when it took these mortgages, had reasonable cause to believe that it was intended thereby to give it a preference over other creditors of the same class."

Page 829, note 441. Impliedly, *Clingman v. Miller*, 20 A. B. R. 360, 160 Fed. 326 (C. C. A. Kans.).

§ 1401½. Debtor's Intent Immaterial by Amendment of 1910.

By the Amendment of 1910 the cause for belief on the creditor's part is no longer that a preference was "intended" to be given by the bankrupt, but, rather, that a preference would be effected.

Bankr. Act, as amended 1910, § 60 (b): "If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

Logically, it is the creditor's knowledge or belief that a preference would be effected that should be the test rather than his knowledge or belief of the debtor's intention to prefer.

Report No. 691 of Senate Judiciary Committee of the 61st Congress, Second Session.

"Further, the Amendment of 1903, making the existence of 'reasonable cause to believe' on the creditor's part a prerequisite to the trustee's right to recover the preference from him, required that this reasonable cause of belief should be that a 'preference was intended to be given,' rather than that a 'preference would be effected.' Logically, it is the creditor's knowledge or belief that a preference would be effected that should be the test, rather than his knowledge or belief of the debtor's intention to prefer."

It is the knowledge of the effect on the creditors' assets that constitutes the wrong doing.

§ 1402. Reasonable Cause for Belief of Insolvency Requisite.

Page 830, note 443. See, in addition, *Brewster v. Goff Lumber Co.*, 21 A. B. R. 106, 164 Fed. 124 (D. C. Pa.); *In re Pfaffinger*, 18 A. B. R. 807, 154 Fed. 528 (D. C. Ky.), quoted at § 1399; *In re Kullberg*, 23 A. B. R. 758, 176 Fed. 585 (D. C. Minn.).

Thus, a transfer to secure not only a pre-existing debt, but also to secure repayment of money advanced at the time to a debtor with which to make a composition with his other creditors, has been upheld, since, though the facts were sufficient to put the transferee upon inquiry and such transferee knew that he was getting his claim secured in full whilst other creditors were getting but a percentage, yet, the facts were not sufficient, after investigation, to show that the assets were really worth less than the amount of the debts.

In re Bartlett, 22 A. B. R. 891, 172 Fed. 679 (D. C. Pa.): "The bankrupt, of course, was embarrassed, his condition being such that he had to go to his trade creditors with a compromise. But embarrassment is not always insolvency, although it suggests it, and the bank was, therefore, put on inquiry. The bank knew also that it was being secured in full, where other creditors were getting but a fraction. And while it supposed that all the indebtedness outside of its own, except that of Frederick Job, was taken care of by the compromise, it ran the chance of there being others, and, as it now turns out, the bankrupt also owed his wife and uncle. There are other considerations, however, by which the bank is blameless. It may be conceded that, except for the compromise, the bankrupt was insolvent, his indebtedness being close to \$12,000, and his assets, at top figures, several hundred dollars less than that. But if he was, the bank had no idea of it. And they took pains to inform themselves. * * * The bankrupt, also, three months before that, had made a statement, showing that he was worth a good deal more than this, which to a certain extent, they had the right to rely on. And the very offer of a compromise suggested an excess of assets, without which there was no inducement for it."

§ 1403. Also of All Other Elements of Preference.

Page 830, note 445. See, in addition, *In re First Nat'l Bk. of Louisville*, 18 A. B. R. 766, 155 Fed. 100 (C. C. A. Ky.), quoted at §§ 1400, 1405.

Page 831. For instance, where a debtor pays some creditors under a settlement made with all, but has not enough to pay the others, it must be proved that the creditors who were paid had reasonable ground for believing the debtor would be unable to pay all alike.

Smith v. Hewlett Robin Co., 24 A. B. R. 153, 178 Fed. 271 (C. C. A. N. Y.).

§ 1403½. Burden of Proof.

The burden of proof of the existence of the reasonable cause of belief is on the trustee.

Calhoun Co. Bank v. Cain, 18 A. B. R. 509, 152 Fed. 983 (C. C. A. W. Va.); *Getts v. Janesville Grocery Co.*, 21 A. B. R. 5, 163 Fed. 417 (D. C. Wis.).

As well as of each element of the preference.

Page 831, note 448. See, in addition, *In re Pfaffinger*, 18 A. B. R. 807, 154 Fed. 528 (D. C. Ky.); *(Butler) Paper Co. v. Goembel*, 16 A. B. R. 26, 143 Fed. 296 (C. C. A. Ills.). See ante, § 775½; post, § 1768.

But where the transfer complained of was made to a relative, that fact is important in determining whether the burden has been sustained.

Compare, even stronger statement of the rule, *In re Sanger*, 22 A. B. R. 145, 169 Fed. 722 (D. C. W. Va.), wherein the court even holds that in such cases the burden shifts.

§ 1404. Reasonable Cause for Belief Preference Intended Involves Reasonable Cause for Belief Debtor Knew His Insolvency.

Page 832. The Amendment of 1910 renders unnecessary proof of reasonable cause for belief that the debtor knew his insolvency.

See ante, §§ 1400, 1401.

§ 1405. Whether Intent of Bankrupt to Prefer Need Be Shown.

Page 832, note 450. Inferentially, *Brewster v. Goff Lumber Co.*, 21 A. B. R. 106, 164 Fed. 124 (D. C. Pa.), quoted at § 1406; *Harder v. Clark*, 23 A. B. R. 756 (City Court of New York).

On the other hand it is urged that naturally and justly no one could be charged with "reasonable cause to believe" something unless the "something" existed to which the belief was supposed to relate, and that actual intent to prefer on the debtor's part must be proved to exist.

Page 834. *Tumlin v. Bryan*, 21 A. B. R. 319, 165 Fed. 166 (C. C. A. Ga.): "It may often happen that one, though in fact insolvent, will continue his business and make payments in the usual way, without a thought of prefer-

ring one creditor to another, and with the hope and belief that he would finally be able to pay all. If these payments were made by the firm, without the thought of injuring other creditors, and in the belief that it would be able to pay them all, the defendant cannot be charged with reasonable cause to believe a preference was intended."

In *re Mayo Contracting Co.*, 19 A. B. R. 551, 157 Fed. 469 (D. C. Mass.): "But to make the transfer such a preference as is voidable under § 60b, and therefore a preference which must be surrendered in order to obtain the allowance of the creditor's claim under § 57g, a preference must have been actually intended in fact on the debtor's part, or there must have existed what the law regards as the equivalent of such an actual intent on his part, and such an intent is not to be conclusively presumed from the mere fact that the debtor knows himself to be insolvent according to the definition in the Bankruptcy Act."

In *re First Nat'l Bk. of Louisville v. Holt*, 18 A. B. R. 766, 155 Fed. 100 (C. C. A. Ky.): "But to make the reception of payment a preference, the creditor must have had reasonable cause to believe that the debtor was intending to give him a preference over other creditors, and we incline to think, with the Circuit Court of Appeals for the First Circuit, *Hardy v. Gray*, 16 Am. B. R. 387, 144 Fed. 922, 925, that the reasonable implication of the language is that the debtor himself must have intended the preference. The very word signifies the doing of a thing with a purpose to give an advantage; and the construction which treats the motive of the debtor as indifferent, seems artificial and awkward."

Also, see *Rutland County Nat'l Bank v. Graves*, 19 A. B. R. 446, 156 Fed. 168 (D. C. Vt.); In *re Leech*, 22 A. B. R. 599, 171 Fed. 622 (C. C. A. Ky.).

Page 834. The Amendment of 1910 renders proof of intent of the bankrupt to prefer unnecessary.

See ante, §§ 1400, 1401.

§ 1406. At Any Rate Existence of Actual Intent to Prefer, Proved by Circumstantial Evidence, or by Presumptions.

Page 834. *Brewster v. Goff Lumber Co.*, 21 A. B. R. 106, 164 Fed. 124 (D. C. Pa.): "That there was a preference in fact cannot, of course, be gainsaid, the firm, as the individual members of it, being insolvent, and the Goff Lumber Co. securing by the transaction over one-third of their bill, where other creditors will get practically nothing. This being the inevitable effect, it will be conclusively presumed that it was so intended, even though it may be that Moore had no idea in reality of treating the Goff Lumber Co. any differently from or of giving them any advantage over, other creditors. *Western Tie & Timber Co.*, 196 U. S. 502, 13 Am. B. R. 447."

Clingman v. Miller, 20 A. B. R. 360, 160 Fed. 326 (C. C. A. Kans.): "In the present case the evidence showed that Pendleton was insolvent on May 4, 1904, and that he must have known it. He made the transfer to Miller & Co. substantially at the same time he made the deed of assignment. Knowing that he was insolvent, he knew that the transfer to Miller & Co. created a preference. He is charged with a knowledge of the law, and hence knew that he could not prefer any creditor in his deed of assignment. He

was being pressed by his creditors. Drafts upon him were being protested at the bank. He was short of funds, and could not raise money. He told Miller & Co. so. He must be presumed to have intended the reasonably to be expected results of his acts."

Page 834, note 451. See, in addition, *Stevens v. Oscar Holway Co.*, 19 A. B. R. 399, 156 Fed. 90 (D. C. Me.).

But it has been held that such intent is not to be conclusively presumed from the mere fact that the debtor knew himself to be insolvent according to the definition of the Bankruptcy Act.

In re Mayo Contracting Co., 19 A. B. R. 551, 157 Fed. 469 (D. C. Mass.), quoted at § 1405.

The testimony of the debtor himself that he had no preferential intent is entitled to but little weight; but where the amount involved was trivial, no presumption of intent to prefer will arise.

See ante, § 131.

The Amendment of 1910 renders proof of the bankrupt's intent to prefer unnecessary.

See ante, §§ 1400, 1401.

§ 1407. Mere Cause to Suspect Debtor's Insolvency Not Enough.

Page 834, note 452. *Getts v. Janesville Grocery Co.*, 21 A. B. R. 9, 163 Fed. 417 (D. C. Wis.); *Irish v. Citizens Trust Co.*, 21 A. B. R. 39 (D. C. N. Y.); *Curtiss v. Kingman*, 20 A. B. R. 95, 159 Fed. 880 (C. C. A. Mass.); obiter, *Huttig Mfg. Co. v. Edwards*, 20 A. B. R. 349, 160 Fed. 619 (C. C. A. Iowa); In re Pfaffinger, 18 A. B. R. 807, 154 Fed. 523 (D. C. Ky.), quoted at § 1399; impliedly, *Stevens v. Oscar Holway Co.*, 19 A. B. R. 399, 156 Fed. 90 (D. C. Me.); *Tumlin v. Bryan*, 21 A. B. R. 319, 165 Fed. 166 (C. C. A. Ga.); *Stuart v. Farmers' Bk. of Cuba City*, 21 A. B. R. 403, 137 Wis. 66, 117 N. W. 820; obiter, *Nat'l Bk. v. Abbott*, 21 A. B. R. 436, 165 Fed. 852 (C. C. A. Mo.); *Sharpe v. Allender*, 22 A. B. R. 431, 170 Fed. 589 (C. C. A. Pa.); In re Wolf Co., 21 A. B. R. 73, 164 Fed. 448 (D. C. Pa., affirmed sub nom. *Sharpe v. Allender*, 22 A. B. R. 431, 170 Fed. 589 C. C. A.), quoted at § 1409; In re Bartlett, 22 A. B. R. 891, 172 Fed. 679 (D. C. Pa.).

Page 835. And circumstances may seem suspicious after the bankruptcy occurs, that would not have appeared unusual at the time of their occurrence, and would then have presented no "reasonable cause" on which to found a belief of intended preference.

Tumlin v. Bryan, 21 A. B. R. 319, 165 Fed. 166 (C. C. A. Ga.).

§ 1408. Mere Giving of Unusual Security Insufficient.

Page 835, note 453. Compare, *McDonald v. Clearwater R. Co.*, 21 A. B. R. 182, 164 Fed. 1007 (U. S. C. C.).

Likewise, the deeding of each partner's private residence to their importunate creditor, has been held sufficient to indicate the existence

of reasonable cause, even though the firm claimed to have large outstanding accounts due them on building contracts, which they were unable to collect.

Brewster v. Goff, 21 A. B. R. 239, 164 Fed. 127 (D. C. Pa.).

But the giving of unusual security, along with other facts, may indicate existence of the reasonable cause.

Wright v. Skinner Mfg. Co., 20 A. B. R. 527, 162 Fed. 315 (C. C. A. N. Y.).

§ 1409. Mere Nonpayment of Claim Long Past Due, or Frequent Dues or Broken Promises Not Sufficient.

Page 836. In re Wolf Co., 21 A. B. R. 73, 164 Fed. 448 (D. C. Pa., affirmed sub nom. *Sharpe v. Allender*, 22 A. B. R. 431, 170 Fed. 589 C. C. A.): "The question whether the transfer was a voidable one depends on whether Mr. Allender had reasonable cause to believe that a preference was intended, that is to say, that he was getting a prohibited advantage over other creditors similarly situated. He was if the company was insolvent, but not, if it was not; and the case turns therefore on whether the signs of insolvency were such as to put him on inquiry, affecting him with whatever inquiry would have discovered. It is not easy to decide, much less to point out in advance, what will amount to notice, each case standing pretty much on its own bottom. Mere financial embarrassment is not always enough, although it usually will be. The law differs somewhat in this respect from what it was formerly, owing to the different meaning given to insolvency, which, under the Act of 1867, existed if the debtor was not in a condition to pay his debts in the ordinary course of business (*Toof v. Martin*, 13 Wall. 40), but not now, unless the aggregate of his property is insufficient to meet his obligations. In the present instance, the Wolf Co. was embarrassed, and as we now know, insolvent. * * * It was plain, of course, that the Wolf Co. was in embarrassed circumstances. Its debts were known to be large, its operations extended, and some of them at least unprofitable, and new capital was needed to carry on the business. The proposed reorganization had also failed at least with the existing syndicate, and the money advanced by them had got to be repaid shortly. But, on the other hand, it did not follow from any or all of this, that the company was insolvent in the sense that its assets were not sufficient at a fair valuation to satisfy its obligations. If its debts were large, so was its plant and its business, its machinery being sold all over the United States and even as far as Japan and China. In the proposed reorganization, preferred stock to the amount of \$400,000 was to be issued, and a like amount of common, the syndicate who were to finance the operation putting up \$150,000 to take care of the outstanding bonds and getting \$180,000 of each kind of stock, W. G. Wolf on his part receiving \$170,000 of each, leaving \$50,000 of each in the treasury. If figures of this magnitude were at all justified as they apparently were in the contemplation of the parties it was hardly suggestive of insolvency. * * * The idea that Allender could go to the books is not to be thought of. Neither could he expect to get access to the report of the experts if it had been asked for. It is not intimate and inaccessible information such as this, that a creditor is bound by, but that which is open to observation and will yield to reasonable inquiry, where it has not been expressly brought home to him. No doubt in the present

instance, Allender was anxious over his debt, and pressed for its payment, and may have expressed apprehension with regard to it. But this is not to be carried too far, nor made to operate too strongly against him, particularly in view of the assurances which he had received from those best calculated to know on which he had a right to rely, to the contrary."

Page 836, note 456. See, in addition, *Huttig Mfg. Co. v. Edwards*, 20 A. B. R. 349, 160 Fed. 619 (C. C. A. Iowa); *Wright v. Skinner Mfg. Co.*, 20 A. B. R. 527, 162 Fed. 315 (C. C. A. N. Y.).

§ 1410. Failure to Investigate No Excuse Where Facts Sufficient to Put on Inquiry.

McElvain v. Hardesty, 22 A. B. R. 320, 169 Fed. 31 (C. C. A. Mo.): "Moreover, if *McElvain* did not have actual knowledge of the insolvent condition of his debtors, we think in the circumstances of this case he is constructively chargeable with that knowledge. He took a transfer of all his debtors' property—of a going concern—in satisfaction of a debt. This in itself was an unusual thing, and the reasons which actuated it must have sprung from a fear or suspicion of danger. Solvent and prosperous business houses do not commonly pay debts that way. He knew of his own dishonored notes. He knew that his debtors could not have carried on active business for seven months and thereby make enough to pay over \$2,600 upon his own indebtedness, assumed by them, without purchasing supplies. These facts and many others disclosed by the record were sufficient to put him as an ordinarily prudent man upon inquiry as to his debtor's solvency and to charge him with all the knowledge he could have acquired by the exercise of reasonable diligence."

Brewster v. Goff Lumber Co., 21 A. B. R. 106, 164 Fed. 124 (D. C. Pa.): "But the trustee must go further, to make out a case, and show that the *Goffs* had reasonable cause to believe that they were getting a preference; and this depends on whether they might or ought to have known, that *Moore & Son* were insolvent, as to which they were affected with whatever put them on inquiry and would lead to a disclosure, actual knowledge not being required."

Coder v. McPherson, 18 A. B. R. 523, 152 Fed. 951 (C. C. A. Iowa): "Notice of facts which would incite a man of ordinary prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would disclose. The bank knew that *Armstrong* had stated that he owed only \$36,000 in December, 1903, that he had given a mortgage to *Arts* for \$98,503.32 in May, 1904, and that he had stated on June 13, 1904, that he owed \$147,500 secured by mortgages upon his lands and \$47,900 that was unsecured. According to these two statements which he had given to the bank, his indebtedness had increased \$159,400 between December 24, 1903, and June 13, 1904, and his assets less than \$9,000. Two such statements would inevitably incite the ordinary creditor to inquire what had become of the \$150,000 which the increased indebtedness indicated that the debtor had received and had not added to his property during these six months, and such an inquest would have developed the fact at once that *Armstrong's* statements were not true."

Page 836, note 457. See, in addition, *In re Mills Co.*, 20 A. B. R. 501, 162 Fed. 42 (D. C. N. Car.); *Wright v. Skinner Mfg. Co.*, 20 A. B. R. 527,

162 Fed. 315 (C. C. A. N. Y.); *In re Tindal*, 18 A. B. R. 773, 155 Fed. 456 (D. C. S. Car.); *Stevens v. Oscar Holway Co.*, 19 A. B. R. 399, 156 Fed. 90 (D. C. Me.); (1867) *Burfee v. First Nat'l Bk.*, 9 N. B. Reg. 314; *Rogers v. Fidelity Sav. Bk. & Loan Co.*, 23 A. B. R. 1, 172 Fed. 735 (D. C. Ark.).

Page 837. Thus, careful abstinence from making inquiries as to financial condition, when the transfer, which itself is out of the ordinary course of trade, is made, will tend to prove cause for belief.

Huttig Mfg. Co. v. Edwards, 20 A. B. R. 349, 160 Fed. 619 (C. C. A. Iowa).

Page 837. But the rule charging the creditor with knowledge must have a reasonable construction, and to make it operate justly must relate to information concerning the financial condition and property of the debtor.

In re Pfaffinger, 18 A. B. R. 807, 154 Fed. 528 (D. C. Ky.), quoted at § 1399.

Page 837. The doctrine that the creditor is chargeable with such facts as he would have discovered by investigation where the facts actually known to him were sufficient to put him on inquiry is rejected in some cases.

Stuart v. Farmers' Bk. of Cuba City, 21 A. B. R. 403, 137 Wis. 66, 117 N. W. 820.

Page 837. Where facts are sufficient to put a creditor on inquiry, yet if thereupon such creditor does properly make inquiry and fails to ascertain facts that would indicate a deficiency of assets to meet obligations, it would seem that then the creditor is excused.

In re Bartlett, 22 A. B. R. 891, 172 Fed. 679 (D. C. Pa.), quoted at § 1402.

Where a debtor has not enough money to carry out a settlement made on an equal percentage with all creditors, it is exacting too great a diligence to require the creditors receiving their shares to investigate the ability of the debtor to pay the others their respective shares likewise.

Smith v. Hewlett Robin Co., 24 A. B. R. 153, 178 Fed. 271 (C. C. A. N. Y.).

§ 1410½. Date of Recording, Date for Existence of Reasonable Cause of Belief.

Even before the Amendment of 1910, if since the Amendment of 1903, it was probably the true rule that in cases where the transfer was effected by an instrument requiring record by State law to make it effective as against levying creditors, the date of such recording was the date at which the existence of such reasonable cause for belief was to be proved, such being the date of the effective transfer as against other creditors.

See ante, § 1379½.

McElvain v. Hardesty, 22 A. B. R. 320, 169 Fed. 31 (C. C. A. Mo.): "As,

for the purposes of this case, the transfer is to be treated as made on the date the agreement was recorded, so the transferee's belief or cause for belief concerning it must relate to that time. The evidence of two witnesses, including Carter, one of the firm, strongly tends to show that McElvain had full knowledge of the hopelessly insolvent financial condition of the firm when he recorded the agreement and took possession of the saloon."

Amendment of 1910.—But by the Amendment of 1910 to Bankr. Act § 60 (b) the question has been put at rest: the date of the recording is the date at which the "reasonable cause" must be proved to have existed.

Bankr. Act, § 60 (b), as amended 1910, quoted ante, § 1334½. Also, see ante, § 1379½.

§ 1412. Agent's Knowledge Imputed to Principal.

Page 838, note 462. Instance, *Brewster v. Goff*, 21 A. B. R. 239, 164 Fed. 127 (D. C. Pa.); instance, bank acting as lender's agent in procuring loan to be used in preferring the bank itself, *In re Lynden Mercantile Co.*, 19 A. B. R. 444, 156 Fed. 713 (D. C. Wash.).

§ 1413. Except When Agent Acting for Own Interest.

And it has been held that where a creditor's attorney has, later, been employed by the bankrupts and, on the morning of the day on which they file their petition and schedules in bankruptcy, receives collection of the creditor's claim in full and straightway turns it over to his client, the attorney himself, in the absence of fraud, may not be charged with the amount, but the trustee must pursue the client.

In re Martin & Co., 29 A. B. R. 705, 167 Fed. 236 (D. C. N. Y.): "The theory of the special commissioner is that, Mr. Turk being aware of the bankrupts' financial condition when he made the payment, it should therefore be regarded as a nullity, and he should be required to pay the money involved into the estate. The theory of Mr. Turk is that he merely acted as agent in the matter, and if there is to be any recovery of the money, recourse to Mr. Paris, the principal, should be had. I think the contention of Mr. Turk should be sustained. No doubt the knowledge which an agent obtains is, under ordinary circumstances, often imputable to his principal, but a somewhat different rule applies where the relations of attorney and client are involved and there is no question of fraud. In the latter case it is the duty of an attorney to turn a collection, made in the ordinary course of business, over to his client and not to a third person. This matter has not been litigated upon any theory of fraud, in which event, a fraud being established, a more stringent rule against the attorney should be applied (*Mayer v. Herman*, 16 Fed. Cas. No. 1,241. Here an order for the payment of money was made against an attorney who collected the sum in pursuance of business committed to him long before the bankruptcy, and who paid it in due course to his client. It seems to me that compelling the attorney to pay the amount again is not justified, and the referee's order to that effect should not be sustained."

Compare, post, § 1821½.

Doubtless a different rule would prevail in case fraud were involved.

Where the president of one corporation stole from it and put the money into another corporation and later stole from the latter corporation and replaced the money taken from the first corporation, without the knowledge of the original victim, it was held not to be a preference, because of the nonexistence of "reasonable cause for belief."

McNaboe v. Columbian Mfg. Co., 18 A. B. R. 684, 153 Fed. 967 (C. C. A. N. Y.).

It would seem that several other elements also were lacking—for instance, voluntary action of the corporation from whom the money was last stolen was lacking, hence there was no "transfer;" likewise, it is questionable whether there was a depletion of the assets of the last corporation since the money taken from it was stolen money.

§ 1414. Whether Public Corporations Chargeable with "Reasonable Cause for Believing."

But the exemption only applies to its governmental functions. The same rules should apply to public corporations as to other creditors.

Painter v. Napoleon Township, 19 A. B. R. 412, 156 Fed. 289 (D. C. Ohio): "The recitals of the bill indicate that the pleader intended to cover violations of § 60a and § 60b, Bankruptcy Act,— * * * as amended by act, Feb. 5, 1903, * * * and § 67e of the Bankrupt Act. By the Act of 1903 amending §§ 23b, 60b, and 70e, a trustee in bankruptcy is authorized to bring a suit to recover property. This is not an action for personal injury arising from the negligent act of omission or commission on the part of the township's agents, but an action authorized by the national bankrupt law to recover money charged to have been paid to the board of township trustees by Delventhal, while insolvent, within five days prior to his adjudication as a bankrupt, with an intent to create a preference and to defraud his other creditors, and to have been received by the board with reason on its part to believe and know that he was insolvent at the time of payment, and that the payment was purposely made to prefer the township as a creditor. If the averments of the bill are true, and if the effect of the payment to the board of trustees was to enable it to obtain a greater percentage of its debt than any other creditor of the same class, then Delventhal's property, in the distribution of which his creditors are entitled to share, was wrongfully, and in violation of the provisions of the Bankrupt Act received and appropriated by the board of trustees to the use and benefit of the township, and the board now seeks to retain and enjoy the benefits thus obtained by its own wrongful act. The nature of the bankrupt's liability to the township is not stated, nor is there a showing of when and how such liability arose; but, if the board's contention is correct, an insolvent debtor, within four months prior to the filing of a petition in bankruptcy, or after the filing of such petition and before the adjudication thereof, may designedly and successfully, with an intent to defraud his creditors, create a preference in favor of a township whose

agents know or have reasonable cause to believe and know that a preference in its behalf is intended, and that the enforcement of such transfer will be to enable it to obtain a greater percentage of its debt than any other of the bankrupt's creditors of the same class. The township would thereby obtain and retain a greater percentage of its debt than any other creditor of the same class, and thus defeat the salutary provisions of a beneficent law designed to accomplish an equitable distribution among creditors of bankrupt estates. In *Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed. 1040, Mr. Justice Field said: 'The obligation to do justice rests upon all persons, natural and artificial, and, if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.' The same obligation in this respect rests upon a township as upon a county. The rights and remedies of a trustee in bankruptcy are created and defined by Congress, which, under the federal Constitution (article 1, § 8, cl. 4), has exclusive control of the subject of bankruptcies, with the one qualification that its laws thereon shall be uniform throughout the United States. The rights given and the remedies thus created by federal statute may be enforced against townships or their boards of trustees. Nor is the State's permission, by legislative enactment or otherwise, necessary to the maintenance of an action of this character, or to make townships or their boards of trustees liable therein. Had the Legislature of Ohio specially enacted that townships and their boards of trustees should be exempt from liability in cases like this, such enactment would be ineffective. *Bliss v. City of Brooklyn*, 8 Blatchf. 533, Fed. Cas. No. 1,544; *May v. Com'rs of Logan County* (C. C.), 30 Fed. 250; *May v. County of Ralls* (C. C.), 31 Fed. 473. If a State law conflicts with an act of Congress, the State law must yield (*Smith v. Parsons*, 1 Ohio, 236; 13 Am. Dec. 608), because the laws of the United States, when made in pursuance of the Constitution, form the supreme law of the land, anything in the Constitution or laws of the State to the contrary notwithstanding (*McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; article 6, Const. U. S.; *In re Debs*, 158 U. S. 564, 579, 15 Sup. Ct. 900, 39 L. Ed. 1092; *Lewis' Sutherland's Stat. Constr.* [2d Ed.] 22)."

§ 1415. Whether Purchaser at Trustee's Sale Entitled to Set Aside Preferential Encumbrances on Property Purchased.

Page 839. But this ruling has been expressly disapproved.

Manufacturing Co. v. Lumber Co., 23 A. B. R. 595, 175 Fed. 335 (C. C. A. Mich.): "A conveyance of property by a bankrupt within four months before bankruptcy, which would be fraudulent at the common law, is a void conveyance under the sixty-seventh section of the bankruptcy law, and the title would vest in the bankrupt's trustee. But it is otherwise as to a conveyance which is a mere preference under section 60 of the same act, and would be merely voidable at the suit of the trustee. This is not a suit by the trustee, but by an assignee of the trustee. If the delivery was a preference, the trustee only could maintain a suit to avoid it. He may not transfer to another this right of avoidance. *Bryan v. Madden*, 15 Am. B. R. 388, 109 App. Div. 876, 96 N. Y. Supp. 465, has been cited to the contrary. We cannot agree to the conclusion of the Supreme Court of New York."

§ 1416. Right of Preferred Creditors to Offset New Credit.

Page 839, note 465. See, in addition, *Price v. Derbyshire Coffee Co.*, 21 A. B. R. 280, 128 App. Div. 472, 112 N. Y. Supp. 830. Compare, *In re Peacock*, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.).

§ 1419. Net Result, as to Enrichment of Estate after Insolvency, Test.

Page 841. *Wild & Co. v. Provident Life & Trust Co.*, 22 A. B. R. 109, 214 U. S. 292, reversing 18 A. B. R. 506, 153 Fed. 562. "The facts of the case are simple. The bankrupt became insolvent on or before January 1, 1901, but the claimants had no knowledge of their insolvency during the running of the account hereafter referred to, and the merchandise therein specified was sold and delivered in the ordinary course of business. The appellants sold and delivered merchandise in various items, beginning February 14, 1901, and ending October 8, 1901. The total price of the merchandise thus delivered was \$3,377.28. There were payments on account on June 29 and October 10, amounting to \$811.36, leaving the net amount by which the bankrupt estate was enriched \$2,565.92. The last payment, on October 10, was \$634.78, and was two days after the last sale and delivery of merchandise. The single question in the case is whether that payment was a preference. It is conceded that it would not be a preference, in view of the other facts in the case, if it had been followed by a sale and delivery of goods of any value, however small. This concession is made necessary by the decision in *Jaquith v. Alden*, 189 U. S. 78, 9 Am. B. R. 733, * * * which is, in all respects, like the present case, except that two days after the payment which was alleged to be a preference, merchandise of trifling value was sold and delivered to the bankrupt. But the decision in that case was not rested upon the fact of this slight sale subsequent to the last payment. It was rather put upon the broader principle that all the dealings between the creditor and the bankrupt were after the bankrupt's insolvency, and that their net effect was to enrich the bankrupt's estate by the total sales, less the total payments. The majority of the court thought these facts distinguished the case from *Pirie v. Chicago Title & T. Co.*, 182 U. S. 438, 5 Am. B. R. 814, * * * though there was a difference of opinion upon that point. But all doubt was resolved in *Yaple v. Dahl-Millikan Grocery Co.*, 193 U. S. 526, 11 Am. B. R. 596, * * * where the precise question which is now here was decided by the court, and it was held, where a creditor has a claim upon an open account for goods sold and delivered during the period of four months before the adjudication in bankruptcy, the account being made up of debits and credits, leaving a net amount due from the bankrupt estate, that payments made under such circumstances did not constitute preferences which the creditor was bound to surrender before proving his claim in bankruptcy."

Page 841, note 468. Compare, *In re Peacock*, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.).

§ 1425½. Offset Only Applicable upon Antecedent Preferential Transfers.

The offset is available only upon antecedent preferential transfers. The credit to be set off must be a "subsequent" credit. The credit may not be set off against a subsequent preferential transfer.

Page 845. *Price v. Derbyshire Coffee Co.*, 21 A. B. R. 280, 128 App. Div. 474, 112 N. Y. Supp. 830: "The complaint stated thirteen causes of action, each being predicated upon the payment by the bankrupt of a promissory note made in favor of the defendant. These payments are alleged to have been made at various dates between January 2 and April 20, 1906. The set-offs claimed in the answer are for merchandise alleged to have been sold by defendant to the bankrupt upon credit on February 20 and March 9, 1906. We think that the fair and obvious construction of subdivision c of § 60 of the Bankruptcy Act is that further credits extended to a person who thereafter becomes a bankrupt, may be set off only against antecedent preferential payments, and not against such as may have been made after the extension of the new credits. It follows in the present case that the set-offs claimed by the defendants are inapplicable to some of the causes of action set forth in the complaint."

Also, *In re Beswick*, 7 A. B. R. 403 (Ref. Ohio). Also, see cases cited under § 1426.

But of course such rule must be qualified so as not to include payments made, not on the pre-existing indebtedness, but upon the subsequent new credit.

Compare, cases cited at § 1426; also, see § 1425.

§ 1427. "Surrender of Preferences" as Prerequisite to Allowance of Claim.

Page 846, note 476. Compare, *Wild & Co. v. Life & Trust Co.*, 18 A. B. R. 506, 153 Fed. 562 (C. C. A. Pa.), reversed, on other points, in 22 A. B. R. 109, 214 U. S. 292, quoted, on other points, at § 1419.

§ 1429. Second Branch of Trustee's Peculiar Title and Rights Conferred by Bankruptcy Act.

Page 848, note 478. See, in addition, *In re Walsh Bros.*, 20 A. B. R. 472, 159 Fed. 560, 163 Fed. 352 (D. C. Iowa).

§ 1435. Invalidating of Liens Obtained by Legal Proceedings Distinguished from Barring of Debt by Bankrupt's Discharge.

Page 849, note 484. Instance, impliedly, *Sample v. Beasley*, 20 A. B. R. 164, 158 Fed. 606 (C. C. A. La.).

§ 1437. First Element Requisite to Nullify Lien by Legal Proceedings.

Page 850, note 487. See, in addition, *In re McKane*, 18 A. B. R. 594, 152 Fed. 733, 155 Fed. 674 (D. C. N. Y.), quoted at § 1444.

Page 850, note 492. See, in addition, *In re West Side Paper Co.*, 20 A. B. R. 660, 162 Fed. 110 (C. C. A. Pa.), quoted at § 1160; also, see ante, § 1160; post, §§ 1444, 2204; *In re Robinson & Smith*, 18 A. B. R. 563, 154 Fed. 343 (C. C. A. Ills.), quoted at § 1444; *Plaut, trustee, v. Gorham Mfg. Co.*, 23 A. B. R. 42, 174 Fed. 852 (D. C. N. Y.).

Page 850. Similarly, in most States subcontractors' liens are held not to be liens created by legal proceedings; although in other States they are held to be created thereby.

See ante, § 1156.

§ 1439. All Kinds of Liens by Legal Proceedings Nullified.

Page 850, note 495. So also, does clause "c" of § 67; *Coal Land v. Ruffner Bros.*, 21 A. B. R. 474, 165 Fed. 881 (C. C. A. W. Va.).

Page 850, note 496. See, in addition, *In re Matthews & Son*, 20 A. B. R. 570, 163 Fed. 127 (D. C. N. Y.).

Page 850, note 499. Perhaps, *In re Hecox*, 21 A. B. R. 314, 164 Fed. 823 (C. C. A. Colo.).

Page 850, note 501. See, in addition, *In re Walsh Bros.*, 20 A. B. R. 472, 159 Fed. 560, 163 Fed. 352 (D. C. Iowa).

And it applies also to creditors' bills.

Page 851. *Dunn Salmon Co. v. Pillmore*, 19 A. B. R. 172 (N. Y.): "Assuming that the commencement of the action by the plaintiff gave him a lien upon the claim against the defendant Pillmore, the lien was created within four months of the adjudication of bankruptcy, and when the defendant Jones was unquestionably insolvent, and hence was void under the Bankruptcy Act as against creditors. Section 67, subd. f. In other words, this particular creditor was prevented by the Bankruptcy Act from enforcing his rights as against the lien attempted to be created, because he would thereby gain a preference contrary to the Bankruptcy Act. * * * Although counsel have not argued the case upon that theory, it seems to me that the complaint may fairly be treated as the ordinary creditors' bill to set aside a transfer of the judgment debtor fraudulent against his creditors. In that view of the case, the lien created by the commencement of the action was void under the Bankruptcy Act; and, under the provisions of the Bankruptcy Act already referred to and under § 7 of article I of the Personal Property Law, being chapter 47 of the General Laws, the sole right to maintain an action for the benefit of the creditors resides in the trustee in bankruptcy."

§ 1440. Including Lien Acquired by Creditors by General Assignments.

Page 851, note 505. See, in addition, *In re Fish Bros. Wagon Co.*, 21 A. B. R. 147, 164 Fed. 553 (C. C. A. Kans.), quoted at § 1489.

§ 1441. Including Statutory Suits in Behalf of all Creditors for Setting Aside Fraudulent or Preferential Transfers Prohibited by State Law.

The better reason would seem to be that § 67 also includes the lien acquired by creditors by virtue of statutory suits for the setting aside of transfers fraudulent or preferential under State law and the ad-

ministration and distribution of the debtor's property for the general benefit of all creditors.

Compare, *Miller v. Acid & Fertilizer Co.*, 21 A. B. R. 416, 211 U. S. 496: "It is obvious that if, at the time of the alleged preferential transfer to Miller, there were no other creditors of the individual estate of Guillory than Miller, under the rule laid down by the Bankrupt Act, the transfer to him of assets of the individual estate, in payment of an individual debt, did not constitute a preference. That it might have constituted a preference under the State law results from the difference in the classification made by the State law, on the one hand, and the bankruptcy law on the other. So, also, it is evident, having regard to the separation between the partnership and individual estates made by the Bankrupt Act and the method of distribution of those estates, that, if there were no individual creditors, and the sum paid to Miller was returned to the estate as a preference, it would be his right to at once receive back, by way of distribution, that which he was obliged to pay in upon the theory that it was a preference. * * * As the suit by the creditors was brought within four months before the adjudication in bankruptcy, their right to a lien or preference arising from the suit was annulled by the provisions of subdivision f of § 67 of the bankrupt law. But that section authorized the trustee, with the authority of the court, upon due notice, to preserve liens arising from pending suits for the benefit of the bankrupt estate, and to prosecute the suits to the end for the accomplishment of that purpose."

§ 1442. "Legal Proceedings" Must Have Operated to Create Lien.

Legal proceedings must have operated to create the lien.

Woods v. Klein, 22 A. B. R. 722, 223 Pa. St. 257, quoted at § 1444. Also, compare all cases cited under § 1429, et seq.

§ 1443. Unfounded Replevin Actions.

But even in cases where the replevin action is thus a mere subterfuge, the proper practice would be for the trustee to intervene therein and assert his rights; if it were a mere subterfuge, the replevin suit would fail and the trustee be thus vindicated. The plaintiff in the replevin suit is entitled to his day in court to prove it is not a mere subterfuge; and, where else should he maintain his rights than in the suit itself?

Impliedly, *In re Rudnick & Co.*, 20 A. B. R. 33, 160 Fed. 903 (C. C. A. N. Y.), quoted at § 1585.

§ 1444. Legal Proceedings Not Themselves Creating Liens but Merely Enforcing Pre-Existing Rights or Liens Not Affected.

Page 854, note 507. Also, see ante, §§ 1160, 1437; post, §§ 1501, 1589, 2204. See, in addition, *In re Matthews & Son*, 20 A. B. R. 570, 163 Fed. 127 (D. C. N. Y.); *In re McKane*, 18 A. B. R. 594, 152 Fed. 733, 155 Fed. 674 (D. C. N. Y.).

Page 854. Thus, § 67f does not refer to seizures by replevin.

See ante, § 1443; post, § 1585.

Likewise, foreclosure suits, where no new lien is created but merely a former valid lien enforced, are not affected.

Page 854. *Woods v. Klein*, 22 A. B. R. 722, 223 Penn. St. 257: "The appellee acquired no right or lien as a preference over other creditors of the appellant within four months of the institution of the bankruptcy proceedings. What he did within that period was the exercise of a right and the enforcement of a lien which had been acquired 18 months before. The right was to take possession of the mortgaged boat and sell it at any time upon the default of the mortgagor. The preference was obtained when the lien attached in 1905, and not when it was enforced in 1907. No provision of the Bankrupt Act contemplates that a valid lien, acquired more than four months before the filing of a petition in bankruptcy shall be vacated by the bankruptcy proceedings, or that the enforcement of such a lien by execution shall constitute an illegal preference. *Owen v. Brown* 9 Am. B. R. 717, 120 Fed. 812 (C. C. A.). There is a clear distinction between the bald creation of a lien within the four months and the enforcement of one previously acquired. * * * The lien that is invalidated by the Bankrupt Act is one created by a levy, judgment, attachment, or otherwise, within four months. Where the lien is obtained more than four months prior to the institution of the bankruptcy proceedings, it is not only not to be deemed null and void on an adjudication of bankruptcy, but its validity is recognized. When the lien is obtained within four months, the property of the bankrupt is discharged therefrom, but not otherwise."

In re McKane, 18 A. B. R. 594, 152 Fed. 733, 155 Fed. 674 (D. C. N. Y.): "As to the second motion, in which a stay of the sale under the foreclosure is asked, a hasty examination seems to indicate, from the reasoning set forth in the case of *Metcalf v. Barker*, 187 U. S. 165, 9 Am. B. R. 36, that the judgment in foreclosure has not created the lien, and is not within the provisions of § 67f. The judgment is merely a decree by a court having competent jurisdiction directing the enforcement of a lien which cannot be affected or vacated by bankruptcy proceedings."

Instance (though also instituted before the four months—an immaterial consideration), *Sample v. Beasley*, 20 A. B. R. 164, 158 Fed. 606 (C. C. A. La.).

Nor are seizures by the sheriff, on execution, of property already mortgaged to the same creditor for the same debt affected; nor does § 67f refer to proceedings to give effect to landlord's liens.

In re Robinson & Smith, 18 A. B. R. 563, 154 Fed. 343 (C. C. A. Ills.): "And the claim of appellant is that the seizure in distress is, within these paragraphs, in the nature of a suit or proceeding in attachment, and having been begun within the four months before bankruptcy, is annulled by the adjudication of bankruptcy. We cannot concur in this view. The whole question is one of interpretation of the Bankruptcy Act—the policy of that act respecting the recognition of liens in the distribution of bankrupt estates. Paragraphs 'c' and 'f' quoted were meant, in our judgment, to relate only to those actions or proceedings taken by creditors, who having no existing

lien or right of lien resting in existing contract, entered into in good faith, seek to obtain preference by being first in a race of diligence—a preference that the bankruptcy law annuls, because the purpose of that law is to substitute equality for diligence. But the lien obtained by the distress warrant under the kind of lease involved in this case is not the result of a race of diligence. Under the lease, and the Illinois law interpreting the lease and the rights of the parties thereunder (*Powell v. Dailey*, 163 Ill. 646, 45 N. E. 414; *Atkins v. Byrnes*, 71 Ill. 332) the right of lien was created when the lease was executed, and the tenant entered upon possession of the premises—a right put wholly, at that time, within the control of the landlord, and maturing the moment the landlord chose to mature it. And though it did not actually attach (as in the New York case, 4 Am. B. R. 126, 102 Fed. 292, *supra*) until within four months of the bankruptcy, it was the kind of lien, it seems to us, that § 67d was intended to preserve; for unquestionably as between the parties to the lease it was a lien, not simply because the distress warrant was actually levied, but because, by contract between them, the levy of the distress warrant was authorized; and as against creditors, such a lien prevails from the moment it is made a matter of record or public notice, not solely because by such record or notice the lien attaches, but because, from the moment of such record or notice, the creditors are informed that the lien, or the right to such lien, had been in existence from the time that the contract authorizing it was entered into. In other words, the lien is not one that the creditor has obtained irrespective of any right or lien given him by the debtor, but wholly by resort to the judicial proceedings in law or equity that are open to all; but is a lien given directly by the debtor and accepted by the creditor, in good faith, and not in contemplation of bankruptcy—just the kind of relationship that distinguishes a lien attaching as the result of contract, from a lien springing out of some independent and adverse proceedings.”

Nor will it cause the bankruptcy court to supersede the custody of the State court under levy thereon.

Page 854, note 511. See, in addition, *In re West Side Paper Co.*, 20 A. B. R. 660, 162 Fed. 110 (C. C. A. Pa.), quoted at § 1160.

Nor does it refer to warrants of eviction in landlord's proceedings to recover possession of leased premises.

Plaut, trustee, v. Gorham Mfg. Co., 23 A. B. R. 42, 174 Fed. 852 (D. C. N. Y.). Compare, as to *forum*, however, post, §§ 1796, 1799.

Nor does it refer to the mere appointment, within the four months, of a receiver in supplementary proceedings, where the supplementary proceedings were instituted before the four months.

Wrede v. Clark, 21 A. B. R. 821 (N. Y. Sup. Ct. App. Div.), quoted at § 1455.

§ 1445. Lien Valid in Part, and Void as to Balance.

Page 855. The custody of the State court may be preserved as to the first part and be superseded as to the latter part.

Page 855, note 512. But compare, *Coal Land Co. v. Ruffner Bros.*, 21 A. B. R. 474, 165 Fed. 881 (C. C. A. W. Va.), quoted at §§ 1603, 1902.

§ 1446. Receiverships, etc., May Operate to Create "Liens by Legal Proceedings."

And in some cases are held to be supplanted by virtue of § 67c instead of by § 67f.

Coal Land Co. v. Ruffner, 21 A. B. R. 474, 165 Fed. 881 (C. C. A. W. Va.).

§ 1447. Second Element Requisite to Nullify Lien by Legal Proceedings.

Page 856. Where a writ of attachment has been levied within the four months period and while the bankrupt was insolvent, but has been discharged by an undertaking for which the surety takes no security from the bankrupt's estate, the writ will not be vacated after the adjudication in bankruptcy so as to discharge the surety.

King v. Block Amusement Co., 20 A. B. R. 784, 126 App. Div. 48, 111 N. Y. Supp. 102: "Counsel for appellant contends that the effect of these provisions is merely to discharge the lien of the attachment, and not to vacate the writ. He concedes that, so far as the bankrupt is concerned, the cause of action has been discharged, but he urges that his client should be permitted to proceed to judgment against the bankrupt with a perpetual stay against the enforcement of the judgment against the bankrupt, which would protect the latter in all the rights guaranteed by the Bankruptcy Act, and at the same time would enable the plaintiff to enforce the liability of the surety on the undertaking. Authority for that course is found in many cases where the warrant of attachment was procured more than four months prior to the filing of the petition in bankruptcy. *Hill v. Harding*, 130 U. S. 699; *Holyoke v. Adams*, 59 N. Y. 233; *Metcalf v. Barker*, 187 U. S. 165, 9 Am. B. R. 36. See, also, *Hillyer v. Le Roy*, 12 Am. B. R. 733, 179 N. Y. 369, and *Pikert v. Eaton*, 81 App. Div. 423. In all of these cases it is to be borne in mind that unless the right of the plaintiff to continue the action to judgment were preserved he would lose the lien duly acquired by the attachment or the benefit of the security of the undertaking which took its place. The effect of the contention of the learned counsel for appellant would be to place his client in a better position by having obtained the undertaking, than if the levy had stood upon the property, for it is clear that under the provisions of the Federal statute herein quoted, if no undertaking had been given to discharge the levy, the levy would be discharged by the decree in bankruptcy and the trustee in bankruptcy would be entitled to the property. In that event the plaintiff's only right would have been to share with other general creditors in his proportion of the proceeds derived from the sale of the property. It is conceded that if the surety had taken security, it would be the duty of the court under subdivision f of section 67 of the Bankruptcy Act to vacate the warrant of attachment as a condition of requiring the surety to deliver over to the trustee in bankruptcy the property pledged. It is argued in behalf of respondent that since the attachment was issued within four months of filing the petition in bankruptcy, and the lien thereof, if the undertaking had not been given, would have been discharged by the bankruptcy of the defendant, the plaintiff has not been prejudiced by the giving of the undertaking, and a construction should not be placed upon the act which would give the plaintiff the advantage of holding the

surety on the undertaking when he could not have held the property under the attachment and that the proper construction of these provisions of the Bankruptcy Act is that where the lien is acquired by virtue of a judgment or warrant of attachment recovered or issued within four months of filing the petition in bankruptcy both the lien and the instrument under which it was acquired should be deemed null and void, * * * and the United States Circuit Court of Appeals, Fifth Circuit, so held, in effect, in *Klipstein & Co. v. Allen-Miles Co.*, 14 Am. B. R. 15, 136 Fed. 385. Our Court of Appeals, however, held under the Bankruptcy Act of 1867, which, although different in terms on this point, is not sufficiently different in substance to warrant us in distinguishing and not following the authority, that a warrant of attachment which had been issued within four months of filing the petition in bankruptcy and had been discharged by a similar undertaking but not vacated, was unaffected, at least as to the surety, by the subsequent adjudication in bankruptcy and discharge of the bankrupt, and that where the action was prosecuted to judgment the liability of the surety became thereby fixed. *McCombs v. Allen*, 82 N. Y. 114. In the case at bar this court following *Holyoke v. Adams*, supra, recently held that this defendant should not be permitted to amend its answer by setting up its discharge in bankruptcy which would prevent plaintiff obtaining judgment upon which the liability of the surety might be enforced. 125 App. Div. 922. It would seem to follow that the defendant was not entitled to have the warrant of attachment vacated. We are not concerned with the question as to the remedy of the surety over against the estate in bankruptcy or against the bankrupt personally in the event that it shall be obliged to pay any judgment that may be recovered herein (see *Hill v. Harding*, supra, and *Klipstein & Co. v. Allen-Miles Co.*, supra), and no opinion is expressed on those points."

§ 1448. "Judgment" Means Judgment Lien, Not Judgment Itself.

Page 857, note 515. See, in addition, (1867) *Catlin v. Hoffman*, 9 N. B. Reg. 345.

Page 858, note 516. See, in addition, *In re Matthews & Son*, 20 A. B. R. 570, 163 Fed. 127 (D. C. N. Y.).

§ 1449. Judgments Whose Liens Annulled Yet Valid for Other Purposes, as *Res Adjudicata*, etc.

Page 859. And while § 67f discharges the lien of an attachment, it does not vacate the writ.

King v. Block Amusement Co., 20 A. B. R. 784, 126 App. Div. 48, 111 N. Y. Supp. 102, quoted at § 1447, cited in *In re Squiers*, 21 A. B. R. 346, 165 Fed. 515 (D. C. N. Y.).

§ 1450. Lien by Legal Proceedings May Have Been Indirectly Effected.

Page 860, note 518. See, in addition, obiter, *King v. Block Amusement Co.*, 20 A. B. R. 784, 126 App. Div. 48, 111 N. Y. 102, quoted at § 1447.

§ 1450½. Lien on Property in Foreign Country.

Where the creditor has obtained a lien by legal proceedings upon the

bankrupt's property in foreign countries, such creditor will not be allowed to share in the dividends until he has surrendered the lien.

Compare, ante, § 1294½.

In *re Pollman*, 19 A. B. R. 474, 156 Fed. 221 (D. C. N. Y.): "Inasmuch as there is no evidence of insolvency on Pollmann's part in November, 1904, the referee has based his finding entirely on § 67c (3), * * * holding that the German procedure was of the nature of 'an attachment upon mesne process,' that it was begun 'within four months before the filing of a petition in bankruptcy' against Pollmann, and that such lien (i. e., attachment) 'was sought and permitted in fraud of the provisions of this act.' In the able opinion filed by the referee I concur. If the procedure above outlined had taken place, as it well might, in the United States, it cannot be doubted that the successful attachment creditor would have been obliged to refund the proceeds of his attachment. * * * The fact that the lien was obtained in a foreign country can make no difference in the meaning of the phrase 'in the fraud of the provisions of this act.' That expression does not necessarily mean active fraud or illegality, but intent to prevent equitable distribution of the debtor's property, and where that intent obtains is immaterial. But, further, the decision is in my opinion right upon broad equitable grounds. It may well have been that the trustee acquired no title whatever to the German realty. *Oakey v. Bennett*, 11 How. 33, * * *. But this proves no more than that Klemm was entitled to enjoy in Germany the fruits of his German legal proceeding."

§ 1451. Third Element to Nullify Lien.

Page 860, note 519. See, in addition, *Dunn Salmon Co. v. Pillmore*, 19 A. B. R. 172 (N. Y.), quoted on other point at § 1439. *Batchelder & Co. v. Wedge*, 19 A. B. R. 268, 80 Vt. 353; obiter, *Woods v. Klein*, 22 A. B. R. 722, 223 Pa. St. 257, quoted on other points at § 1444; In *re Koslowski*, 18 A. B. R. 723, 153 Fed. 823 (D. C. Pa.).

§ 1455. Attachment or Other Lien Effected before Four Months, but Judgment Not Rendered until within, Lien Good.

Page 863, note 526. See, in addition, In *re U. S. Graphite Co.*, 20 A. B. R. 573, 159 Fed. 300, 161 Fed. 583 (D. C. Pa.); *Nat'l Surety Co. v. Medlock*, 19 A. B. R. 654, 2 Ga. App. 665, 58 S. E. 1131. Compare, analogous proposition ante, § 1444.

Page 864. Such is the rule where the attachment or garnishment itself is superseded by the giving of a redelivery bond, the bond taking the place of the property.

Nat'l Surety Co. v. Medlock, 19 A. B. R. 654, 2 Ga. App. 665, 58 S. E. 1131: "Whether the service of a summons of garnishment creates a technical lien on the funds in the hands of the garnishee or not, still, especially when the garnishee admits liability and pays the fund into court, or in lieu of such actual payment a statutory bond is substituted, the court acquires such a hold upon the money or the res, such a right to retain and administer the fund, or what has been substituted for the fund, the bond, that the subsequent adjudication in bankruptcy, made more than four months thereafter, will not disturb it."

Similarly, where within the four months, a receiver was appointed in proceedings supplementary to execution which had been instituted before the four months, the lien was held to revert to the date of the order in the supplementary proceedings, not to the date of the appointment of the receiver.

Wrede v. Clark, 21 A. B. R. 821 (N. Y. Sup. Ct., App. Div., reversing 21 A. B. R. 170): "The question for determination is whether the service of the order in supplementary proceedings upon the judgment debtor prior to the four months' period created a lien upon his property rights in the seat on the Stock Exchange, so that if the trustee in bankruptcy took anything he took it subject to such lien; or whether, although the plaintiff was appointed and qualified as receiver during the four months' period, his title to the judgment debtor's rights in the seat related back to the commencement of the proceedings instituted by service of the order on the judgment debtor, so that no title whatever passed to the trustee in bankruptcy. We are of the opinion that a lien was created as of the commencement of the proceedings and that the surplus being insufficient to pay the judgment represented by plaintiff the trustee in bankruptcy was entitled to no part of it and that all of it should have been awarded to the plaintiff-receiver. Section 2469 of the Code of Civil Procedure prescribes that where a receiver in supplementary proceedings has been appointed and has duly qualified so that title to the property of the judgment debtor shall become vested in him, such title extends back by relation for the benefit of the judgment creditor in whose behalf the special proceedings was instituted to the time of the service of the order for examination, and that such title by relation back to the time of the commencement of the proceedings shall be good as against all persons except a purchaser in good faith without notice and for a valuable consideration or the payment of a debt due the judgment debtor in good faith and without notice. The language of the section is plain and the courts have not attempted to construe it other than literally, but have held that upon the appointment of a receiver in supplementary proceedings and his qualification he takes the legal title to all the personal property of the judgment debtor, whether in his hands or in the hands of others, as of the date of service of the order in supplementary proceedings, except as to purchasers in good faith or a debtor who has paid his debt in good faith. (*Ward v. Petrie*, 157 N. Y. 301, 307.) The commencement of the proceedings supplementary to execution gave the judgment creditor a lien upon the property of the judgment debtor, and that lien having been acquired more than four months prior to the bankruptcy proceedings was not affected thereby."

Page 864. The same rule has been held to apply to the case of a judgment rendered within the four months upon an award of arbitrators made before the four months, where, by State law, the lien of such judgment reverts to the date of the rendering of the award.

In *re Koslowski*, 18 A. B. R. 723, 153 Fed. 823 (D. C. Pa.), quoted at § 1459. But compare, discussion in § 1459.

Likewise, where the attachment is obtained before the four months but judgment is not rendered until after adjudication, the lien is unaffected.

Batchelder v. Wedge, 19 A. B. R. 268, 80 Vt. 353.

§ 1459. **State Law Controls as to Nature of Lien, Time Takes Effect, Abandonment, etc.**

Page 865, note 531. As to lien of supplementary proceedings, *Wrede v. Clarke*, 21 A. B. R. 821 (N. Y. Sup. Ct. App. Div.), quoted at § 1455.

Page 866. And, on principle, it would seem that the time of the actual "obtaining" of the judgment lien or of the levy of execution or attachment should control; but the tendency of some decisions bearing upon the point seems to be in the opposite direction, to the effect that it does not necessarily control where the statutes or decisions of the State declare that the lien of a judgment or levy shall revert to the beginning of the term or to the attesting of the writ or to some other date.

Page 866. Impliedly, *In re Koslowski*, 18 A. B. R. 723, 153 Fed. 823 (D. C. Pa.): "But on the other hand, to the extent that the action is sustained and a judgment recovered within the amount of the award, the lien is carried back to the date of its entry, and takes rank accordingly. First National Bank's Appeal, 100 Pa. 418. This is familiar law, which hardly needs the citation of authorities. The only question is as to how to apply it. It is contended by the trustee and the contesting creditors, as already intimated, that, as the judgment which was secured by the claimant was essential to give effect to the award, and was obtained within four months of bankruptcy, the lien of the award is incapable of enforcement, the judgment being nullified either by those provisions of the Bankruptcy Act (§ 67f) which make void 'all levies, judgments, attachments, or other liens, obtained through legal proceedings, against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him;' or by those (§ 60a, b) which prohibit and make voidable a preference of one creditor over another which has been similarly secured. * * * Where a valid lien has been secured more than four months prior to bankruptcy, proceedings to enforce the same do not conflict with the bankruptcy law, and may be instituted and prosecuted to the end, if that is requisite. * * * In the present instance, therefore, the applicant was entirely within his rights in taking judgment as he did by agreement with the bankrupt, and it is immaterial that this was within a few days of the filing of the petition. And the merits having been thereby concluded in his favor, the lien of the judgment is carried back to the award, which being sustained to its full amount, excepting interest, is binding as of the date of its entry, and must be paid."

Reardon v. Rock Island Plow Co., 22 A. B. R. 26, 168 Fed. 654 (C. C. A. Ills.).

Page 866. Thus, the lien of supplementary proceedings has been held to revert to the date of the service of the order (anterior to the four months), and not to have arisen at the date of the appointment of a receiver therein, though the latter was appointed within the four months time.

Wrede v. Clarke, 21 A. B. R. 821 (N. Y. Sup. Ct. App. Div.), quoted at § 1455.

Page 866. And it would seem on principle that the bankruptcy courts need not, in this particular, adopt the fictions of the State law, since the peculiar title and rights conferred by the Bankruptcy Act for the protection of the insolvent fund are involved.

§ 1460. Fourth Element to Nullify Lien—Insolvency.

Page 867, note 533. See, in addition, *Dunn Salmon Co. v. Pillmore*, 19 A. B. R. 172, 106 N. Y. 88; inferentially, *Coal Land Co. v. Ruffner*, 21 A. B. R. 474, 165 Fed. 881 (C. C. A. W. Va.).

§ 1461. Fifth Element to Nullify Lien by Legal Proceedings—Debtor Must Eventually Be Adjudged Bankrupt.

The debtor must eventually be adjudged bankrupt, else the lien is not invalidated.

In *re Greek Mfg. Co.*, 21 A. B. R. 717, 167 Fed. 427 (D. C. Pa.); also, see, impliedly, all other decisions, under this subdivision, since they are all predicated, impliedly at any rate, on adjudication.

Page 867, note 535. See analogous proposition under "Preferences," §§ 1291, 1312½; post, § 2266.

§ 1462. Invalidity of Liens by Legal Proceedings Ultimately Rests on Basis of Preference.

Upon reflection, it becomes evident that the invalidity of such liens rests on almost the same basis as the voidability of preferences.

Inferentially, compare, In *re Koslowski*, 18 A. B. R. 723, 153 Fed. 823 (D. C. Pa.), quoted partially at § 1459; inferentially, *Dunn Salmon Co. v. Pillmore*, 19 A. B. R. 172, 106 N. Y. 88; impliedly, *Woods v. Klein*, 22 A. B. R. 722, 223 Pa. St. 257, quoted at § 1444.

§ 1463. Clause "f" of § 67 Supersedes Clause "c" Where in Conflict.

Page 871, note 541. This clause, also, is the basis of the decision in *In re Pollman*, 19 A. B. R. 474, 156 Fed. 221 (D. C. N. Y.), quoted at § 1450½; and in *Coal Land Co. v. Ruffner*, 21 A. B. R. 474, 165 Fed. 881 (C. C. A. W. Va.), quoted at § 1603.

Page 871, note 542. Compare, *Coal Land Co. v. Ruffner*, 21 A. B. R. 474, 165 Fed. 881 (C. C. A. W. Va.).

Page 871. And again, it is under this clause that the bankruptcy court has required the surrender of a lien obtained in a foreign country upon property of the bankrupt there as a prerequisite to the creditor's participation in the bankruptcy here.

In *re Pollman*, 19 A. B. R. 474, 156 Fed. 221 (D. C. N. Y.), quoted at § 1450½.

§ 1464. Clause "f" Applies to Voluntary Bankruptcies as Well as to Involuntary.

Page 871, note 544. Instance, *In re Walsh Bros.*, 20 A. B. R. 472, 159 Fed. 560, 163 Fed. 352 (D. C. Iowa).

§ 1468. Lien Absolutely Void and Falls of Itself.

Page 873, note 548. Impliedly, *In re Walsh Bros.*, 20 A. B. R. 472, 159 Fed. 560, 163 Fed. 352 (D. C. Iowa); impliedly, *In re Cohn*, 18 A. B. R. 786 (Ref. Calif., affirmed by D. C.); obiter, *In re Smith*, 23 A. B. R. 864, 176 Fed. 426 (D. C. N. Y.), quoted at § 234.

§ 1470. Requisite to Bring Situation to Notice of Court or Officer Seeking to Enforce Lien.

Page 874, note 549. **Notification of Attaching Officer by Referee.**—Instance, *In re Walsh Bros.*, 20 A. B. R. 472, 159 Fed. 560, 163 Fed. 352 (D. C. Iowa).

§ 1471. May Come into Court Where Lien Obtained and Ask for Surrender.

Page 874, note 550. Impliedly, *In re Hecox*, 21 A. B. R. 314, 164 Fed. 823 (C. C. A. Colo.), quoted at § 1611.

Page 874. The trustee in bankruptcy, also, may come into the case where the lien was obtained and ask the court there for the preservation of the lien of the State court proceedings.

See post, § 1489; *Conti v. Sunseri*, 18 A. B. R. 898 (Pa. Com. Pleas).

§ 1472. Comity Requires Resort First to Court Wherein Lien Obtained.

Page 875. *In re Hecox*, 21 A. B. R. 314, 164 Fed. 823 (C. C. A. Colo.)—a case of a receivership created within the four months: "In contemplation of the Bankrupt Act, in so far as concerned his right to the custody of the property of the bankrupt, he stood as if he had never been appointed by the State court. In such situation, as he holds the property not in his own right, but solely in his claimed official capacity, it was his duty, on notification and demand by the trustee in bankruptcy, to deliver the property to him. But inasmuch as he was the appointee of the State court, as a mere act of courtesy, sometimes, but hardly accurately, termed 'judicial comity,' the bankrupt court in the first instance directed the trustee to prefer a request to the State court for an order on its receiver to deliver the property in his custody to the trustee. In such case, if the State court decline to reciprocate the consideration thus paid to its dignity, the law is well settled that it is then competent for, and the duty of, the bankrupt court to order the receiver to deliver the property over to the trustee, and he would be in contempt if he refuse to comply therewith. Controlling authorities affirm the foregoing proposition."

§ 1474. Or May (after Adjudication) Issue Order to Surrender.

Page 877, note 557. Impliedly, *In re Grassler & Reichwald*, 18 A. B. R. 694, 154 Fed. 478 (C. C. A. Calif.); instance, receiver in supplementary pro-

ceedings, In re Matthews & Sons, 20 A. B. R. 570, 163 Fed. 127 (D. C. N. Y.); instance, constable ordered to surrender possession, In re Cohn, 18 A. B. R. 786 (Ref. Calif.); instance (placed however on other grounds than lien by legal proceedings), In re Hecox, 21 A. B. R. 314, 164 Fed. 823 (C. C. A. Colo.), quoted at § 1611.

Page 878, note 557. That the referee may make such order, after adjudication and reference, see ante, § 540; post, § 1827.

Contempt by officer in failing to obey order of surrender, see post, § 1856 and § 2330.

Page 878. And it has been held that the marshal or receiver may be ordered to seize the property before adjudication; but this hardly would be justified, for the lien is not annulled by the mere filing of the petition, but only by the adjudication.

Compare, ante, § 1461.

§ 1477. Where Sheriff Already Paid Over Proceeds to Execution Creditor Latter Becomes Adverse Party Not to Be Summarily Dealt with.

Page 878, note 560. Obiter, In re Grassler & Reichwald, 18 A. B. R. 694, 154 Fed. 478 (C. C. A. Calif.); In re Resnek, 21 A. B. R. 740, 167 Fed. 574 (D. C. Pa.), quoted at § 1478.

Page 880. But a delivery of the attached property to the attaching creditor upon the giving of a redelivery bond by the creditor, is not within the doctrine of this paragraph, for the property, in such circumstances, is still in the custody of the court, in the eyes of the law, the bond standing in the stead of the property, in specie; and the doctrine of this paragraph refers only to the *proceeds* of property sold under order.

Instance, In re Cohn, 18 A. B. R. 786 (Ref. Calif.).

§ 1478. And Recovery Only to Be Had on Other Grounds than § 67f.

Page 880. In re Resnek, 21 A. B. R. 740, 167 Fed. 574 (D. C. Pa.): "Where, within four months before the filing of a petition in bankruptcy against an insolvent debtor, an execution has been issued and levy and sale made and the proceeds paid over to the judgment creditor before the filing of the petition, the case does not fall within the provisions of § 67f of the Bankruptcy Act, and the lien created by the judgment and levy is not rendered void by the adjudication. The remedy, if any the trustee has, against the creditor, is under the provisions of §§ 60a and 60b of the Bankruptcy Act in a plenary action, where it will be necessary to allege and show that the creditor had reasonable cause to believe that the bankrupt, by suffering judgment to be taken against him, intended to give a preference."

Page 880, note 561. See ante, § 1338.

Page 881. As, for instance, a preference by way of judgment "procured" or "suffered."

In re Resnek, 21 A. B. R. 740, 167 Fed. 574 (D. C. Pa.), quoted ante.

Page 881, note 562: See, in addition, In re Resnek, 21 A. B. R. 740, 167 Fed. 574 (D. C. Pa.), quoted supra.

§ 1479. **Proceeds of Execution or Attachment Sale in Sheriff's Hands Pass to Trustee.**

Page 881, note 563. See, in addition, In re Matthews & Son, 20 A. B. R. 570, 163 Fed. 127 (D. C. N. Y.); impliedly, In re Grassler & Reichwald, 18 A. B. R. 694, 154 Fed. 478 (C. C. A. Calif.), quoted at § 1796; impliedly, In re Walsh Bros., 20 A. B. R. 472, 159 Fed. 560, 163 Fed. 352 (D. C. Iowa).

Page 882. And the delivery of the attached property to the attaching creditor, under redelivery bond, would not alter the case, since such property is, in legal contemplation, still in the possession of the court's officer, the bond answering therefor.

Instance, In re Cohn, 18 A. B. R. 786 (Ref. Calif.).

Compare, ante, § 1477.

§ 1481. **Bona Fide Purchasers at Legal Sales Protected.**

Page 883, note 566. 5. Purchaser buying only "the bankrupt's interest" and being notified of attachments levied more than four months prior to the bankruptcy, Batchelder v. Wedge, 19 A. B. R. 268, 80 Vt. 353.

§ 1484½. **If Pays after Bankruptcy, Creditor Summarily Ordered to Surrender.**

If the sheriff pay over the proceeds to the creditor after the bankruptcy, the creditor may be ordered summarily to surrender them.

In re Grassler & Reichwald, 18 A. B. R. 694, 154 Fed. 478 (C. C. A. Calif.): "If the property had been in the adverse possession of the petitioner before the bankrupts filed their petition to be adjudicated bankrupts there can be no doubt that a plenary suit would have been necessary. But assuming, as we may under the record, the facts to have been, as it is claimed by the respondent herein that they were, that certain property of the bankrupts was taken upon a void attachment and that the money realized on the sale thereof was paid to the petitioner on a judgment entered in his favor by default against the bankrupts several weeks after they had filed their petition in the District Court to be adjudicated bankrupts, and that this was known to the petitioner, we think there can be no question that under the provisions of § 2 (7) and § 67f of the Bankruptcy Act, authorizing the referee to compel the surrender of funds to the trustee, the proceeding had before the referee in this case was permissible."

And where several creditors receive different portions of the proceeds from the sheriff, under a common scheme to thwart the creditors in bankruptcy, an order against them all jointly will lie.

Ryan v. Hendricks, 21 A. B. R. 570, 166 Fed. 94 (C. C. A. Wis.).

§ 1485. Lien for Costs Falls with the Rest.

Page 884, note 571. In re Iroquois Mach. Co., 22 A. B. R. 183, 166 Fed. 629 (D. C. R. I.), quoted at § 2197. But compare, In re Schmidt & Co., 21 A. B. R. 593, 165 Fed. 1006 (C. C. A. N. Y.), quoted at § 1486.

Page 885. But, in cases where State or United States laws give priority to the costs, they may have the same priority in bankruptcy, under § 64 (b) (5).

Complete discussion and citation of cases, see post, §§ 2196, 2197.

§ 1486. Sheriff No Right to Retain Creditor's Costs, nor to Retain Property Till Costs Paid.

Page 885. But compare, In re Schmidt & Co., 21 A. B. R. 593, 177 Fed. 1006 (C. C. A. N. Y.), which arose upon a petition to review an order directing the trustee in bankruptcy to pay the fees of the sheriff of New York on two executions levied upon property of the bankrupt within four months prior to the filing of the petition in bankruptcy. "We are satisfied that the language used by Congress in the 67th section of the Bankrupt Act providing that levies under judgment within the period named 'shall be deemed null and void' was not intended to deprive the State's officer of his statutory fees, accruing prior to bankruptcy, under proceedings in the State courts, which were in all respects regular and in accordance with the State law and practice."

§ 1488½. Seizure from Sheriff by Third Person.

Page 885. After adjudication the possession of the sheriff or other levying officer is not adverse to the bankruptcy court.

In re Walsh Bros., 20 A. B. R. 472, 159 Fed. 560, 163 Fed. 352 (D. C. Iowa), quoted further at § 1807. See also, post, § 1661.

And a seizure, by replevin or otherwise, from his custody, has been treated as a direct interference with the custody of the bankruptcy court.

In re Walsh Bros., 20 A. B. R. 472, 159 Fed. 560, 163 Fed. 352 (D. C. Iowa): "It is urged that, if the plaintiffs in the several replevin suits sold the property replevined by them respectively to the bankrupts, under such circumstances as will entitle them to rescind the sales and reclaim the property, the title to such property would not pass to the trustee in bankruptcy. The merits of this contention will not be heard or considered upon this hearing. It is admitted that the property had been delivered to the bankrupts pursuant to contracts of purchase thereof, and was in their possession when it was seized by the sheriff under the attachment, and was in his custody at the time of the adjudication in bankruptcy. The adjudication in bankruptcy discharged the attachment and released the attached property therefrom, unless the court of bankruptcy shall order the lien preserved for the benefit of the bankrupt estate. Bankruptcy Act, § 67f, * * * The adjudication also operated as a seizure of the property, and it was in custodia legis from that time; and upon the appointment and qualification of the trustee the title and right thereto passed to the trustee, who then became its legal custodian for the court of bankruptcy, and that court will award it to whomever it rightly be-

longs. *White v. Schloerb*, 178 U. S. 542, 4 Am. B. R. 178, * * * In re Granite City Bank, 14 Am. B. R. 404, 137 Fed. 818, * * * The seizure of the property upon the writs of replevin was therefore a direct interference with the rightful custody of the court of bankruptcy and wholly unauthorized. *White v. Schloerb*, 178 U. S. 542, 4 Am. B. R. 178."

And such seizure has been held to be a contempt of the bankruptcy court.

In re Walsh Bros., 20 A. B. R. 472, 159 Fed. 560, 163 Fed. 352 (D. C. Iowa), quoted further at § 1807.

§ 1489. Preservation of Lien for Benefit of Estate.

Page 886, note 577. Obiter, impliedly, In re Walsh Bros., 20 A. B. R. 472, 159 Fed. 560, 163 Fed. 352 (D. C. Iowa); *Goodnough Stock Co. v. Galloway*, 22 A. B. R. 803, 171 Fed. 940 (D. C. Ga.); obiter, impliedly, *Davis v. Crompton*, 20 A. B. R. 53, 158 Fed. 735 (C. C. A. Pa.), quoted at § 1243¾; *Conti v. Sunseri*, 18 A. B. R. 891 (Pa. Com. Pleas).

Page 888, note 581. Apparently, *Dunn Salmon Co. v. Pillmore*, 19 A. B. R. 172 (N. Y.).

Page 888. The lien of an assignment for the benefit of creditors has been preserved in order to invalidate unrecorded liens which otherwise would be good as against the trustee in bankruptcy.

In re Fish Bros. Wagon Co., 21 A. B. R. 149, 161 Fed. 553 (C. C. A. Kans.): "We think that a title or lien acquired by an assignee under a general assignment valid according to the law of the State where it is made, that is to the advantage of the estate when it has passed into bankruptcy, is not necessarily destroyed by the supersession of the assignment proceeding, but that upon the order of the court of bankruptcy it may be retained by the trustee for the benefit of the creditors. This conclusion is in harmony with the object sought by express provisions of the Bankruptcy Act for the preservation of liens obtained in judicial proceedings against the debtor, and it is a fair corollary of the settled rule allowing the assignee compensation for acts that are beneficial to the estate which afterwards passes to the trustee."

Similarly, the liens of executions have been preserved, to cut off unrecorded conditional sales contracts and other unrecorded instruments.

Reardon v. Rock Island Plow Co., 22 A. B. R. 26, 168 Fed. 654 (C. C. A. Ills.): "The Bankruptcy Act provides (§ 67b, c. f.) for the preservation of liens in favor of the estate, when obtained by any creditor of the bankrupt, through legal proceedings or otherwise, and set aside in bankruptcy, with the trustee subrogated therein for their enforcement; and the effect of this provision, in reference to an order in bankruptcy so preserving a lien obtained in legal proceedings, is not open to question (*First National Bank v. Staake*, 202 U. S. 141, 146, 148, 15 Am. B. R. 639, 26 Sup. Ct. 580, 50 L. Ed. 967) as rendering it inoperative as a preference, while the statute recognizes its force otherwise, but 'distributes the lien among the whole body of the creditors,' in conformity with the policy of the act. The executions described in the bill were issued in favor of judgment creditors of the bankrupt and in the hands of the sheriff for levy; and when bankruptcy intervened, liens being claimed,

the court made this statutory order, on notice to the claimants—the only notice, as we believe, intended by the provision—so that the trustee became subrogated to any lien obtained by such creditors, as of the date of the adjudication of bankruptcy.”

Likewise, the lien of creditors under a suit to set aside a transfer that is preferential under State law but not under the Bankruptcy Law has been preserved.

Miller v. Acid & Fertilizer Co., 21 A. B. R. 416, 211 U. S. 496 (affirming 117 La. 821): “It is obvious that if, at the time of the alleged preferential transfer to Miller, there were no other creditors of the individual estate of Guillory than Miller, under the rule laid down by the Bankrupt Act, the transfer to him of assets of the individual estate, in payment of an individual debt, did not constitute a preference. That it might have constituted a preference under the State law results from the difference in the classification made by the State law, on the one hand, and the bankruptcy law on the other. * * * As the suit by the creditors was brought within four months before the adjudication in bankruptcy, [the filing of the petition?] their right to a lien or preference arising from the suit was annulled by the provisions of subdivision f of section 67 of the bankrupt law. But that section authorized the trustee, with the authority of the court, upon due notice, to preserve liens arising from pending suits for the benefit of the bankrupt estate, and to prosecute the suits to the end for the accomplishment of that purpose. * * * It is inferable that the parties proceeded.” [For further quotation, see § 1491.]

Page 888. The referee has jurisdiction to order the trustee to interfere.

Conti v. Sunseri, 18 A. B. R. 891 (Pa. Com. Pleas).

§ 1491. Order of Preservation Requisite.

Page 889. *Goodnough Stock Co. v. Galloway*, 22 A. B. R. 803, 171 Fed. 940 (D. C. Ga.): “There is provided in that subdivision [Bankr. Act, § 67f] a method whereby the lien of attachment may in proper cases be preserved for the benefit of the estate. This may be done by order of the court on due notice. No attempt, however, was made in the bankruptcy proceeding to so preserve the attachment lien of the bank for the benefit of the estate, and no such order of court has been made within the purview of the Act, and hence it cannot be insisted that the attachment lien still exists for any purpose. The statute was designed to preserve some interest acquired by virtue of the attachment, which would not pass to the trustee by virtue of the bankruptcy proceeding. * * * If the property passes at any rate to the trustee, there is no necessity for invoking the order of the court. The attachment being dissolved, the trustee is not further embarrassed in his settlement of the estate.”

Page 889, note 585. See, in addition, *Davis v. Crompton*, 20 A. B. R. 53, 158 Fed. 735 (C. C. A. Pa.), quoted at § 1243¼. Also, compare, *Miller v. Acid & Fertilizer Co.*, 21 A. B. R. 416, 211 U. S. 496, quoted, on other point at § 1489.

Page 889. But if the order is not made until after the property is surrendered by the creditor, it is, perhaps, too late; since, then, there

is no longer any lien in existence to which the trustee might be subrogated.

Davis v. Crompton, 20 A. B. R. 64 (C. C. A. Pa.), quoted at § 1243¾.

The order of preservation is to be made by the bankruptcy court, not by the State court.

Obiter, *Miller v. Acid & Fertilizer Co.*, 21 A. B. R. 416, 211 U. S. 496: "It is inferable that the parties proceeded upon the erroneous conception that the State court, where the suit was pending, was competent to authorize the trustee; but, as no question on that subject was made below or is here raised, we may not reverse the judgment in favor of the trustee because of the absence of authority from the bankrupt court, when presumably the want of authority would have been supplied had its absence been challenged. Assuming, therefore, that the trustee was properly authorized, it follows that he was entitled to preserve and enforce the privilege or lien which arose in favor of the creditors, resulting from their pending action, even although the cause of action arose from the State law, and the application of that law was essential to secure the relief sought. To the accomplishment of this end the bankrupt law was cumulative and did not abrogate the State law." [For further quotation, see ante, § 1489.]

And the referee has jurisdiction to make the order.

Conti v. Sunseri, 18 A. B. R. 891 (Pa. Com. Pleas).

§ 1491¼. Notice on Lienor Requisite.

Notice to the lienor is requisite.

Reardon v. Rock Island Plow Co., 22 A. B. R. 26, 168 Fed. 654 (C. C. A. Ills.), quoted at § 1489.

§ 1491½. Whether Extent of Lien Measures Extent of Trustee's Rights.

It would seem to follow, logically, that the extent of the lien preserved would measure the extent of the trustee's rights acquired by virtue of the preservation. So that, as to any surplus of value of the property over the amount of the lien, the trustee would stand in the bankrupt's shoes.

See §§ 1243¾, 1243½. Also, compare, § 1225½.

§ 1493. Third Branch of Trustee's Peculiar Title and Rights Conferred by Bankruptcy Act—Fraudulent Transfers within Four Months.

Page 890, note 587. Bankr. Act, § 67 (e): "All conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the

filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors."

Page 890, note 587. **Section 67 (e) Covers Two Classes of Fraudulent Transfers.**—It must be observed that § 67 (e) covers two classes of fraudulent transfers: First, those where the transferrer's fraudulent intent alone need be proved to make out a *prima facie* case; second, those which are fraudulent by State law. The first class only is being considered at this place since it alone is a title peculiarly conferred by the Bankruptcy Act. The second class has already been considered in connection with the "Title of the Trustee as Successor to the Creditors," ante, § 1216.

§ 1494. *Prima Facie* Case without Proof of Transferee's Participation.

Page 891, note 588. *Shelton, trustee, v. Price*, 23 A. B. R. 431, 174 Fed. 891 (D. C. Ala.).

Page 892, note 588. Instance, held not invalid under § 67 (e). *Coder v. Arts*, 18 A. B. R. 513, 153 Fed. 943 (C. C. A. Iowa).

Instance, held invalid under § 67 (e) but transferee's intent not adverted to. *Henkel v. Seider*, 20 A. B. R. 773, 163 Fed. 553 (D. C. N. Y.): Voluntary transfers to wives to avoid creditors.

Instance, *Clingman v. Miller*, 20 A. B. R. 360, 160 Fed. 326 (C. C. A. Kans.), although this was also under the last clause of § 67 (e) as well as under the first clause, and therefore properly appearing also at § 1269, where it can be found; the court in this case holding that where an insolvent debtor, in a jurisdiction where the statute provides that every general assignment shall be for the benefit of all the creditors of the assignor, on the same day that he made a general assignment for creditors, transferred certain property to a particular creditor by a separate instrument, the trustee in bankruptcy, in a suit to recover the value of property transferred to the particular creditor, is entitled to go to the jury on the question whether the transfer was a part of the transaction which resulted in the making of the general assignment, so as to make the transfer void both under the State law and also under § 67 (e) of the Bankruptcy Act, 1898, and the direction of a verdict against the plaintiff constitutes reversible error.

Page 893, note 589. To same effect, compare, *Allen v. McMannes*, 19 A. B. R. 276, 156 Fed. 615 (D. C. Wis.), quoted at § 1216; *In re Rosenberg*, 22 A. B. R. 900 (Ref. N. Y.). See ante, § 1270½.

Page 893, note 590. *In re Rosenberg*, 22 A. B. R. 900 (Ref. N. Y.). See ante, § 1270½.

§ 1495. But Transferee's Good Faith and Valuable Consideration, Defense.

Page 893, note 591. See, in addition, *Shelton, trustee, v. Price*, 23 A. B. R. 431, 174 Fed. 891 (D. C. Ala.).

Page 893, note 592. See, in addition, *In re Rosenberg*, 22 A. B. R. 900 (Ref. N. Y.). See ante, § 1270½.

And a presently passing consideration must have been given.

Impliedly, *Henkel v. Seider*, 20 A. B. R. 773, 163 Fed. 553 (D. C. N. Y.).

Where the consideration moving from the transferee is purely executory, his innocence will not suffice.

See ante, § 1219½.

§ 1496. What Constitutes "Good Faith."

The standard of good faith as a defense for the transferee under § 67 (e) is the same as that of a creditor in accepting payments, or transfers of property as payment, or as security, from an insolvent debtor.

See ante, § 1216; compare, *Wright v. Sampter*, 18 A. B. R. 355, 152 Fed. 196 (D. C. N. Y.).

Page 893, note 593. See, in addition, *In re Rosenberg*, 22 A. B. R. 900 (Ref. N. Y.). See ante, § 1270½.

Page 894. Although the mere fact that the sale was one out of the usual course of business is not of itself *prima facie* proof of fraudulent intent, but merely a badge to be taken into consideration along with other facts.

Houck v. Christy, 18 A. B. R. 330, 152 Fed. 612 (C. C. A. Kans.): "It may be that, in the recent case of *Dokken v. Page* (C. C. A.), 17 Am. B. R. 228, 147 Fed. 438, involving a sale by a retail merchant of his entire stock of goods, we gave undue prominence to the language of the court in *Walbrun v. Babbitt*; but it was not our intention to say that the fact that the sale was out of the usual and ordinary course of business was, when taken alone, *prima facie* evidence of fraud under the present Bankruptcy Act, but only that it was a circumstance which, in connection with the surrounding facts disclosed in the opinion, vitiated the sale there under consideration."

Page 895, note 594. See, in addition, *In re Rosenberg*, 22 A. B. R. 900 (Ref. N. Y.). See ante, §§ 1227, 1270½.

Thus, likewise, purchasers from one known to be insolvent, or purchasing an entire stock at less than cost, are put upon inquiry and are bound to investigate and are not exercising good faith if they do not investigate.

Page 895. *Houck v. Christy*, 18 A. B. R. 330, 152 Fed. 612 (C. C. A. Kans.): "One is not a purchaser in good faith, if he purchases with knowl-

edge of the fraudulent intent of the vendor, or under such circumstances as should put him upon inquiry as to the object for which the vendor sells. *Jones v. Simpson*, 116 U. S. 609, 614, * * *. Apart from what Christy had learned through his connection with the bank, he and Cover knew that Stephenson was engaged in a business in which men usually have creditors, that he had been recently incumbering his property for small amounts, that he was hastily disposing of all of it for much less than its fair value, that he was insisting that he be paid in cash, which it is easy to conceal from creditors, and that the transaction was altogether unusual. Plainly, therefore, they had knowledge of what reasonably should have put them, as prudent men, upon inquiry as to his solvency and purpose, and were chargeable with all the knowledge which would have been acquired by prosecuting the inquiry with reasonable diligence; which they did not do."

Page 895. But where adequate consideration was given, and the sale was talked of for a long time beforehand and everything appeared fair and above board, the transferee's good faith has been held established.

See *In re Bartlett*, 22 A. B. R. 891, 172 Fed. 679 (D. C. Pa.).

§ 1496¼. Badges of Fraud Considered All Together, Not Separately.

Badges of fraud altogether inclusive if separately considered, may, by their number and joint operation, be sufficient to constitute conclusive proof of fraudulent intent on the part of both transferrer and transferee.

Houck v. Christy, 18 A. B. R. 330, 152 Fed. 612 (C. C. A. Kans.), quoted at § 1496; also, see ante, §§ 109, 1216½.

§ 1496½. Great Latitude in Admission of Evidence.

Questions of fraud can scarcely ever be proved by direct evidence, hence the necessity for admission of all circumstances fairly connected with the transaction.

In re Luber, 18 A. B. R. 476, 152 Fed. 492 (D. C. Pa.), quoted at § 114½.

§ 1497. Section 67 (e) Not Applicable to Mere Preferential Transfers.

Page 895, note 596. *In re Kullberg*, 23 A. B. R. 758, 176 Fed. 585 (D. C. Minn.).

Van Iderstine, trustee, v. Nat'l Discount Co., 23 A. B. R. 345, 174 Fed. 518 (C. C. A. N. Y.): "There is a marked distinction between a preferential payment and a fraudulent conveyance. Every preferential payment must to some extent hinder and delay creditors, but it is not necessarily a fraudulent conveyance. * * * A preferential payment may be constructively fraudulent, but it is not in and of itself a fraudulent conveyance. It can only become the latter in the unusual case where actual fraud in addition to the preferences is established. Thus a secret trust in favor of a person making such payments might turn a mere preference into a fraudulent conveyance. But there is

no proof in this case of any intent to hinder or defraud creditors more than the preferential payments in themselves would have hindered them."

Coder v. Arts, 213 U. S. 223, 22 A. B. R. 1: "A consideration of the provisions of the bankruptcy law as to preferences and conveyances shows that there is a wide difference between the two, notwithstanding they are sometimes spoken of in such a way as to confuse the one with the other. A preference, if it have the effect prescribed in § 60, enabling one creditor to obtain a greater portion of the estate than others of the same class, is not necessarily fraudulent. Preferences are set aside when made within four months, with a view to obtaining an equal distribution of the estate, and in such cases it is only essential to show a transfer by an insolvent debtor to one who himself or by his agent knew of the intention to create a preference. In construing the Bankruptcy Act this distinction must be kept constantly in mind. As was said in *Githens v. Shiffler* (D. C.), 7 Am. B. R. 453, 112 Fed. 505: 'An attempt to prefer is not to be confounded with an attempt to defraud, nor a preferential transfer with a fraudulent one.' In *re Maher*, 16 A. B. R. 343, 144 Fed. 503-509, it was well said by the district court of Massachusetts: 'In a preferential transfer the fraud is constructive or technical, consisting in the infraction of that rule of equal distribution among all creditors which it is the policy of the law to enforce when all cannot be fully paid. In a fraudulent transfer the fraud is actual—the bankrupt has secured an advantage for himself out of what in law should belong to his creditors, and not to him.'"

Page 895. *Sargent v. Blake*, 20 A. B. R. 115, 160 Fed. 57 (C. C. A. Me.): "Intentional transfers by insolvents to secure or pay pre-existing debts within four months prior to the filing of a petition in bankruptcy which are not voidable as preferences under § 67e, or violative of other provisions of law, and which are made without intent to hinder, delay, or defraud creditors more than such securities or payments necessarily have that effect, do not evidence an intent to hinder, delay, or defraud creditors within the meaning of § 67e of the Bankruptcy Act of 1898. It is not every intent to hinder or delay creditors in collecting, or to prevent them from collecting, but, an intent to do so unlawfully only that is denounced by that section."

Coder v. Arts, 18 A. B. R. 513, 152 Fed. 943 (C. C. A. Iowa, affirmed in *Coder v. Arts*, 22 A. B. R. 1, 213 U. S. 223: "A transfer by an insolvent, within four months prior to the filing of a petition, for the purpose of securing or paying a pre-existing debt, without any intent or purpose to affect other creditors injuriously beyond the necessary effect of the security, is lawful, if not violative of other provisions of law, and it does not evidence any intent to hinder, delay, or defraud creditors within the meaning of Bankruptcy Act, 1898, § 67e."

§ 1498. And Trustee Must Show Bankrupt's Actual Fraud.

And the trustee must, of course, as part of his case in chief show the bankrupt's fraud in making the transfer.

Impliedly, *In re Bloch*, 15 A. B. R. 748, 142 Fed. 676 (C. C. A. N. Y.).

Coder v. Arts, 22 A. B. R. 1, 213 U. S. 223: "But the act does not dispense with the necessity of showing, to avoid a conveyance or transfer under § 67e, that the bankrupt had the actual intent to hinder, delay, or defraud creditors. What is meant when it is required that such conveyances, in order to

be set aside, shall be made with the intent on the bankrupt's part to hinder, delay, or defraud creditors? This form of expression is familiar to the law of fraudulent conveyances, and was used at the common law, and in the statute of Elizabeth, and has always been held to require, in order to invalidate a conveyance, that there shall be actual fraud; and it makes no difference that the conveyance was made upon a valuable consideration, if made for the purpose of hindering, delaying, or defrauding creditors. The question of fraud depends upon the motive. Kerr, *Fraud & Mistake*, 196, 201. The mere fact that one creditor was preferred over another, or that the conveyance might have the effect to secure one creditor and deprive others of the means of obtaining payment, was not sufficient to avoid a conveyance; but it was uniformly recognized that, acting in good faith, a debtor might thus prefer one or more creditors. *Stewart v. Dunham*, 115 U. S. 61, * * * *Huntley v. Kingman & Co.*, 152 U. S. 527, * * * We are of opinion that Congress, in enacting 67e, and using the terms 'to hinder, delay, or defraud creditors,' intended to adopt them in their well-known meaning as being aimed at conveyances intended to defraud. In section 60 merely preferential transfers are defined, and the terms on which they may be set aside are provided; in 67e, transfers fraudulent under the well recognized principles of the common law and the statute of Elizabeth are invalidated. The same terms are used in § 3, subdivision 1, in which it is made an act of bankruptcy to transfer property with intent to hinder, delay, or defraud creditors. Such transfers have been held to be only those which are actually fraudulent."

The rule of 67 (e) simply relieves the trustee from the necessity, otherwise existing, of showing the transferee's participation therein.

§ 1499. Transfer Must Have Been within Four Months.

The transfer must have been made within the four months to be voidable, if the transferee's participation in the fraudulent intent be not shown.

Impliedly, *In re Hill*, 15 A. B. R. 499, 140 Fed. 981 (D. C. Calif.); impliedly, *Henkel v. Seider*, 20 A. B. R. 773, 163 Fed. 553 (D. C. N. Y.).

But if made on the same day of the month of the fourth month preceeding, it is "within four months."

Voluntary conveyances by way of gift, to avoid creditors, are not limited to four months and do not have to come under § 67 (e). They are void under Bankruptcy Act, § 70 (a) (4), being "property transferred by him in fraud of his creditors," title to which passes to the trustee by operation of law.

§ 1500. Protection of Liens Which Are Not in Contravention of Act.

Page 896, note 600. See, in addition, *Ohio Valley Bank Co. v. Mack*, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio); *In re Hersey*, 22 A. B. R. 863, 171 Fed. 1001 (D. C. Iowa); *Martin v. Orgain*, 23 A. B. R. 454, 174 Fed. 772 (C. C. A. Tex.); impliedly, *Simmons v. Greer*, 23 A. B. R. 443, 174 Fed. 654 (C. C. A. S. Car.); *In re Kullberg*, 23 A. B. R. 758, 176 Fed. 585 (D. C. Minn.).

Page 897. *Am. Mach. Co. v. Norment*, 19 A. B. R. 679, 157 Fed. 801 (C. C. A. N. C.): "This deed of trust having been executed within four months of the bankruptcy adjudication can only be maintained on the ground that the debt secured thereby was made in good faith and without fraud to secure a present advancement or loan of money to the bankrupt company, and therefore saved by subdivision 'd' of § 67 of the Bankrupt Act."

Amendment of 1910.—Since the Amendment of 1910 to Bankr. Act, § 67d, the proposition of this section is more correctly stated as follows:

"Liens given or accepted in good faith and not in contemplation of or in fraud upon the act and for a present consideration, which have been recorded according to law, if record be necessary to impart notice, are, but to the extent of such present consideration only, not affected."

Bankr. Act, § 67 (d), as amended in 1910: "Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this act."

§ 1501. Is Converse of Avoidance of Liens Opposed to Bankruptcy Act.

Page 898. Likewise, we find the converse of the nullification of liens acquired by legal proceedings while the debtor is insolvent within four months of the bankruptcy, under § 67 (f), in the protection of liens not acquired by legal proceedings, or where the legal proceedings simply enforce a lien already existing and not acquired by legal process.

See ante, §§ 1155, 1160, 1161, 1444. Also, see *In re Robinson & Smith*, 18 A. B. R. 563, 154 Fed. 343 (C. C. A. Ills.).

This provision protects assignments, given for presently passing consideration, of wages to be earned in the future under existing contracts of employment.

Citizens Loan Ass'n v. Boston, etc., R. Co., 19 A. B. R. 650 (Mass.), quoted at § 2678, also, see § 451.

Page 898. And it must not be considered that liens which do not come within its provisions are rendered invalid by it, unless they be otherwise invalid.

Impliedly, *Coder v. Arts*, 18 A. B. R. 513, 152 Fed. 943 (C. C. A. Iowa): "And finally, mortgages or transfers, to secure pre-existing debts made within four months of the filing of a petition in bankruptcy, are legal and valid, unless voidable by reason of some provision of the bankruptcy law, or of some State law, notwithstanding the fact that they create preferences. They are valid unless avoided; not void unless validated. The provision of § 67d, that liens for present considerations given and accepted in good faith shall

not be affected by the bankruptcy law, does not strike down or render voidable those given and accepted for past considerations."

Page 898. There is some apparent ambiguity in the use of the word "only" in the Amendment of 1910 to § 67d, whereby the possible construction might be given to this amendment that by implication all other liens except those mentioned in § 67d, as thus amended, *are* "affected" by the act. However, such is not a proper construction of the amendment. Section 67d, no more now than formerly, creates any additional right of avoiding liens; it is still merely the converse of the avoidance of liens opposed to the Bankruptcy Act. The object of the amendment is manifest. Some of the decisions had gone to the extent of holding an entire lien valid if any portion of it were given on present consideration, thus affording a ready means of defeating the Bankruptcy Law in reference to preferential liens. The true rule, even before the Amendment of 1910, was that a lien might be valid as to the part covered by presently passing consideration and yet be void as to the rest (see ante, § 1326, note), and the Amendment of 1910 simply puts the question at rest.

See Report No. 691 of the Senate Judiciary Committee of the 61st Congress, Second Session.

§ 1502. Lien within Four Months Valid if Other Essentials Exist.

It will be observed that the lien may be given even during the four months period preceding bankruptcy—it may be given at any time, even up to the hour of adjudication, provided the other essentials, good faith, present consideration and recording, exist.

In re Hersey, 22 A. B. R. 863, 171 Fed. 1001 (D. C. Iowa).

§ 1504. What Constitutes "Good Faith."

Page 899, note 609. See ante, §§ 1227, 1496.

Page 899. But the requirement that lack of reasonable cause for believing the debtor insolvent must appear clearly and without question is probably not proper.

Impliedly, *Ohio Valley Bank Co. v. Mack*, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio): "It is enough to say that the state of the evidence does not, under the principles affecting appeals upon questions of fact determined by a referee who heard the witnesses and confirmed by the district judge, warrant a refusal to accept the conclusion of the courts below that Stockhoff did not knowingly abet the bankrupt in giving a preference to Charles Mack, Sr. He stands therefore in the attitude of one who took a security for money advanced at the time in good faith. This saves his mortgage."

Page 900, note 613. See, in addition, *Ohio Valley Bank Co. v. Mack*, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio), quoted supra. See ante, § 1301, et seq.

Page 900. And, likewise, liens given for a presently passing consideration, but the proceeds of which are used in making preferences, are nevertheless good if the mortgagee is ignorant of its intended use or simply knows that the proceeds are to be used to pay existing creditors, but does not know that such payment of existing creditors would work a preference.

Compare, *In re Kullberg*, 23 A. B. R. 758, 176 Fed. 585 (D. C. Minn.); also, compare, *Stedman v. Bank of Monroe*, 9 A. B. R. 4, 117 Fed. 237 (C. C. A.); also, compare, *In re Soudans Mfg. Co.*, 8 A. B. R. 45, 113 Fed. 804 (C. C. A.).

Page 900, note 614. Compare, rule protecting bona fide purchasers for value in cases of fraudulent transfers and what will not amount to bona fides in such cases, ante, § 1494; and *Houck v. Christy*, 18 A. B. R. 330, 152 Fed. 612 (C. C. A. Kans.). See ante, § 1301, et seq.

Page 900, note 615. See, in addition, *In re Blanchard*, 20 A. B. R. 417, 161 Fed. 793 (D. C. N. Car.).

Page 900, note 616. See, in addition, *In re Blanchard*, 20 A. B. R. 417, 161 Fed. 793 (D. C. N. Car.).

§ 1505. Second Essential to Protection of Lien—Not to Be Given and Accepted in Contemplation of Bankruptcy or in Fraud of Act.

Page 900, note 618. *In re Blanchard*, 20 A. B. R. 417, 161 Fed. 793 (D. C. N. Car.).

§ 1506. Third Essential to Protection of Lien—"Present Consideration."

The lien must be given for a "present consideration."

Page 901, note 620. See, in addition, *McDonald v. Clearwater R. Co.*, 21 A. B. R. 182, 164 Fed. 1007 (U. S. C. C. Idaho); *Simmons v. Greer*, 23 A. B. R. 443, 174 Fed. 654 (C. C. A. S. Car.); obiter and impliedly, *In re Bartlett*, 22 A. B. R. 891, 172 Fed. 679 (D. C. Pa.). See ante, § 1326½.

If it be given in part for a presently passing consideration, and in part for a pre-existing debt it is protected pro tanto.

See also, *In re Hersey*, 22 A. B. R. 863, 171 Fed. 1001 (D. C. Iowa).

As to whether mechanics' liens, landlords' liens, etc., are given for "present consideration," see ante, §§ 1155, 1160, 1161, 1444.

As to cases where the transferee is innocent but the consideration moving from him is wholly executory, see ante, § 1219½.

§ 1507. Fourth Essential to Protection of Lien—"Recording" Where State Law "Requires to Impart Notice."

Page 901, note 621. And "creditor" under Massachusetts law does not mean merely one levying process but includes a general creditor, so that

the trustee may avoid such a lien though no levy has been made, as, for instance, where it is recorded in one place whilst the statute requires it to be recorded in two places. In *re McDonald*, 23 A. B. R. 51, 173 Fed. 99 (D. C. Mass.).

§ **1510. Rights of Creditors against Sureties for Bankrupt, etc.**

Page 902, note 624. *National Surety Co. v. Medlock*, 19 A. B. R. 654, (Ga.) 58 S. E. 1131: Garnishee in libel suit bound where garnishment levied before four months period.

§ **1511. Applies to Secondary Liability on Obligation Itself, Not to Sureties in Court Proceedings—Attachment and Appeal Bonds Released if Liability Dependent on Judgment.**

Page 902, note 625. See, in addition, *Crook-Horne Co. v. Gilpin*, 23 A. B. R. 350 (Md. Ct. App.); compare, *In re Mercedes Import Co.*, 21 A. B. R. 590, 166 Fed. 427 (C. C. A. N. Y.).

§ **1511½. Stockholder's Liability Not Released.**

The bankruptcy of a corporation will not release a stockholder, director or officer thereof from any liability, as such, under the laws of the State or of the United States.

Bankr. Act, § 4 (b); *Firestone Co. v. Agnew*, 21 A. B. R. 292 (N. Y.).

§ **1513. Conversely, Rights and Defenses of Sureties of Bankrupt Not Affected.**

Page 903, note 626. See, in addition, *In re Benedict*, 18 A. B. R. 604 (Ref. N. Y.), quoted at § 1513½.

§ **1513½. Creditor's Acceptance of Composition, Whether Releases Surety.**

Where the creditor is one of those whose consents in writing, etc., have enabled the bankrupt to fulfill the prerequisites of the right to make a composition, it is altogether likely that the surety is released, unless he had consented to such action. Whatever might be the case with regard to a creditor who participates in the composition for the first time after confirmation, it is manifestly an entirely different case where his own active consent has helped the bankrupt to get the majority in number and amount of claims allowed, which is the prerequisite to his right to file a petition for confirmation of composition.

In *re Benedict*, 18 A. B. R. 604 (Ref. N. Y.): "While through a 'composition' the principal debtor is as completely relieved from his personal liability as he would be by a 'discharge,' yet such relief is obtained in a different manner. Relief under composition cannot be obtained without the co-operation of the creditors. The active consent of the necessary

number of creditors is a condition precedent. Without this active co-operation on the part of the creditors the liability of the principal debtor would remain undischarged and the remedies of the surety unimpaired. Under the Bankruptcy Act, two methods of relief are open to the insolvent debtor. The relief to be obtained is equally effectual and complete whichever method is followed. Under the first method, the insolvent surrenders his entire property for a distribution of the entire avails among his creditors. Under the second method, he may surrender the whole, or, as in this case, only a portion of his property, and with the co-operation of the requisite number of creditors and the consent of the court, he may be equally relieved from further liability to pay his indebtedness. Such relief, while equally effectual and for many purposes of the same quality as the other, it appears to me should not be considered a 'discharge' within the meaning of § 16 and so as to destroy otherwise existing rights of other persons secondarily liable. If a surety is required to pay the debt of his principal, equity demands that he should have an opportunity to indemnify himself—at least to the full measure of the principal's ability to pay—and that if in any way the holder of the claim has co-operated to deprive him of this right, such holder should be denied recourse to the surety. This view has full sanction, it appears to me, in the Matter of McDonald, reported at Federal Cases, 8,753, where it was decided under the Act of 1867 that if the holder of a note assented to the 'discharge' of the maker, without the consent of the endorser, the endorser would be released. Under that act, unless an estate paid fifty per cent., the 'discharge' could only be granted upon consent of the majority in number and amount of the creditors. McDonald was unable to pay the required percentage for a discharge. He procured the written consent of the required number and value of his creditors and was discharged."

Compare, inferentially, *Firestone Co. v. Agnew*, 21 A. B. R. 292 (N. Y.).

§ 1513¾. Surety's Right to Defend Attachment Suit, Where Bankrupt's Trustee Refuses.

Where the trustee of a bankrupt defendant in an attachment suit declines to defend, the surety upon the attachment bond is entitled to defend.

Bluegrass Canning Co. v. Steward, 23 A. B. R. 726, 175 Fed. 537 (C. C. A. Ky.): "Pending the suit below the canning company was adjudicated a bankrupt, and this fact was shown in the case. The creditors declined to prosecute the suit. The court below allowed the suit to go on in the name of the bankrupt upon the execution of a bond indemnifying the bankrupt against costs by J. E. Gunther, a surety upon the attachment bond, but announced that it would dismiss the case if the defendants would release the sureties upon the attachment bond. This was declined, and the motion to dismiss the suit because of the plaintiff's bankruptcy was denied. The surety upon the attachment bond had a direct interest in the successful prosecution of the suit, and, if he was willing to indemnify the bankrupt, was properly allowed to go on with the case for his own protection. The bankruptcy of the corporation did not dissolve it. 2 Clark & Marshall, Private Corporations, p. 863. While the bankrupt trustee may intervene and prosecute a pending suit if he will, yet, if he does not, we see no reason why the bankrupt may not go on with it if he wishes."

§ 1519. Creditor Entitled to Prove against Both Principal and Surety Where Both Bankrupt.

Page 904. Board of Commrs. *Kan. v. Hurley*, 22 A. B. R. 209, 169 Fed. 92 (C. C. A. Kan.): "The obligee in a bond, or the holder of a claim upon which several parties are personally liable, may prove his claim against each of the estates of those who become bankrupt, and may at the same time pursue the others at law, and he may recover notwithstanding payments after the bankruptcy by other obligors or by their estates dividends from each estate in bankruptcy upon the full amount of his claim at the time the petition in bankruptcy was filed therein, until from all sources he has received full payment of his claim, but no longer. The filing of a petition in bankruptcy vests in each creditor of the bankrupt an equitable estate in such a proportion of his property as the creditor's claim bears to the entire amount of the provable claims."

§ 1521. Creditor Receiving Dividends Out of Maker's Estate First, Whether May Prove Only for Unpaid Balance against Surety.

But if the creditor receives dividends out of the maker's estate before he has proved his claim against the endorser, it has been held that he may prove against the endorser merely for the unpaid balance. Yet this would not be the rule except in cases where such dividends out of the maker's estate were received before the filing of the surety's bankruptcy petition.

Board of Commrs. *Kans. v. Hurley*, 22 A. B. R. 209, 169 Fed. 92 (C. C. A. Kans.): "A single question remains: Is the claim of a creditor against the estate of a surety in bankruptcy upon which the principal has made partial payments after the date of the filing of the petition in bankruptcy entitled to allowance at and to dividends upon the amount owing upon it when the petition was filed, or upon the amount remaining unpaid upon it when the final allowance of it is made, or when the respective dividends are paid? In the discussion of this question preferences, securities consisting of pledged or mortgaged property, such as are required to be surrendered or applied upon claims by the bankruptcy law, are laid out of consideration, and what is said has no reference to rights under them, because no such rights are in issue here. Laying out of view then such preferences and securities, the status of claims at the time of the filing of the petition in bankruptcy, and not at any subsequent time, fixes the rights of their owners to share in the distribution of the estate of the bankrupt. Bankruptcy Act, § 63 a (1), * * * *Swarts v. Siegel*, 8 Am. B. R. 690, 117 Fed. 13, 15, 54 C. C. A. 399, 401; *In re Bingham* (D. C.), 2 Am. B. R. 223, 94 Fed. 796. On that date the property of the bankrupt passes from his control to the court or to its receiver, and thence to the trustee in trust for the creditors of the bankrupt in proportion to the amounts of their claims at that time. On that date there vests in each creditor as a cestui que trust an equitable estate in such a part of the property of the bankrupt as the amount of his provable claim at that time bears to the entire amount of the provable claims against the estate. * * * The obligee in a bond, or the holder of a claim, upon which several parties are personally liable, may prove his claim against the estates of those who become bank-

rupt and may at the same time pursue the others at law, and, notwithstanding partial payments after the bankruptcy by other obligors or their estates, he may recover dividends from each estate in bankruptcy upon the full amount of his claim at the time the petition in bankruptcy was filed therein until from all sources he has received full payment of his claim, but no longer. In *re Babcock* (Mr. Justice Story), 2 Fed. Cas. 289, 291 (No. 696); *Ex parte Farnsworth*, 8 Fed. Cas. 1055, 1056 (No. 4,672); In *re Hicks*, 12 Fed. Cas. 113, 114 (No. 6,456); In *re Howard*, 12 Fed. Cas. 625, 627 (No. 6,750); *Downing's Assignee v. Traders' Bank*, 2 Dill. 136, 144, 7 Fed. Cas. 1008, 1011 (No. 4,046); In *re Souther*, 22 Fed. Cas. 815 (No. 13,184)."

§ 1524. Staying Discharge and Permitting Creditor to Take Judgment to Fix Liability on Surety.

Page 906. In *re Mercedes Import Co.*, 21 A. B. R. 590, 166 Fed. 427 (C. C. A. N. Y.), reversing 20 A. B. R. 648: "The district judge was not obliged to grant the stay under § 11 of the Bankruptcy Act, but did so because he thought that the creditor had no better equity against the surety than he had against the bankrupt. As the trustee in bankruptcy has no interest whatever in the claim against the surety we think the creditor's rights and equities are questions to be disposed of by the State court. * * * We think the court in which the action is pending should be left free to take whatever steps it thinks equitable in the premises in accordance with its own practice, and the order granting the stay is therefore reversed."

Page 906, note 636. See, in addition, *King v. Block Amusement Co.*, 20 A. B. R. 784, 126 App. Div. 48, 111 N. Y. Supp. 102, quoted at § 1447; In *re Maher*, 22 A. B. R. 290, 169 Fed. 997 (D. C. Ga.); rule affirmed but not applied because indemnity given, In *re Maaget*, 23 A. B. R. 14, 173 Fed. 232 (D. C. N. Y.); In *re Ennis & Stoppani*, 22 A. B. R. 679, 171 Fed. 755 (D. C. N. Y.), quoted post, this same section; obiter (creditor seeking to subject property not exempt as to him without staying discharge), *Bowen & Thomas v. Keller*, 22 A. B. R. 727, 130 Ga. 31. Also, see §§ 648, 1914, 2200, 2446, 2712. And the same rule would prevail as to exempt property. See § 1102, et seq.

Provided such third party by becoming such surety had not released property of the bankrupt from an attachment, execution or other sequestration by legal proceedings itself annulled by the bankruptcy.

Page 908. In *re Ennis & Stoppani*, 22 A. B. R. 679, 171 Fed. 755 (D. C. N. Y.): "Though I cannot wholly vacate the stay, I can, however, permit the petitioner to enter his judgment against the bankrupts, and to do so much else as may be necessary to perfect any rights he may have under the undertaking, if any. The undertaking was taken out more than four months before the petition was filed; and, assuming that the indemnity given the surety created a lien under § 67c or 67f, which it is not necessary to decide, such a lien is not invalid. If the petitioner can enforce the undertaking, I will aid him to do so."

Page 908, note 638. Analogously, obiter, *King v. Block Amusement Co.*, 20 A. B. R. 48, 111 N. Y. Supp. 102, quoted at § 1447; inferentially, *Crook-Horner Co. v. Gilpin*, 23 A. B. R. 350 (Md. Ct. App.). See, under subject of "Discharge," post, §§ 2711, 2712.

Page 908. And the matter of stay rests in the sound discretion of the court.

In re Mercedes Import Co., 21 A. B. R. 590, 166 Fed. 427 (C. C. A. N. Y., reversing 20 A. B. R. 648, on other grounds); In re Mercedes Import Co., 20 A. B. R. 648, 166 Fed. 427, reversed, on other grounds, in 21 A. B. R. 590, 166 Fed. 427.

But stay should not be granted on application of the trustee where assets of the bankrupt estate are not involved nor creditors' rights prejudiced. Thus, where stay of a creditor's suit in personam had been granted on the ground that the bond in attachment had been given to the creditor after the passage of the Bankruptcy Act and that therefore the creditor must be presumed to have taken it with the act in view, the upper court held that the stay was erroneous because it did not concern the trustee what judgment was had to bind the surety.

In re Mercedes Import Co., 21 A. B. R. 590, 166 Fed. 427 (C. C. A. N. Y., reversing 20 A. B. R. 648), quoted supra.

But, even though the bankruptcy court should thus stay the discharge in order to permit a qualified judgment to be taken with perpetual stay of execution thereafter, the question might still remain as to whether the policy of the State law would permit the State court to render such qualified judgment.

Compare, Crook-Horner Co. v. Gilpin, 23 A. B. R. 350 (Md. Ct. App.); Kendrick & Roberts v. Warren Bros., 110 Md. 47, 72 Md. 461.

§ 1532. Creditor before Filing Claim May Examine, but Proof May Be Required.

A creditor who has not filed his claim nor had the same allowed, may examine the bankrupt and witnesses, even though he may not be entitled to vote for trustee, share in dividends or otherwise participate in creditors' meetings until his claim has been allowed.

In re Rose, 19 A. B. R. 169 (D. C. Pa.); obiter, In re Samuelsohn, 23 A. B. R. 528, 174 Fed. 911 (D. C. N. Y.).

Page 916, note 14. See ante, § 580. See, in addition, In re Rose, 19 A. B. R. 169 (D. C. Pa.).

Page 916. And a fortiori, a creditor who has not proved his claim may examine the testimony already taken and written out on general examination, and may even require it to be filed with the referee.

In re Samuelsohn, 23 A. B. R. 528, 174 Fed. 911 (D. C. N. Y.), quoted at § 915.

Page 916. In re Kuffler, 18 A. B. R. 587, 153 Fed. 667, 155 Fed. 1018, (D. C. N. Y.): "These cases all support the view that under the circumstances a person listed as a creditor in the bankrupt's schedules is

within the meaning of §§ 1, 21a, and 55b of the bankruptcy law. If an outsider should appear at any time in bankruptcy proceedings and demand the right to examine the bankrupt, for the purpose of obtaining evidence, in order to make up his mind whether he should claim to be a creditor, the situation would be entirely different. But when, as in the present case, a person listed as a creditor states that he has a claim against the bankrupt's estate, and demands an examination in order to decide whether he will take an affirmative part in the bankruptcy proceedings, it would seem that the court has power to let him do so. This will not in any way abrogate the rule in this district, which is entirely proper for general purposes, and the permission granted the creditor upon this motion will not free him from any responsibilities or obligations to meet the pecuniary expenses of the examination he desires."

Page 916. And thus it has been held that a scheduled creditor, though his claim be barred by the statute of limitations, may examine.

In re Kuffler, 18 A. B. R. 587, 153 Fed. 667, 155 Fed. 1018 (D. C. N. Y.): "The statute of limitations is a defense, and not a part of the affirmative claim; and it has been held in a number of cases that a debt may be provable, even where the defense of the statute of limitations is good as against an action brought in the State courts of the State in which the bankruptcy proceeding has been instituted. In re Ray, 1 N. B. R. 203, Fed. Cas. No. 11,589; In re Shepard, 1 N. B. R. 439, Fed. Cas. No. 12,753. Such debts, therefore, being provable and covered by a discharge, it would seem that all the more a creditor included in the schedules, whose identity is established satisfactorily to the referee, is entitled to be given an opportunity to ascertain the exact condition of the bankrupt's estate before he determines whether it is worth his while to become a party to the proceeding and attempt to obtain a portion of whatever dividend may be declared."

§ 1537. Order for Examination to Be Entered and Served.

Page 918, note 20. See ante, § 548½.

Page 918, note 20. Inferentially (as to notice upon surety on bond of assignee, where assignee called to accounting), *Cohen v. American Surety Co.*, 22 A. B. R. 909, 132 App. Div. N. Y. 917.

§ 1543. Whether Bankrupt May Be Put under "General" Examination before Adjudication.

The bankrupt may not be put under "general" examination before adjudication.

Page 919, note 27. In re Back Bay Automobile Co., 19 A. B. R. 835, 158 Fed. 679 (D. C. Mass.); contra, *Skubinsky v. Bodek*, 22 A. B. R. 689, 172 Fed. 332 (C. C. A. Pa.), quoted post, this same section, § 1543. Contra, obiter, In re Herskovitz, 18 A. B. R. 249, 152 Fed. 316 (D. C. N. Y.); instance, contra, In re Stark, 18 A. B. R. 467, 155 Fed. 694 (D. C. N. Y.). Compare, *United States v. Liberman*, 23 A. B. R. 734, 176 Fed. 161 (U. S. C. C. N. Y.).

Although, undoubtedly, he may be examined upon any specific issue raised by controversy before adjudication, precisely as any other witness.

Obiter, In re Back Bay Automobile Co., 19 A. B. R. 835, 158 Fed. 679 (D. C. Mass.).

The bankruptcy court, early in the practice under the present law, ordered a "general" examination of the officers of a debtor corporation prior to adjudication.

Page 921. In re Crenshaw, 19 A. B. R. 266, 156 Fed. 638 (D. C. Ala.): "We may find in some instances that the courts say there is nothing in the act which limits the examination of the bankrupt to any particular time or occasion, yet they uniformly say, when they make any expression on the subject, that an examination may be ordered at any time during the pendency of the bankrupt proceedings, while the bankrupt's estate is in process of administration. Can the bankruptcy court administer the estate of one who has not been adjudicated a bankrupt? In the case of an involuntary bankrupt proceeding, like the one under consideration, a petition is filed, and it may be said that the bankrupt proceedings are pending, non constat the alleged bankrupt may never be adjudicated a bankrupt. It appears clear to me that the court should not order an examination 'concerning the acts, conduct, or property of a bankrupt' before the party 'concerning whose acts, property, etc., it is proposed to examine has been adjudged a 'bankrupt.' However, when we consider those sections of the Bankruptcy Act which pertain to the subject under consideration, and which should be construed together, with the forms which relate thereto, I think it manifest that both the act and forms imply that such examination is to be had subsequent to the adjudication. The sections of the act referred to are 21, 58, and 7, and Forms Nos. 28 and 30. Section 58 provides that creditors shall have at least 10 days' notice of all examinations of the bankrupt. In re Price (D. C.) 1 Am. B. R. 419, 91 Fed. 635. How are the creditors to be known except as they appear in the list of creditors of the bankrupt, or make themselves known after due notice by publication under the order of court?"

Compare, In re Davidson, 19 A. B. R. 833, 158 Fed. 678 (D. C. Mass.): "There is no doubt that the court may order examination of the alleged bankrupt under § 21a of the Bankruptcy Act * * * if his estate can be said to be in process of administration under the act. * * * But it can hardly be said to have begun. The court has been asked to administer it under the act, and has summoned the bankrupt to answer this application. But until these preliminary steps have resulted in establishing the power of the court to institute its administration, I do not see how that administration can be regarded as in process. Should the result of the contest regarding adjudication be in the bankrupt's favor, no step will be or will have been taken by the court in such administration. There is an attempt pending to have such administration ordered, but that is all that can be said. The court has not in this case assumed, nor is it asked to assume, even that temporary and provisional control of the estate which it sometimes exercises through a receiver while adjudication is pending. In a very recent decision by Judge Hough, in the New York Southern District, to which I am referred (In Matter of Fleischer, 18 Am. B. R. 194, 151 Fed. 81), it is held that such an examination as is here asked for may be ordered, before adjudication, upon the application of a receiver. The court thought it not open to doubt that the moment a receiver is appointed for the purpose of making fruitful the attachment, and enforcing the injunction of

fectured by the filing of an involuntary petition, the administration of the estate has begun. There is nothing, however, in this decision which requires the conclusion that the estate of the alleged bankrupt in this case must be regarded as in process of administration. I am unable to believe that it is the intent of the Bankruptcy Act to invest a petitioning creditor, for no other reason than that his petition has been filed, and that such an examination might assist him, with the same right to examine the debtor whose bankruptcy he undertakes to establish which he will possess after he has succeeded in establishing it. Without deciding that such an examination could never be ordered before adjudication, I must decline to order it under the present circumstances."

Skubinsky v. Bodek, 22 A. B. R. 689, 172 Fed. 332 (C. C. A. Pa.): "The authority conferred by this section [Bankr. Act, § 21] to grant a reference for the purpose of throwing light on 'the acts, conduct or property of the bankrupt' is limited to the case of one 'whose estate is in process of administration under this act.' While by virtue of § 1 of the act the term 'bankrupt' may include a person against whom an involuntary petition has been filed as well as one who has been adjudged a bankrupt, § 21 contains the significant and unambiguous words 'bankrupt whose estate is in process of administration under this act.' We do not think that the appointment and qualification of the receiver and his exercise of official functions before the adjudication of *Skubinsky* as a bankrupt and, indeed, before the return of the rule to show cause or the presentation of any issue of law or fact in the case, can be tortured into process of administration of his estate under the act. It did not appear when the order of special reference was made that he ever would be adjudged a bankrupt. The appointment of receivers in bankruptcy can be justified only where it shall be found 'absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified.' Such a receivership certainly up to the time of an adjudication is purely a precautionary measure. Until after an adjudication the function of a receivership is not administrative of the estate in bankruptcy, but solely preservative. And this is equally true whether receivers in bankruptcy are or are not authorized by the court to conduct the business of alleged bankrupts for limited periods. While such authority can be conferred upon receivers only 'if necessary in the best interests of the estates,' the granting of such authority and action thereunder prior to an adjudication of bankruptcy can in no legitimate sense be deemed process of administration of the estate under the act. It doubtless is true that a receiver may be authorized by the court, even before an adjudication, to collect and secure possession of moneys and other property belonging to the alleged bankrupt; but such action on the part of the receiver before an adjudication does not constitute or involve 'process of administration under this act.' It is simply gaining control of the estate which is to be subjected to the process of administration if an adjudication of bankruptcy shall be made. If the appointment of a receiver before adjudication per se constitutes process of administration and no adjudication be made the remarkable result is presented of a process of administration, and consequently a partial administration, in bankruptcy, of the estate of the alleged bankrupt where absolutely no beneficial object or purpose of the Bankruptcy Act can by any possibility be effected. The special reference before adjudication to inquire into 'matters pertaining to the business and conduct of the alleged bankrupt,' was premature, inquisitorial and

not to be tolerated. Common fairness requires that the alleged bankrupt before being subjected to such a proceeding and before any order can properly be made in that behalf, should have the opportunity to make defense to the petition seeking his adjudication as a bankrupt. We are not aware of any provision in the Bankruptcy Act when fairly construed which justifies the order of special reference now before us."

Of course, since the Amendment of 1910, permitting compositions before adjudication of bankruptcy, expressly provides for a meeting of creditors to be called on such occasions "for the examination of the bankrupt," etc., thereat, there can be no doubt of the right to examine the bankrupt before adjudication, where the bankrupt has made such offer of composition.

Bankr. Act, § 12 (a): "* * * In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, etc."

It is not to be doubted that such "general examination" before adjudication of bankruptcy in composition cases, may, also, extend to the examination of witnesses other than the bankrupt himself.

See post, § 2358, et seq.

§ 1547. Broad Scope of General Examination—"Acts, Conduct and Property."

The examiner is not bound to state what he expects to prove by any of his questions. He is not trying to prove anything. He is simply inquiring and informing himself about his debtor's affairs.

Page 925. Impliedly, *In re Jacobs & Roth*, 18 A. B. R. 728, 154 Fed. 988 (D. C. Pa.): "In the course of the examination of Jacob Jacobs, one of the bankrupts, Mr. Sachs, representing certain of the creditors, showed the witness a paper, being a statement of credit made to the Fushan-Zeman Shoe Company in September last, and asked him if he had signed it. Objection was made to the question and the referee ruled that the witness was entitled to at least a statement of the purpose, to which Mr. Sachs replied, 'Purpose to show that the witness made a written statement on or about September 4th, 1906, that it is material, that the testimony given by him at this hearing as regards the financial condition of the partnership about said time,' presumably meaning thereby that it is material with reference to the testimony given by him at this hearing to know the financial condition of the partnership about said time. The referee ruled that this question had relation more to an application for discharge than to an examination of the bankrupt at this time, and sustained the objection. The offer was then renewed and the further reason given that it is for the purpose of proving that on the strength of the written statement offered the bankrupt obtained credit and merchandise from one of the present creditors and that this is within the scope of the purpose of an examination of the

bankrupt, which is for the purpose of disclosing all his affairs and dealings with his creditors. Upon the objection being renewed, it was again sustained, and a certificate asked for. The very clause of the Bankrupt Act quoted by the referee authorizes the examination of the bankrupt as to any matter which will aid his creditors in ascertaining what has become of the property with which at any time within a reasonable period prior to the bankruptcy proceeding he has certified himself as being possessed of, in order to enable them to ascertain whether or not he has been guilty of making fraudulent disposition of his property or otherwise disposing of the same to their prejudice and also to learn generally regarding the character and amount of his estate at that time as compared with the present and his conduct and disposition thereof in the meantime."

Page 925. So, also, would it be improper repeatedly to cover the same ground.

In re Jacobs & Roth, 18 A. B. R. 728, 154 Fed. 988 (D. C. Pa.): "It is not intended by this to state that a general voyage of discovery is to be authorized covering any and every period of the bankrupt's business dealings and transactions, but only such as within a reasonable time of the bankruptcy proceeding can fairly be taken to shed some light upon his affairs at that time."

§ 1548. Production of Books, Papers and Documents Enforced.

Page 926, note 41. See instance of contempt for failure to produce, the bankrupt's excuses not being accepted as reasonable by the court, In re Alper, 19 A. B. R. 612, 162 Fed. 207 (D. C. N. Y.).

And even such showing is not, on principle, necessary if the books also involve transactions with the bankrupt, or in which the trustee is interested. Thus, the minute book of a corporation has been ordered produced.

In re United States Graphite Co., 20 A. B. R. 280, 159 Fed. 300, 161 Fed. 583 (D. C. Pa.): "The referee is engaged in making inquiry as to an alleged fraud between the Pennsylvania Graphite Company, whose minute book is required, and the bankrupt estate, and further, the corporation—the owner of the minute book—is also interested in having an order made for security for payment of rent. So that in these two questions under investigation, if not in the others, the Pennsylvania Graphite Company is a party to this litigation, and is required, in response to the subpoena for that purpose, to produce such specified books and papers as bear upon the questions investigated. When the book has been produced before the referee, of course, counsel, intending to establish certain facts from this minute book, is entitled to see it and to examine its contents for the purpose of ascertaining what it contains in relation to the questions at issue. An indiscriminate call for a book or paper which, upon its face, could in all probability have no bearing upon the questions investigated, would be improper, and an objection to its examination by counsel for an adverse party would be sustained, but where it appears that the book or paper called for is so obviously the document containing the truthful information

concerning the questions investigated, it is clearly the right of counsel to examine the book or paper to see what it discloses as to the matters at issue."

And claimants proving debts to share in dividends must produce their books and documents that are pertinent to the claims.

In re Clark, 21 A. B. R. 776 (Ref. Calif.).

Page 926. In re Wheeler, 19 A. B. R. 461, 158 Fed. 603 (C. C. A. Conn.): "The president of the bank was on the stand and the book was within his control, being in the hands of his counsel. Said counsel testified that the book did not belong to the bank, but was the president's personal property, containing a mere compilation from the books of the bank, a mere mathematical computation or calculation. Manifestly this statement is largely hearsay; whether the book contains original entries or merely compilations from other entries could be told only by one who knew when and under what circumstances the entries were made. The president himself testified that the book was one which 'he kept during all the time that these payments were being made,' that the 'payments were entered therein as they were made,' and that the entries were in the handwriting of the president or the cashier. Under these circumstances the evidence was competent, certainly as to details of date and amount which could not be carried by the unaided memory; and it should have been produced. Whether or not any particular entry was obnoxious to some valid objection, was a question to be determined by the referee with the book before him."

§ 1551. But Examiner Must Develop Facts Showing Sufficient Connection with Bankrupt to Make Further Inquiry Relevant.

Page 927, note 46. Apparently rule taken for granted, In re United States Graphite Co., 20 A. B. R. 280, 159 Fed. 300, 161 Fed. 583 (D. C. Pa.), quoted at § 1548.

§ 1552. Whether General Examinations to Be in Writing.

It would seem that, as a rule, the general examinations of witnesses and bankrupts are to be taken down in writing, by or under the direction of the referee, in the form of a deposition, and may be in narrative form; or by question and answer. But it has been held, on the other hand, to be a matter resting in the sound discretion of the referee, whether the examination shall be oral or be taken in writing.

In re Goldstein, 19 A. B. R. 96, 155 Fed. 695 (D. C. N. Y.).

And such would seem to be the reasonable rule.

Undoubtedly, the requirement that it be taken in writing may be waived by counsel of both parties. Other examinations, taken upon issues joined, are not subject to this requirement.

§ 1553. Objections to Be Entered on Record.

The ground of objection must, in general, be stated, else exception will not be available on review.

Equity Rule XI of Circuit Court of Appeals, 150 Fed. XXVII; see, also, inferentially, *In re Clark*, 21 A. B. R. 776 (Ref. Calif.).

Where, however, there is only one possible ground and that one is sufficiently obvious, the reviewing court may consider the objection.

Johnson v. United States, 20 A. B. R. 724, 163 Fed. 30 (C. C. A. Mass.).

§ 1554. Referee to Rule on Admissibility and to Exclude Incompetent Testimony.

Page 928, note 52. See ante, § 552. Compare, however, *National Bank v. Abbott*, 21 A. B. R. 436, 165 Fed. 852 (C. C. A. Mo.).

Page 929. *In re Ruos*, 20 A. B. R. 281, 159 Fed. 252 (D. C. Pa.): "A word upon the practice before referees may be appropriate. Where a question arises concerning the competency of a witness, or the admissibility of evidence, the referee should decide the point himself in the first instance instead of turning the matter over to the court. It will be time enough to certify the question when he is asked to do so in a proper manner. Very often his ruling will be acquiesced in, and the delay of referring the dispute to the court will thus be avoided."

But compare, *Missouri Am. Elec. Co. v. Hamilton Brown Co.*, 21 A. B. R. 270, 165 Fed. 283 (C. C. A. Mo.): "It is the duty of examiners, masters, referees, and the court taking evidence in controversies in bankruptcy, in the absence of a jury, to take, record, and, in case of an appeal, to return to the reviewing court, all the evidence offered by either party, that which they hold to be incompetent or immaterial as well as that which they deem competent and relevant, to the end that if the appellate court is of the opinion that evidence rejected should have been received it may consider it, render a final decree, and thus conclude the litigation without remanding the suit to procure the rejected evidence. From this rule evidence plainly privileged, the testimony of a privileged witness, and evidence which clearly and affirmatively appears to be so incompetent, irrelevant, or immaterial that it would be an abuse of the process or power of the court to compel its production or permit its introduction, are excepted."

Page 929. At any rate, the referee is to exclude evidence that is so clearly incompetent, irrelevant or immaterial that it would have been an abuse of the process or power of the court to have compelled its production.

In re Clark, 21 A. B. R. 776 (Ref. Calif.).

§ 1555. General Examination Competent as Admission in Subsequent Litigation against Same Party.

Page 930, note 54. See post, §§ 1747, 1839.

Page 930, note 55. Also, see post, § 1747. In addition, see, *Taylor*, trustee, *v. Nichols*, 23 A. B. R. 310, 134 App. Div. (N. Y.) 787.

But is not admissible as against any other party.

Page 930. In re Hersey, 22 A. B. R. 863, 171 Fed. 1001 (D. C. Iowa): "Upon the hearing of the claim, and the objections of the trustee thereto, the testimony of the bankrupt and other witnesses examined before the referee at the first and other meetings of the creditors was offered by the trustee and admitted in evidence over the objections of the petitioner that no notice had been given him that such testimony was to be used in any proceeding whatever against him. Hart [the claimant] was also examined at such meeting, and was present at the examination as attorney for the bankrupt while the latter was being examined, but was not present when the others were examined, and was not notified at any time before the testimony was taken that it was to be used against him. It seems clear that, aside from his own examination, none of this testimony was admissible against the petitioner upon the hearing of this claim, and it will not be considered as against him."

§ 1555½. But Not to Be Considered unless Actually Introduced or Stipulated in.

But the general examination is not to be considered as in evidence, though taken before the same referee in the same bankruptcy, unless actually introduced in evidence or stipulated in, in the particular controversy then under consideration.

In re Murray, 20 A. B. R. 700, 162 Fed. 983 (D. C. Conn.); In re Wolder, 18 A. B. R. 419, 152 Fed. 489 (D. C. Conn.); see ante, § 553.

§ 1556. Bankrupt's Testimony Not to Be Used in Criminal Proceedings against Him.

Page 931, note 57. Compare, post, § 2324.

Page 931. And this immunity cannot be evaded by merely reading questions and answers therefrom and questioning the bankrupt thereon, without introducing the examination itself.

Jacobs v. United States, 20 A. B. R. 550, 161 Fed. 694 (C. C. A. Mass.): "The underlying philosophy of the statute in question is that, as a matter of justice to the bankrupt, and also for the interests of creditors, he should be encouraged to testify freely in his examination; but he would have no encouragement thereto if, on being prosecuted for an offense, he could not undertake to absolve himself by his own testimony except at the risk of being tripped or embarrassed by what he had previously sworn to. To permit a course of cross-examination in the method here, whether the documentary evidence taken before the referee was produced in the presence of the jury or not, would be simply to permit an evasion of the statute, because to do so would involve the mischief which the statute intended to guard against, in that the witness might be more harassed and prejudiced than he would be if the whole document had been frankly put into the case."

Page 931. Nor is the immunity waived by the bankrupt voluntarily offering himself as a witness.

Jacobs v. United States, 20 A. B. R. 550, 161 Fed. 694 (C. C. A. Mass.).

Page 931. But it has been held in some cases to create an effective obstacle to any conviction for perjury in swearing falsely before the referee.

Page 931, note 58. **Use of Petition, Schedules, etc., Simply to Show Existence of Bankruptcy Proceedings and Validity of Oath, Not Forbidden.**—Where the petition, schedules, etc., did not and could not contain evidence on the special matter of the indictment for perjury, but were introduced solely to show the existence of bankruptcy proceedings and of the oath taken therein, their use is not forbidden. *United States v. Brod.*, 23 A. B. R. 740, 176 Fed. 165 (D. C. Ga.). See post, § 2324.

Page 931. But in other cases it has been ably contended that the clause does not grant immunity from prosecution for falseness in the testimony itself thus protected; that the immunity extends simply to prosecution for any actual crime revealed by the testimony, and is based on such testimony being true.

Wechsler v. United States, 19 A. B. R. 1, 158 Fed. 579 (C. C. A. N. Y., reversing *U. S. v. Wechsler*, 16 A. B. R. 1).

Page 932. And the case of *Edelstein v. United States* has been followed.

United States v. Brod., 23 A. B. R. 740, 176 Fed. 165 (D. C. Ga.).

Wechsler v. United States, 19 A. B. R. 1, 158 Fed. 579 (C. C. A.): "The Bankruptcy Act * * *, requires the bankrupt to submit to an examination under oath as to various matters specified therein, with the proviso that 'no testimony given by him shall be offered in evidence against him in any criminal proceeding.' It is contended that the immunity thus accorded in broad, unqualified language should apply to prosecution for falsely testifying upon such examination; and it is suggested that the section quoted from does not contain the qualification found in § 860, Rev. St. U. S. * * * (and in other Federal statutes), that the immunity provision 'shall not exempt any * * * witness from prosecution and punishment for perjury committed in * * * testifying as aforesaid.' Plaintiff in error cites in support of his contention the opinion of Judge Hanford in *U. S. v. Simon* (D. C.), 146 Fed. 89, and the dissenting opinion of Judge Philips in *Edelstein v. U. S.*, 17 Am. B. R. 649, 149 Fed. 636, * * *, which are directly in point and fully sustain his contention. He also cites dicta in *Re Marx* (D. C.), 4 Am. B. R. 521, 102 Fed. 676, and in *Re Logan* (D. C.), 4 Am. B. R. 525, 102 Fed. 876; in *Re Leslie* (D. C.), 9 Am. B. R. 561, 119 Fed. 406; in *Re Dow's Estate* (D. C.), 5 Am. B. R. 400, 105 Fed. 889, and in *Re Gaylord*, 7 Am. B. R. 1, 112 Fed. 668, 50 C. C. A. 415. On the other hand, the provision quoted was held not to give immunity from prosecution for giving false testimony upon an examination under the Bankruptcy Act in a well-considered opinion concurred in by a majority of the court in *Edelstein v. U. S.*, 17 Am. B. R. 649, 149 Fed. 636, * * * (C. C. A.); and an application for certiorari in that cause was refused by the Supreme Court (205 U. S. 543). * * * Whatever might be our conclusions were the question presented as a novel one, we are clearly of the opinion that we should follow the construction adopted in the Eighth Circuit and left undisturbed by the Supreme Court, so that in a matter of so much importance the decisions of the Federal courts in the different circuits may be uniform."

Section 860 of the United States Revised Statutes has been repealed since the decision of *Wechsler v. United States*.

See post, § 2324½.

§ 1557. Protection Applies Only to Federal Prosecution.

Page 932, note 59. **U. S. Revised Statute, § 860, Repealed.**—Section 860 of the Revised Statutes has been repealed, see post, § 2324½.

Page 932. Nor would United States Statute, § 860, protect him from the use of his schedules, in the State court.

Com. v. Ensign, 22 A. B. R. 797, 40 Pa. Superior Ct. 157.

§ 1558. Incriminating Questions—Constitutional Rights Preserved, Notwithstanding § 7 (9).

Page 933, note 62. In *re Tracy & Co.*, 23 A. B. R. 438, 177 Fed. 532 (D. C. N. Y.).

Page 933, note 63. See, in addition, In *re Harris*, 20 A. B. R. 911, 164 Fed. 292 (D. C. N. Y.); In *re Tracy & Co.*, 23 A. B. R. 438, 177 Fed. 532 (D. C. N. Y.).

Page 934, note 65. In *re Harris*, 20 A. B. R. 911, 164 Fed. 292 (D. C. N. Y.), where the books contained entries showing the falsity of statements to a commercial agency; In *re Tracy & Co.*, 23 A. B. R. 438, 177 Fed. 532 (D. C. N. Y.).

Page 935. And even to the use in the State courts of documents, books, and papers of the bankrupt, title to which passes to the trustee by operation of § 70 (a) (1); although it has been held that where the bankrupt once has voluntarily delivered them, they may thereafter be used in criminal prosecutions in the State court.

In *re Tracy & Co.*, 23 A. B. R. 438, 177 Fed. 532 (D. C. N. Y.), quoted at § 1561.

But the privilege may not be asserted so as to prevent the production and surrender to the trustee of those documents, books, deeds and instruments in writing, relating to the bankrupt's business, the actual title to which passes to the trustee by operation of law under § 70 (a) (1) as defined by § 1 (13).

Impliedly and obiter, *Kerrch v. United States*, 22 A. B. R. 544, 171 Fed. 366 (C. C. A. Mass.). Compare, In *re Harris*, 20 A. B. R. 911, 164 Fed. 292 (D. C. N. Y.), where this principle apparently was applicable, but was not adverted to.

Nor to prevent the introduction into evidence of the bankrupt's books of account and papers already in the possession of the trustee or receiver.

Kerrch v. United States, 22 A. B. R. 544, 171 Fed. 366 (C. C. A. Mass.).

§ 1559. Where Answer by No Reasonable Possibility Could Tend to Incriminate, No Privilege.

Page 937. In re Bendheim, 24 A. B. R. 254 (D. C. N. Y.): "Undoubtedly it is always a difficult thing to say at just what point a bankrupt who is compelled to answer, and who claims his privilege, should be allowed the exercise of his own unquestioned judgment of the danger of self-incrimination. A priori no question can be said to be outside of the range of proof of some crime, and to allow him to stand mute in all cases is to give him the privilege of keeping silent as to all his affairs, in the interest of merely pedantic and verbal integrity of principle. While in all cases he must be given the benefit of all doubts, there must be something which gives rise to a probability of damage upon which a doubt may be based. *Queen v. Boyes*, 1 B. & S. 311, 321. * * * But in the absence of some claim on his part coupled with some proof of reasonable expectation that that claim has a basis, his danger is in my judgment purely academic."

§ 1560. Privilege Does Not Authorize Refusal to Be Sworn Altogether nor to Produce Documents.

Page 938. Compare, even stronger rule, In re Harris, 20 A. B. R. 911, 164 Fed. 292 (D. C. N. Y.): "A rule under which a bankrupt may, in any case, at his own option, refuse to produce his books may, in many instances, almost paralyze the power of the court to administer the estate. No business of any considerable magnitude can be or is carried on without keeping books of account; and when such a business becomes bankrupt it is practically almost impossible for a receiver or trustee to properly discharge his duties without having possession of the books of the business. In view of this necessity in bankruptcy cases it has been held that a bankrupt is not permitted to withhold his books from his trustee on his mere assertion that they tend to incriminate him, but must produce them before the court or referee in bankruptcy in order to have the question determined whether they do, in fact, tend to incriminate him; and that, if it appears that they do contain incriminating evidence, the court can make such an order as will protect the bankrupt from the use of such evidence for any criminal proceeding, and at the same time will enable the trustee to make such use of the books as may be necessary to administer the estate."

§ 1561. Privilege to Be Claimed at Time Question Asked or Production Demanded.

The time to claim the privilege is when the question is asked, and if not then claimed it is waived.

Page 938, note 69. See, in addition, In re Tracy & Co., 23 A. B. R. 438, 177 Fed. 532 (D. C. N. Y.).

Page 938, note 70. In re Tracy & Co., 23 A. B. R. 438, 177 Fed. 532 (D. C. N. Y.).

Page 939. If testimony once be freely given or production of documents once be freely made, the testimony or documents may of course be used thereafter, for the privilege is purely personal and may be waived.

In re Tracy & Co. 23 A. B. R. 438, 177 Fed. 532 (D. C. N. Y.): "Moreover, if freely given once, it may of course be used thereafter (*Tucker v. United States*, 151 U. S. 164), for the privilege is purely personal and may be waived. *Brown v. Walker*, 161 U. S. 591, 597."

Even where the trustee has permitted such documents to be used by the State authorities in prosecution of the bankrupt in the State courts.

In re Tracy & Co., 23 A. B. R. 438, 177 Fed. 532 (D. C. N. Y.).

But where the bankrupt or other witness has given the testimony or produced the document under coercion, as, for example, under the pressure of a court order, and not freely, doubtless the privilege would continue.

Obiter, In re Tracy & Co., 23 A. B. R. 438, 177 Fed. 532 (D. C. N. Y.): "Had the petitioner, for example, resisted the receiver and been compelled by an order of contempt to turn over his books, it might well be that he would retain a privilege. *Boyd v. United States*, 116 U. S. 616. I do not even say that the mere claim of privilege would not be enough to preserve his rights or that he was obliged to wait for the receiver actually to obtain an order of contempt against him."

In re Bendheim, 24 A. B. R. 254 (D. C. N. Y.): "Having volunteered upon a disclosure of what was in his shop at that time, he had waived his privilege, for it is well settled that having once embarked upon such a disclosure he has waived his privilege and cannot thereafter stop halfway."

§ 1562. Privilege Not Waived by Voluntary Bankruptcy.

Page 939, note 71. Compare, *Com. v. Ensign*, 22 A. B. R. 797, 40 Pa. Super. Ct. 157.

Trustee Permitting Use of Documents or Testimony in State Prosecutions.—Although it is no part of the duty of the trustee, perhaps, to assist in the prosecution of a bankrupt in a State Court for an offense connected with the assets or with the bankruptcy, yet it is not improper for him to do so and it may become, indeed, part of good citizenship for him to do so. In re Tracy & Co., 23 A. B. R. 438, 177 Fed. 532 (D. C. N. Y.). Also, see ante, § 915.

Showing Books to Bankrupt's Business Rival.—If the trustee proceeds to show the books to trade rivals of the bankrupts so as to prejudice them in reestablishing themselves in business, it would clearly be wanton and illegal misuse of power. Obiter, In re Tracy & Co., 23 A. B. R. 438, 177 Fed. 532 (D. C. N. Y.).

§ 1562½. Conditional Waiver of Privilege.

It is possible that the witness may condition the production of the document or the giving of his testimony so as to limit its use, where the privilege otherwise would be absolute.

Obiter, In re Tracy & Co., 23 A. B. R. 438, 177 Fed. 532 (D. C. N. Y.): "The delivery might have been conditional, but it was not. * * * So long as the petitioner retained his constitutional privilege, he might decline to

assist any prosecution against himself; or he might surrender to this court his books only on condition, but when he waives it, he must waive it for all those purposes for which courts exist, and I cannot limit them so as to exclude the proposed use here."

§ 1564½. **Right to Inspect Testimony Taken on General Examination.**

The testimony taken on general examination is part of the record in the case and is open to the inspection of all persons entitled to inspect such records.

See ante, § 915; also, see *In re Samuelsohn*, 23 A. B. R. 528, 174 Fed. 911 (D. C. N. Y.), quoted at § 915.

Thus, a creditor who has not filed his claim is entitled to such inspection.

See ante, § 915; also, see *In re Samuelsohn*, 23 A. B. R. 528, 174 Fed. 911 (D. C. N. Y.), quoted at § 915.

Even though it will embarrass the trustee in bringing suit against such creditor later.

See ante, § 915; also, see *In re Samuelsohn*, 23 A. B. R. 528, 174 Fed. 911 (D. C. N. Y.), quoted at § 915.

§ 1566. **Privileged Communications Respected.**

And the privilege does not extend to information gained by the attorney from other sources than confidential communications by his client.

In re Ruos, 20 A. B. R. 281, 159 Fed. 252 (D. C. Pa.).

And a communication to a wife to be privileged must be confidential.

Jacobs v. United States, 20 A. B. R. 550, 161 Fed. 694 (C. C. A. Mass.).

§ 1568. **Contempt for "Willfully Evasive" or "Flagrantly False" Testimony.**

Page 942, note 78. See post, § 2331; also, obiter, *In re Gitkin*, 21 A. B. R. 113, 164 Fed. 71 (D. C. N. Y.), quoted at § 2331; *Ex parte Bick*, 19 A. B. R. 68, 155 Fed. 908 (D. C. N. Y.), quoted at § 2331; *In re Schulman*, 21 A. B. R. 288, 164 Fed. 440, 167 Fed. 231 (D. C. N. Y.), quoted at § 2331; *In re Cashman*, 21 A. B. R. 285, 168 Fed. 1008 (D. C. N. Y.), wherein the defense of insanity was raised but found not sustained by the proof; *In re Schulman*, 23 A. B. R. 809, 177 Fed. 191 (C. C. A. N. Y.), affirming 21 A. B. R. 288, quoted at § 2331.

False swearing is punishable as a contempt although also punishable as a crime.

Obiter, *In re Gitkin*, 21 A. B. R. 113, 164 Fed. 71 (D. C. Pa.).

Thus, repetitions of "I don't know" or "I don't remember," about

matters which undoubtedly must have been known by the witness and must have been in his memory, may be contempt.

See post, § 2331; also, see *In re Cashman*, 21 A. B. R. 285, 168 Fed. 1008 (D. C. N. Y.); *In re Schulman*, 21 A. B. R. 288, 164 Fed. 440, 167 Fed. 231 (D. C. N. Y.), quoted at § 2331; *In re Gitkin*, 21 A. B. R. 113, 164 Fed. 71 (D. C. N. Y.), quoted at § 2331; *In re Bick*, 19 A. B. R. 68, 155 Fed. 908 (D. C. N. Y.), quoted at § 2331; *In re Schulman*, 23 A. B. R. 809, 177 Fed. 191 (C. C. A. N. Y.), quoted at § 2331. See post, § 1861.

§ 1568½. Attendance of Bankrupts or Witnesses Confined as Prisoners or in Institutions.

The attendance of bankrupts or witnesses confined as prisoners or in asylums may be procured by the writ of habeas corpus ad testificandum. This writ is not the high prerogative writ of habeas corpus, but is merely the ancient common-law precept, now authorized by statute, to bring a prisoner into court to testify; and it may be granted and issued by the court at chambers; but its issuance is a matter of discretion; even in cases where the prisoner is the bankrupt and his testimony is wanted at the first meeting of his creditors.

Page 942. *In re Thaw*, 21 A. B. R. 561, 166 Fed. 71 (C. C. A. Pa., affirming s. c., 22 A. B. R. 687, 172 Fed. 288): "That the writ under consideration was rightfully allowed in the first instance need not be questioned, and we think is not questionable; but in our opinion it is likewise clear that the order under which it was issued was subject to revocation and the writ itself to annulment. * * * That writ was not the high prerogative writ of habeas corpus, the great object of which is deliverance from unlawful imprisonment, and which either a court, a justice, or a judge may grant and adjudicate, but was merely the ancient common-law precept to bring a prisoner into court to testify, and it was none the less the process of the court from which it issued because the order for its issuance emanated from a judge at chambers. It was granted and issued to bring a prisoner before the United States District Court at Pittsburg, in order that his testimony might there be taken, and it was directed to the custodian of his person, not that an 'inquiry into the cause of restraint of liberty' might be made, but with an object analogous to that sought to be attained by directing a subpoena duces tecum to the custodian of an evidential document, who, of course, upon cause shown, may subsequently be excused from producing it. 'If the desired witness is confined in jail [or in a State hospital for the criminal insane] a subpoena would be of no avail, since he could not obey it and his custodian would still lack authority to bring him. Accordingly a writ to the custodian is necessary, ordering the prisoner to be brought to give testimony. This writ of habeas corpus ad testificandum, grantable in discretion at common law, is now usually authorized by statute as a matter of course.' Wigmore on Evidence, vol. 4, § 2199. It is unnecessary, we think, to say anything further in support of our conclusion that the District Court, 'Judge James S. Young presiding,' did not overstep its lawful authority in quashing the writ in question, unless, as has been suggested, the scope of its general power in this respect was in some way curtailed by § 7 of the Bankruptcy Act. * * * That section,

no doubt, makes it the duty of a bankrupt to attend the first meeting of creditors, and to do the several other things there enumerated; but it does not follow, as seems to be supposed, that 'a writ of habeas corpus ad testificandum * * * to produce the bankrupt for examination * * * is a right which his creditors have, and * * * which the bankrupt also has,' and that therefore it must be allowed, upheld, and enforced, regardless of circumstances and conditions. The rule of the common law has always been that this writ, which for centuries has been used to bring prisoners into court to testify, is 'grantable in discretion,' and we have not been convinced that by forced implication there should be attributed to Congress the unexpressed intent to abrogate that rule, and to take from the courts of bankruptcy their wholesome supervisory control of a process which manifestly is capable of misemployment, perversion and abuse. We accordingly hold that the question raised by the petition to quash was for determination in the exercise of a sound judicial discretion."

And may be refused where the bankrupt may be examined at the place of his confinement.

See post, § 1570.

§ 1570. **General Examination of Nonresident Bankrupt or Witness before Another Referee, or State Judge.**

Page 943. And habeas corpus ad testificandum may be refused to bring the bankrupt from another State where he is being confined in an asylum for the criminal insane, if he can be examined at the place of his confinement.

In re Thaw, 22 A. B. R. 687, 172 Fed. 288 (D. C. Pa., affirming 21 A. B. R. 561, C. C. A., quoted at § 1568½; compare, ante, § 1568½).

§ 1574. **But Is Entitled if Witness Be Creditor or Bankrupt.**

Page 944, note 85. Contra, In re Adler & Co., 21 A. B. R. 302 (D. C. La.).

§ 1575. **Witness' Fees and Mileage.**

The wife or husband of the bankrupt is entitled to the fee, the same as any other "designated person."

In re Marcus, 20 A. B. R. 397, 160 Fed. 229 (D. C. Vt.).

§ 1579. **Employment of Stenographer.**

Page 945. Different rules are said to prevail before the adjudication and reference to the referee.

In re Stark, 13 A. B. R. 467, 155 Fed. 694 (D. C. N. Y.). But compare, § 1543.

Where there are no funds in the estate, if the bankrupt desires the testimony on general examination to be taken down in writing, he may be compelled to furnish indemnity therefor.

In re Goldstein, 19 A. B. R. 96, 155 Fed. 695 (D. C. N. Y.).

§ 1580. Jurisdiction and Conflict of Jurisdiction in Collecting and Protecting Assets.

The sections of the Bankruptcy Act involved are §§ 2 (7), 23, 38, 60 (b), 67 (e) and 70 (e).

In re MacDougall, 23 A. B. R. 762, 175 Fed. 400 (D. C. N. Y.).

§ 1581. Courts Cautious in Dealing with Conflict of Jurisdiction.

Page 948, note 1. Impliedly, In re Dana, 21 A. B. R. 684, 167 Fed. 529 (C. C. A.).

And the duty to be cautious rests also on State courts. It is reciprocal.

In re Mustin, 21 A. B. R. 147, 165 Fed. 506 (D. C. Ala.).

§ 1582. If State Court First Obtains Possession, It Retains Jurisdiction, Except Three Instances.

Page 949, note 2. See, in addition, In re Rudnick & Co., 20 A. B. R. 33, 160 Fed. 903 (C. C. A. N. Y.), quoted at § 1585; In re New England Breeders' Club, 23 A. B. R. 689, 175 Fed. 501 (D. C. N. H.); In re Rohrer, 24 A. B. R. 52, 177 Fed. 381 (C. C. A. Ohio), quoted at § 1586.

Also, see *Plaut v. Gorham Mfg. Co.*, 20 A. B. R. 269, 159 Fed. 754 (D. C. N. Y.); impliedly, *Murphy v. Hofman*, 211 U. S. 562, 21 A. B. R. 487, quoted at § 1796.

Page 955. And in one case it was held that where, within the four months period, an action to enforce a lien is brought in a State court against a bankrupt, and its entire property is involved in the litigation, the bankruptcy court has jurisdiction to stay further proceedings in said action, and, if necessary, to take charge of the property and to supersede the custody of the State court.

Coal Land Co. v. Ruffner, 21 A. B. R. 474, 165 Fed. 881 (C. C. A. W. Va.): "In the case here the whole proceeding in the State court was within four months of the time both of the filing of the petition in bankruptcy and of the adjudication, and the entire property of the bankrupt was involved in the litigation. The District Court, therefore, had the jurisdiction, and the right to assert it, to stay further action by the State court, and if necessary to secure a just and equitable distribution of the bankrupt's estate to take charge of the property to this end. The powers of the District Court in bankruptcy are ample to administer an estate with due regard to priorities or vested liens and to protect all interests in such estate, whether they be legal or equitable."

The rule, however, is stated in this case in broader terms than the facts necessitated, for the facts showed the case to be that of a lien created by legal proceedings within four months rather than that of legal proceedings within four months merely enforcing good and valid pre-existing liens.

See ante, § 1444; post, § 1586.

And it has been held that even where a foreclosure suit has been started before the bankruptcy, if within four months thereof, but the bankruptcy court afterwards obtains actual possession of the property involved, it has jurisdiction to marshal the liens, determine all rights in the property, and to enjoin the further prosecution of the foreclosure suit, though there is no claim that the liens are preferential or otherwise invalid.

In re Dana, 21 A. B. R. 684, 167 Fed. 529 (C. C. A.).

In this case, however, the State court receiver had voluntarily surrendered possession to the trustee.

Page 957. However, it has been held that where, during the pendency of an insolvency petition, a receiver is appointed, but, between the entry of the decree appointing him and the filing of his bond, an officer of the State court takes possession of the goods of the alleged bankrupt found on the premises of the bankrupt, under writ of replevin, such seizure is an unauthorized interference with the possession of the bankruptcy court.

In re Alton Mfg. Co., 19 A. B. R. 805, 158 Fed. 367 (D. C. R. I.): "The goods were seized while in the basement of the Alton Company's mill, and in the possession of said company or its assignees. The act of bankruptcy charged in the creditor's petition was the making of a general assignment for the benefit of creditors. The Supreme Court of Rhode Island has held that an action of replevin in that State is so far a proceeding in rem that, unless the res has actually been taken possession of by the officer, there is nothing before the State court, and the court is without jurisdiction to decide the question of title. *Warren v. Leiter*, 24 R. I. 36, 39, 52 Atl. 76. If jurisdiction was acquired by the State court, it was not earlier than the time of seizure, about 11 o'clock a. m. We need not consider, therefore, whether the writ was sued out before the filing of the petition in bankruptcy, nor pass upon the petitioner's contention that the bankruptcy court acquired jurisdiction of the goods by the mere filing of an involuntary petition. See *In re Weinger, Bergman & Co.* (D. C.), 11 Am. B. R. 424, 126 Fed. 875. It is enough to inquire whether the bankruptcy court had possession at any time before the seizure in replevin. It is true that the receiver had not filed his bond, nor taken actual possession, but the terms of the decree appointing him were positive: 'It is ordered and decreed that Henry R. Segar of said Westerly be and he is hereby appointed receiver of the goods, chattels, property and effects of the Alton Manufacturing Company,' and, though he was required to give bond, his appointment dated from the entry of the decree, and preceded the seizure in replevin. The entry of this decree, in my opinion, conferred upon the bankruptcy court such jurisdiction of the goods of the bankrupt that a subsequent seizure under a writ of replevin from the State court was unauthorized, and an interference with the possession of the bankruptcy court. *White v. Schloerb*, 178 U. S. 542, 4 Am. B. R. 178. * * * It is true that in that case there had been an adjudication of bankruptcy, and the entrance to the bankrupt's store had been locked by order of the referee before the seizure. In the present case there had been no adjudication of bankruptcy, and no act of the receiver amounting to an actual taking of possession. For the preservation of the estate, how-

ever, a decree appointing a receiver had been entered; and, considering the nature of this decree, it seems to be unnecessary that it should have been followed by an actual seizure by the receiver in order to confer prior jurisdiction on the bankruptcy court. * * * This jurisdiction attached irrespective of the assignment made by the Alton Company for the benefit of creditors, for the rule is the same whether the goods are held by the bankrupt or for him. In *Bryan v. Bernheimer*, 181 U. S. 192, 193, 5 Am. B. R. 623, * * * it was said that an assignee under a general assignment for creditors is an agent of the bankrupt for the distribution of the proceeds of his property."

§ 1583. Simply because Bankruptcy Court Preferable or Trustee Interested, Not Sufficient to Confer Jurisdiction.

Page 958, note 7. In *re Rudnick & Co.*, 20 A. B. R. 33, 160 Fed. 903 (C. C. A. N. Y.), quoted at § 1585; *Sample v. Beasley*, 20 A. B. R. 164, 158 Fed. 606 (C. C. A. La.). Also, compare, In *re United States Graphite Co.*, 20 A. B. R. 573, 159 Fed. 300 (D. C. Pa.), wherein the court held the lien to be good because it antedated the four months period, but nevertheless ordered a sale in bankruptcy clear of all liens, notwithstanding the possession of the sheriff under the levy, the court applying the well-known rule as to selling clear from liens, although here the bankruptcy court was not in possession.

§ 1584. But State Courts May Be Permitted to Retain Jurisdiction Where Better Suited to Adjust Rights, Even Where Bankruptcy Court Might Have Jurisdiction.

Page 958, note 8. Also, see instance, *Orr v. Tribble*, 19 A. B. R. 849, 158 Fed. 897 (D. C. Ga.); In *re William Openhym & Sons v. Blake*, 157 Fed. 536, 19 A. B. R. 639 (C. C. A. Mo.); inferentially, *Blake, trustee, v. Openhym & Sons*, 23 A. B. R. 616, 216 U. S. 322, quoted on other points, at § 3028; In *re New England Breeders' Club*, 23 A. B. R. 689, 175 Fed. 501 (D. C. N. H.).

§ 1584½. Or Bankruptcy Court May Surrender Custody.

Or the bankruptcy court may surrender custody to the State court or to the admiralty court, where the rights of the parties can be better settled there.

In *re Hughes*, 22 A. B. R. 303, 170 Fed. 809 (D. C. N. J.).

Thus, in the case of dower.

See post, §§ 1972, 1973. But compare, § 1813.

Or of maritime liens.

In *re Hughes*, 22 A. B. R. 303, 170 Fed. 809 (D. C. N. J.).

But the assets thus surrendered will come into the other court burdened with the costs and expense of the bankruptcy court for their preservation.

In *re Hughes*, 22 A. B. R. 303, 170 Fed. 809 (D. C. N. J.).

§ 1585. Replevin and Other Suits Asserting Ownership, Where Seizure Made First by State Court, Not Abated.

Page 958, note 9. See, in addition, *In re William Openhym & Sons v. Blake*, 157 Fed. 536, 19 A. B. R. 639 (C. C. A. Mo.); inferentially, *Blake, trustee, v. Openhym & Sons*, 216 U. S. 322, 23 A. B. R. 616, quoted at § 3028.

In *re Rudnick & Co.*, 20 A. B. R. 33, 160 Fed. 903 (C. C. A. N. Y., reversing 18 A. B. R. 750, 158 Fed. 223): "The plaintiffs, in replevin, on the contrary, allege that they were induced to sell the property to the bankrupt by false and fraudulent representations and that the title never passed to the bankrupt. * * * The argument of convenience and expediency is not properly before us, but it cannot be denied that a question which involves the title to property can, to say the least, be determined as well in a plenary suit, where witnesses are seen, examined and cross-examined, as in a summary proceeding based solely upon affidavits. There is no form of action known to the common law in which the rights of both parties can be safeguarded so thoroughly as in an action of replevin. The jurisdiction of the District Court is purely statutory and unless the Bankruptcy Act permits the taking of property from a state official holding it under process duly issued, the right to do so cannot be maintained. It is contended that § 67f of the act, invalidating levies, judgments, attachments and liens obtained within four months against a person who is insolvent and providing that the property so affected shall pass to the trustee as part of the estate of the bankrupt, vests the necessary power in the District Court. We cannot accede to this view. It is manifest that the section in question deals with the property of the bankrupt. Assuming that Congress might lawfully pass a law requiring the property of third parties, found in the possession of the bankrupt, to be turned over to his trustee as part of his estate; it is sufficient for the purposes of this review that Congress has not done so in the present act. If A leaves his coat with B to be repaired and B refuses to return it, A can reclaim it in an action of replevin, and the status of that suit is not affected by the fact that B subsequently becomes a bankrupt. The mere assertion by B of ownership in the coat does not oust the court of jurisdiction and transfer the controversy to the bankruptcy court. It presents a question of fact merely, to be tried in the court first obtaining possession of the property. The distinction between a requisition in replevin and a lien created by levy or attachment is that the former deals primarily with the property of the plaintiff in replevin and the latter with the property of the bankrupt. It is of no moment that the title is in dispute. This is true in every contested replevin suit, and it is this question which the court must determine before judgment can be rendered."

Page 959. (*William Openhym & Sons v. Blake*, 19 A. B. R. 639, 157 Fed. 536 (C. C. A. Me.): "Upon learning of the fraud practiced upon them, the appellants promptly rescinded the sale. The bankrupt's entire stock of goods was then in the possession of a receiver appointed by a State court. He was engaged in selling it. Certain creditors of the bankrupt had six days previously filed a petition in bankruptcy, but no injunction against the continued sales was obtained, no receiver in bankruptcy was appointed, and no adjudication was had until a month afterwards. The rescission was properly effected by the assertion of appellants' purpose, the demand of the State court receiver for possession, and the replevin action begun with the permission of the State court. The right of rescission was not affected by the pendency of the bankruptcy proceedings."

Page 959. However, it has been held that if the seizure in replevin was made after the appointment of the receiver but before the filing of his bond, and was a seizure from the possession of the bankrupt, it would constitute an unwarranted interference with the custody of the bankruptcy court.

In *re Alton Mfg. Co.*, 19 A. B. R. 805, 158 Fed. 367 (D. C. R. I.), quoted at § 1582. Compare, collaterally, limitations, ante, § 1121.

§ 1586. Foreclosure and Other Suits Not Themselves Creating Liens Nullified by Bankruptcy, but Simply Enforcing Liens, etc., Not Abated Where Started before Bankruptcy Seizure.

Page 960, note 10. Compare, analogous propositions ante, §§ 1442, 1444. See, in addition, *Woods v. Klein*, 22 A. B. R. 722, 223 Pa. St. 251, quoted at § 1444; In *re New England Breeders' Club*, 23 A. B. R. 689, 175 Fed. 501 (D. C. N. H.).

Foreclosure Instituted before Four Months.—A fortiori, a foreclosure suit instituted before the four months period would not be superseded; *Sample v. Beasley*, 20 A. B. R. 164, 158 Fed. 606 (C. C. A. La.); *Kneeland v. Pennell*, 18 A. B. R. 538 (City Ct. of N. Y.), wherein the foreclosure of an attorney's lien on a judgment by him for the bankrupt was sustained; nor will the bankruptcy court restrain the foreclosure proceedings. In *re Pennell*, 18 A. B. R. 909, 159 Fed. 500 (D. C. N. Y.).

Page 960. In *re Kane*, 18 A. B. R. 594, 152 Fed. 587 (D. C. N. Y.): "As to the second motion, in which a stay of the sale under the foreclosure is asked, a hasty examination seems to indicate, from the reasoning set forth in the case of *Metcalf v. Barker*, 187 U. S. 165, 9 Am. B. R. 36, that the judgment in foreclosure has not created the lien, and is not within the provisions of § 67f. The judgment is merely a decree by a court having competent jurisdiction directing the enforcement of a lien which cannot be affected or vacated by bankruptcy proceedings."

In *re Rohrer*, 24 A. B. R. 52, 177 Fed. 381 (C. C. A. Ohio): "The mortgage lien of Hofer was obtained long prior to a period of four months next preceding the date of filing of the petition in bankruptcy against Rohrer; and while the suit was commenced and the decree of foreclosure rendered within that period, neither the mortgage lien nor the judgment lien is denounced by any provision of the bankruptcy statute. * * * The State court acquired complete jurisdiction and control over the defendants and the property prior to the commencement of the bankruptcy proceeding against Rohrer, and that jurisdiction was not divested by anything done in that proceeding, the rule being applicable that the court which first obtains rightful jurisdiction over the subject-matter should not be interfered with."

Page 961, note 11. See, in addition, In *re Victor Color & Varnish Co.*, 23 A. B. R. 177, 175 Fed. 1023 (C. C. A. N. Y.).

Page 961. But where a foreclosure suit was started within four months before the bankruptcy but the receiver in the foreclosure suit voluntarily surrendered possession to the trustee in bankruptcy, the

bankruptcy court had jurisdiction to marshal liens and to enjoin the further prosecution of the foreclosure suit, though it was not claimed that the liens involved were preferential or otherwise invalid.

In re Dana, 21 A. B. R. 683, 167 Fed. 529 (C. C. A.).

Jurisdiction, however, would have been conferred on the bankruptcy court by the surrender of the property by the State court receiver, irrespective of the "four months" apparent qualification of the proposition, being the actual possession of the res, not the "four months," that conferred the jurisdiction.

§ 1588. Attachments and Garnishments Obtained Prior to Four Months, Not Abated.

Page 962, note 17. Batchelder v. Wedge, 19 A. B. R. 268, 80 Vt. 353.

Likewise, where a garnishment has been effected before the four months.

National Surety Co. v. Medlock, 19 A. B. R. 654, 2 Ga. App. 665, 58 S. E. 1131, quoted at § 1455.

§ 1589. Landlord's Levy.

Page 962, note 18. See §§ 1437, 1444, 2204.

But of course such levy under process of distraint will not be permitted under process from the State court upon property in the custody of the trustee or receiver.

In re Bishop, 18 A. B. R. 635, 153 Fed. 304 (D. C. S. Car.); also, see post, § 1799.

§ 1590. Partnership Dissolution Suits.

Page 963, note 19. Compare, Rogers v. Stefani, 19 A. B. R. 566, 156 Fed. 267 (D. C. Ark.).

§ 1594. Assignments and Receiverships Created before Four Months.

Page 964, note 26. Inferentially, this proposition is supported by the cases holding that assignments and receiverships created within the four months period are annulled by the bankruptcy, since all such cases quite invariably insist on the proviso "within four months," see cases cited post, § 1603.

Compare, In re Sterlingworth Ry. Supply Co., 21 A. B. R. 342, 164 Fed. 591, 165 Fed. 267 (D. C. Pa.), where the assets had been in the hands of a State court receiver for more than a year, the court refusing to supersede the State court receiver but not on the ground of its being more than four months.

Page 964. Obiter, Rogers v. Stefani, 19 A. B. R. 566, 156 Fed. 267 (D. C. Ark.): "In this case the said Chancery Court acquired jurisdiction of the persons and property of Rogers & Stefani, the bankrupts, more than four months before the proceedings in bankruptcy were begun, and if it had retained possession of the property until the order in controversy was made,

it would not have lost control of the property, by the adjudication in bankruptcy."

Obiter, *In re Boner*, 22 A. B. R. 151, 169 Fed. 727 (D. C. Va.): "It is to be borne in mind that the bankruptcy law does not undertake to inquire into the assignments and transfers of a man's property made more than four months prior to its proceeding. Nor does it attempt, nor can it attempt, to supervise the course and conduct of insolvency proceedings (here a general assignment) under State law undertaken and carried out more than four months prior to the institution of the bankruptcy proceedings."

§ 1595. Administrators, etc., Where Bankrupt Owns Interest in Estate, Not Disturbed.

Page 964, note 27. **Administrator Appointed in One Jurisdiction Not to Be Sued in Representative Capacity in Another.**—*Bryan v. Curtis*, 19 A. B. R. 894, affirming 18 A. B. R. 90.

§ 1595½. Awards of Arbitrators.

A judgment within the four months period upon an award of arbitrators made before the four months period will not be avoided nor the proceedings thereon be superseded where the lien of such judgment by State law reverts to the date of the award.

In re Koslowski, 18 A. B. R. 723, 153 Fed. 823 (D. C. Pa.), quoted at § 1459.

§ 1596. Trustee's Intervention in State Court Proceedings Does Not Oust State Court.

Page 964, note 28. **Profits on Operation of Oil Well by Trustee Who Takes Possession Notwithstanding State Court's Prior Custody.**—Compare peculiar situation in *In re St. Louis & Kansas Coal Co.*, 22 A. B. R. 56, 168 Fed. 934 (D. C. Kans.), where the trustee intervened in pending suits wherein injunction had been issued, etc., and, apparently without protest from State court, operated oil wells in controversy, the question then arising as to whom the profits should be decreed.

§ 1597. State Courts Administer Bankrupt Law and Trustee, Intervening, Not Confined to Rights Accorded by State Law.

Page 964, note 29. Obiter, *Hurley v. Devlin*, 18 A. B. R. 627, 151 Fed. 919 (D. C. Kan.); obiter, *In re Tracy & Co.*, 23 A. B. R. 438, 177 Fed. 532 (D. C. N. Y.).

Page 964. Obiter, *In re Dana*, 21 A. B. R. 683, 167 Fed. 529 (C. C. A.): "A considerate regard for the dignity of the courts of the States, so essential to harmony in our intricate judicial systems, forbids an assumption that they will not be equally solicitous to observe the Constitution and laws of the United States, which constitute the supreme law of the land binding upon all the courts."

§ 1602. Second Exception to Rule That State Court Retains Jurisdiction if First Obtaining Custody.

Page 967, note 38. See, in addition, *Cohen v. American Surety Co.*, 20 A. B. R. 65 (Court of Appeals of N. Y.); *In re Cameron Currie & Co.*, 20 A. B. R. 790 (Ref. Mich.).

§ 1603. Basis of Superseding Custody of Assignee and Receiver.

The rule that the bankruptcy court supersedes the custody of the State court in cases of assignments, receiverships, etc., created within the four months period, is said to have for its basis the necessary implication arising from such assignments and receiverships being specifically declared to be acts of bankruptcy. Since they operate—if allowed to stand—to take away the very fruits of the adjudication itself and to render the adjudication purposeless, the necessary implication arises, it is said, that the assignments and receiverships themselves become void.

Cohen v. American Surety Co., 22 A. B. R. 909, 132 App. Div. (N. Y.) 917, dissenting opinion.

The case *In re Farrell*, 23 A. B. R. 826, 176 Fed. 505 (C. C. A. Ohio), quoted at § 1632, although reaffirming the doctrine of *Mayer v. Hellman*, 91 U. S. 496, and holding that the general assignment must be within the four months of bankruptcy else it will be valid, does not aid us in ascertaining the basis of the superseding of the custody of the assignee in such a case. The case *In re Farrell* seems to assume that Congress has expressly fixed a limit of four months for the avoidance of assignments, but Congress has done no such thing in express terms, and it is only by construction that the qualification of four months limit is to be made.

Page 973. Impliedly, *In re Fish Bros. Wagon Co.*, 21 A. B. R. 149, 164 Fed. 553 (C. C. A. Kans.): "We think that a title or lien acquired by an assignee under a general assignment valid according to the laws of the State where it is made, that is to the advantage of the estate when it has passed into bankruptcy, is not necessarily destroyed by the supersession of the assignment proceeding, but that upon the order of the court of bankruptcy it may be retained by the trustee for the benefit of the creditors. This conclusion is in harmony with the object sought by express provisions of the Bankruptcy Act for the preservation of liens obtained in judicial proceedings against the debtor. * * * Attention therefore turns to the effect of the general assignment and the provisions of § 67. * * * The general doctrine is that an assignee in a general assignment under a State statute is neither an innocent purchaser nor a creditor having a lien on the assigned property, but that, like a trustee in bankruptcy, he stands in the shoes of his insolvent and is possessed of no greater right. It seems, however, to be otherwise in Kansas. In *Withrow v. Citizens' Bank*, 55 Kan. 378, 40 Pac. 639, it was held that an assignee is not merely the representative of the debtor but is also a trustee for the creditors, in whom title is vested by the deed of assignment, and that an unfiled chattel mortgage is void as against the right so secured by him. The effect of the assignment in question here is to be determined by the Kansas law (*First Nat. Bank v. Staake*, 202 U. S. 141, 15 Am. B. R. 639, * * * and it is the same upon an unfiled contract of conditional sale as upon an unfiled chattel mortgage. So, had no bankruptcy proceeding

been instituted, the assignee would have prevailed over the wagon company in a contest for the possession of the property. Is the right of the assignee available to the trustee, or was it wholly destroyed by the bankruptcy proceeding? The trustee relies upon subdivisions 'a,' 'c,' and 'f' of § 67 of the Bankruptcy Act. The last of these authorizes the preservation, for the benefit of the bankrupt estate, of liens obtained, through legal proceedings against the insolvent debtor within four months prior to the filing of a petition in bankruptcy against him, and subdivision 'c' provides for the subrogation under certain conditions of the trustee to the rights of one who acquires a lien by a suit or proceeding at law or in equity begun against the debtor within the four months' period. There is difficulty in the application of these provisions to the case at bar. Although the right of the assignee under the assignment might be called a 'lien' in the sense that it is a right to resort to specific property for the satisfaction of the debts of the assignor, and is therefore a charge upon such property, and while the assignment proceeding considered in its entirety may be termed a 'legal proceeding,' because under the Kansas law it is conducted in a court of record, yet it is a voluntary proceeding, and is not, as contemplated by the provisions of the Bankruptcy Act above referred to, a proceeding against the insolvent debtor. We think, however, that § 67a is sufficiently comprehensive to cover the case. It provides: 'Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.' At the time of the institution of the bankruptcy proceeding the creditors, through the assignee as their representative, had obtained by the general assignment, which was entirely valid under the local law, a right to have the property now in controversy subjected to the payment of their debts, to the exclusion of the claim of the wagon company under its unfiled contract of conditional sale. Because the assignment was superseded by the bankruptcy proceeding, it does not follow that no rights whatever could grow out of it. True, the making of the assignment was an act of bankruptcy; but, when made, it was authorized by the law of the State, and was valid until done away with by a proceeding that took precedence. An assignment cannot be said to be absolutely prohibited by the Bankruptcy Act, irrespective of the institution of a bankruptcy proceeding. *Randolph v. Scruggs*, 190 U. S. 533, 537, 10 Am. B. R. 1. Though the title of a trustee in bankruptcy to the property he takes is not by way of succession to that of an assignee under an assignment that is superseded, yet in such cases many things done by the latter for the benefit of the estate may be retained and enjoyed by the former. As already observed, the assignee, as the representative of all the creditors, had secured a specific right in the property in controversy by a deed of assignment valid under the Kansas law; and if this right, beneficial, as it is, to the bankrupt estate, is to be stricken down, it must be because the assignment was wholly invalid for every purpose and the invalidity related back to the date of the deed. That might be so in case of actual fraud, but there was no such element in the particular transaction."

And possibly the nullification would come about rather from the provisions of § 67 (c) than from those of § 67 (f); for proof of insolvency is essential under § 67 (f) but is not essential under § 67 (c), where the lien by legal proceedings within the four months period was "sought and permitted in fraud of the provisions of the Act."

Page 974. Compare, inferentially, *Coal Land Co. v. Ruffner Bros.*, 21 A. B. R. 474 (C. C. A. W. Va.), though basing it upon another clause of § 67c: "In the present case, Clark & Krebs, creditors, had filed a petition against the Cataract Colliery Company in a State court of West Virginia, and in that proceeding the court had appointed a special receiver of the property of the said company. As above set forth, the New River Coal Land Company filed its answer and cross-bill in the suit and set up a claim thereby to the entire property of the Colliery Company, basing the claim on amounts alleged to be due for royalties accruing under a contract of lease, for taxes paid and for forfeiture of all said property as liquidated damages for the failure of the Cataract Colliery Company to fulfill the terms of said lease. The whole proceeding in the State court from the commencement of the action was within four months of the filing of the petition in bankruptcy and of the adjudication of the Cataract Colliery Company bankrupt. It is evident from the character of the suit and the condition of the Colliery Company, as disclosed by the pleadings, that at the time of the commencement of the suit it was insolvent; it was unable to meet its obligations or to carry on its work, so alleged in the bill filed, and by the cross-bill of the Coal Land Company its entire property was claimed by one creditor to the exclusion of all others. The appointment by a court of a receiver for an insolvent debtor is an act of bankruptcy on the part of such debtor. Section 67c of the Bankrupt Act provides that a lien created by, or obtained in or pursuant to, any suit or proceeding at law, or in equity, including a judgment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of the petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt, if, first, it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement would work a preference."

§ 1604. Possession under General Assignments Superseded.

Page 975, note 44. See, in addition, *In re Fish Bros. Wagon Co.*, 21 A. B. R. 147, 164 Fed. 553 (C. C. A. Kans.); *Cohen v. American Surety Co.*, 20 A. B. R. 65 (C. C. A. N. Y.); impliedly, *In re Farrell*, 23 A. B. R. 526, 176 Fed. 505 (C. C. A. Ohio).

§ 1605. Likewise, under State Court Receiverships.

Page 975, note 45. Impliedly, *In re Tyler*, 5 A. B. R. 152, 104 Fed. 778 (D. C. N. Y.); instance, *In re Hecox*, 21 A. B. R. 314, 164 Fed. 823 (C. C. A. Colo.); compare, obiter, *Scheuer v. Book Co.*, 7 A. B. R. 384, 112 Fed. 384 (C. C. A. Ala.). But compare, *Strohl v. Sup. Ct.*, 2 A. B. R. 92 (Sup. Ct. Wash.). *New River Coal Land Co. v. Ruffner Bros.*, 21 A. B. R. 474, 165 Fed. 881 (C. C. A. W. Va.), quoted at § 1603. Compare, *In re Electric Supply Co.*, 23 A. B. R. 647, 175 Fed. 612 (D. C. Ga.).

Page 976, note 46. *In re Carver & Co.*, 7 A. B. R. 539, 113 Fed. 128 (D. C. N. Car.). But compare, *In re Price*, 1 A. B. R. 609, 92 Fed. 987 (D. C. N. Y.).

Compare, *In re Sterlingworth Ry. Supply Co.*, 21 A. B. R. 342, 164 Fed. 591, 165 Fed. 267 (D. C. Pa.), where the bankruptcy court refused to supersede the State court, but not on the ground of the four months limit, but rather because the assets had been in the State receiver's hands for more than a year, and because it was more advantageous to let the State court continue.

Page 976. *Obiter*, In re Rogers & Stefani, 19 A. B. R. 566, 156 Fed. 267 (D. C. Ark.): "In this case the said chancery court acquired jurisdiction of the persons and property of Rogers and Stefani, the bankrupts, more than four months before the proceedings in bankruptcy were begun, and if it had retained possession of the property until the order in controversy was made, it would not have lost control of the property by the adjudication in bankruptcy."

§ 1606. General Assignments Not Per Se Illegal nor Void but Voidable Merely.

Page 976, note 47. *Pro*, but in a dissenting opinion, *Cohen v. American Surety Co.*, 22 A. B. R. 909, 132 App. Div. (N. Y.) 917.

§ 1607. Unless Petition Filed within Four Months, Followed by Adjudication, State Court's Custody Not Superseded.

Page 977, note 49. Also, cases cited under §§ 1602, 1603. In addition, see In re Farrell, 23 A. B. R. 26, 176 Fed. 505 (C. C. A. Ohio), quoted, on other points, at § 1632; *Eyster v. Gaff*, 91 U. S. 591; *Boese v. King*, 108 U. S. 379.

§ 1608. But if Filed within Four Months and Adjudication Occurs, Assignment Void.

Page 978, note 50. See cases under main proposition, ante, §§ 1602, 1603.

§ 1610. Assignee or Receiver May Be Enjoined.

Page 978. *New River Coal Land Co. v. Ruffner Bros.*, 21 A. B. R. 474, 165 Fed. 881 (C. C. A. W. Va.): "In the act forbidding courts of the United States to stay proceedings in a State court the courts of bankruptcy are specifically excepted and the bankruptcy law of 1898 expressly confers upon these courts the power to issue injunctions to stay proceedings within this exception. * * * The prime purpose of the Bankruptcy Act is to secure an equal distribution of an insolvent's estate among the creditors, and it is not only a power conferred upon the court in a bankruptcy proceeding to take jurisdiction of the unencumbered property of a bankrupt, but also of property to which liens attach, provided the judge of the court in bankruptcy shall determine that such property should be administered by that court. It has not unfrequently been the case that the bankrupt courts have issued injunctions to stay proceedings in a State court, to foreclose mortgages, to enforce other liens, and even to forbid State officers from proceeding with executions upon judgments, where in the opinion of the judge of the bankruptcy court, it was to the interest of the general estate to do so."

§ 1611. May Be Ordered Summarily to Surrender Assets.

And the assignee or receiver may, after the adjudication of bankruptcy, be required by the bankruptcy court to surrender the assets to the trustee in bankruptcy; and the assignee or receiver may be so required by summary order from the bankruptcy court.

Page 978, note 53. See, in addition, In re Farrell, 23 A. B. R. 826, 176 Fed. 505 (C. C. A. Ohio).

Page 978. *In re Hecox*, 21 A. B. R. 314, 164 Fed. 823 (C. C. A. Colo.): "By operation of law, on the adjudication in bankruptcy and the selection and qualification of a trustee, all right, title, and interest of the bankrupt in and to any and all property passed to and vested in such trustee. The scheme as well as the policy of the Bankrupt Act is that the collecting, marshaling, administration, and distribution of the bankrupt's estate shall reside exclusively in the court of bankruptcy. As the Bankrupt Act is a national law, enacted pursuant to the power vested by the Constitution in Congress, it is a paramount law of the land, to which all State authority, legislative and judicial, must submit. As the receiver in question was appointed by the State court within four months next preceding the filing of the petition in bankruptcy, the debtor being insolvent, his appointment constituted an act of bankruptcy. In contemplation of the Bankrupt Act, in so far as concerned his right to the custody of the property of the bankrupt, he stood as if he had never been appointed by the State court. In such situation, as he holds the property not in his own right, but solely in his claimed official capacity, it was his duty, on notification and demand by the trustee in bankruptcy, to deliver the property to him. But inasmuch as he was the appointee of the State court, as a mere act of courtesy, sometimes, but hardly accurately, termed 'judicial comity,' the bankrupt court in the first instance directed the trustee to prefer a request to the State court for an order on its receiver to deliver the property in his custody to the trustee. In such case, if the State court decline to reciprocate the consideration thus paid to its dignity, the law is well settled that it is then competent for, and the duty of, the bankrupt court to order the receiver to deliver the property over to the trustee, and he would be in contempt if he refuse to comply therewith. Controlling authorities affirm the foregoing propositions."

And the rule applies though the assignment be not one by formal deed of assignment; as, for example, in cases of trust arrangements for effecting compositions out of court.

Obiter, *In re Hersey*, 22 A. B. R. 856, 171 Fed. 998 (D. C. Iowa): "The instrument provides that Hart shall be first paid from the proceeds of the sale of the property for his services and for the expenses * * * incurred by him in caring for and disposing of the same, and in effecting a settlement with the creditors of the bankrupt, or in attempting to do so. While the instrument is not an 'assignment' under the State statute for the benefit of creditors, such is its effect, and Hart thereunder was but the agent of the bankrupt, with the rights given him by the instrument, for the sale of the property and distribution of its proceeds as provided therein."

Of course, plenary action may be instituted, instead.

Instance, *Cohen v. American Surety Co.*, 22 A. B. R. 909, 132 App. Div. (N. Y.) 917.

§ 1611½. But Only on Due Notice and Hearing.

But such summary order may be granted only upon notice and after due hearing; and the rule is not different, in this regard, where such assignee or receiver has been elected trustee in the subsequent bankruptcy.

Page 979. *Loveless v. Southern Grocer Co. Lim.*, 20 A. B. R. 180, 159 Fed. 415 (C. C. A. La.): "The record shows, without dispute, that the trustee, as

such, had paid out in costs and dividends about \$1,300 under orders of the bankruptcy court. The summary order requiring him to make payment into the bankruptcy court raises a controversy as to \$660.34. This sum, or most of it, petitioner claims that he paid out legally and properly while he was acting as receiver in the State court, and his contention is that he should not be required to pay the money again, and, at least, that he should not be required by a summary proceeding to pay the money into the bankruptcy court without a hearing, either in that court or in the bankruptcy court, on the question as to whether or not he is entitled to credits for the payments made by him as receiver. The question as to the correctness of these disbursements has not been passed on by the State court, nor by the court below, and, of course, is not before this court for decision. We are asked to review and vacate or correct the summary order of the court below requiring the payment of the sum in dispute into court before the petitioner has had a hearing on the correctness of his accounts and the legality of the contested disbursement. If the order to pay the money into court stands, the summary proceeding against the trustee can be made the basis of proceedings for contempt if he fails to obey the order. It seems to us just and right that he should have an opportunity to present his accounts to a court and to have his claim for credits for payments made by him while receiver in the State court passed on. He should not be required to pay the money into court by a summary proceeding that deprives him of the right to a hearing on the disputed items of his account. It is true that the bankruptcy proceedings operated to suspend the further administration of the insolvent corporation's estate in the State court; but it remained for the State court to transfer the assets, settle the accounts of its receiver, and close its connection with the matter. Errors, if any, committed in so doing, could be rectified in due course and in the designated way."

§ 1612. No Summary Order as to Sums Already Disbursed.

Page 979, note 54. Compare, *Loveless v. Southern Grocer Co. Lim.*, 20 A. B. R. 180, 159 Fed. 415 (C. C. A. La.), quoted, on other points, § 1611½.

Page 979. But probably he may be required to account for commissions retained by him after the bankruptcy; although a transferee under an instrument for effecting a composition out of court has been held not within summary jurisdiction as to moneys retained by him for expenses and compensation, even though subject thereto for the remaining assets in his control.

In re Hersey, 22 A. B. R. 856, 171 Fed. 998 (D. C. Iowa).

As to sums already disbursed, the assignee is to be reached only by plenary action in the State court, or in case of diversity of citizenship, etc., also in the United States Circuit Court.

Instance (partly), dissenting opinion, *Cohen v. American Surety Co.*, 22 A. B. R. 909, 132 App. Div. (N. Y.) 917.

§ 1615. Assignment Must Be "General" and "Bona Fide," Not "Partial" nor "Fraudulent."

Page 982. When Is an Assignment "General," When "Partial?"—See ante, § 146.

Page 982. It is not essential that the assignment shall have been an assignment by a formal deed.

Post, § 1617½; *In re Hersey*, 22 A. B. R. 856, 171 Fed. 998 (D. C. Iowa).

§ 1617½. And Transferees under Arrangements for Effecting Compositions Out of Court.

And doubtless the same rule would apply to agents and transferees under arrangements for effecting compositions with creditors out of court.

Inferentially, *In re Hersey*, 22 A. B. R. 856, 171 Fed. 998 (D. C. Iowa).

§ 1618. Also, Attaching Creditors Where Attachment Lien Preserved for Benefit of Estate.

And the same rule apparently has been held applicable in favor of the sheriff where the attachment lien is not preserved.

In re Schmidt & Co., 21 A. B. R. 593, 165 Fed. 1006 (C. C. A. N. Y.), quoted at § 1486.

But such holding seems entirely wrong in principle. The sheriff's costs are a debt of the attaching creditor. They are not at all analogous to a receivers' or assignees' charges, incurred in equity for the benefit of all. A sheriff's costs on attachment are not in and of themselves a lien on the funds; they are simply part of the attaching creditor's judgment lien. The judgment for costs in attachment is like the rest of the judgment in favor of one party against the other—"and that he do recover his costs herein" is the ordinary formula—and the court officer is not a party and has not an independent lien. His rights rise no higher than those of his principal—the judgment creditor; and there is no reason why one part of the judgment creditor's lien—that for his costs—should be unaffected by the debtor's bankruptcy whilst the rest of it is affected thereby.

§ 1620. Whether Extent of Lien May Be Fixed by State Court before Surrender.

Page 985. And there is no good reason for applying a different rule where the custody of the State court is under nullified legal liens.

Instance, *In re Hecox*, 21 A. B. R. 314, 164 Fed. 823 (C. C. A. Colo.).

Page 986. And yet as to receiverships and assignments superseded by bankruptcy, at any rate, the rule seems to be that it is not improper for the State court to settle its receiver's or assignee's account before turning over the assets.

Obitier, Loveless v. Southern Grocer Co., 20 A. B. R. 180, 159 Fed. 415 (C. C. A. La.), quoted at § 1611½; also, see post, §§ 1838, 1839, et seq.; also, see

obiter, *In re Rogers & Stefani*, 19 A. B. R. 566, 156 Fed. 267 (D. C. Ark.); but compare, apparently contra, *In re Hecox*, 21 A. B. R. 314, 164 Fed. 823 (C. C. A. Colo.), quoted, on other points, at § 1611.

Obiter, *In re Watts and Sachs*, 10 A. B. R. 113, 190 U. S. 1, 35; “ * * * but it remained for the State court to transfer the assets, settle the accounts of its receiver, and close its connection with the matter. Errors, if any, committed in so doing could be rectified in due course and in the designated way.”

But at any rate if the State court receiver voluntarily turns over the property to the bankrupts, under order of the State court, and then the bankruptcy court takes possession, the State court has lost jurisdiction to determine allowances to its receiver, even though the State court had obtained possession originally more than four months before the bankruptcy.

In re Rogers & Stefani, 19 A. B. R. 566, 156 Fed. 267 (D. C. Ark.): “This case, therefore, stands in this attitude, the State court, by its own orders, caused its receiver to surrender the bankrupts’ estate to the bankrupts, in whose possession it was subsequently seized by the trustee in bankruptcy. Afterwards that court made an order fixing the allowance of its receiver, his attorney, and its clerk, and made such allowance a preferred claim upon the assets of the bankrupt in the hands of the trustee, and caused the same to be certified to the Bankrupt Court accordingly. In effect the making of his order was tantamount to an effort on the part of the State court to administer, as far as this order went, the estate of the bankrupt, rightfully and previously in the possession of the bankrupt court.”

§ 1621. Only Expenses and Compensation for Services Beneficial to Estate and Reasonable, Allowed.

Page 986, note 74. Compare, *In re Rogers & Stefani*, 19 A. B. R. 566, 156 Fed. 267 (D. C. Ark.).

§ 1623½. Adverse Claimant's Rights Preserved.

Properly, the order of surrender should provide that the turning over of the property should be subject to the rights of adverse claimants and others; although the failure of the order to specifically so provide could not prejudice the claimant's rights.

Thus, where the trustee in bankruptcy makes distribution of the property, or turns it back to the bankrupt on confirmation of a composition, without having the court first pass upon an adverse claimant's rights, the trustee may be held, in proper cases, personally liable to such adverse claimant.

In re Cadenas & Coe, 24 A. B. R. 135, 178 Fed. 158 (D. C. N. Y.), quoted at § 2398.

§ 1624. Liability on Assignee's Bond on Superseding of State Court's Custody.

The trustee may maintain an action upon the assignee's bond [on

leave of the State court, in New York], to recover the amount which the assignee fails to turn over to the trustee.

Cohen v. American Surety Co., 20 A. B. R. 65, 192 N. Y. App. 227, affirming 19 A. B. R. 901, 123 App. Div. 519, 108 N. Y. Supp. 519.

And the finding of the bankruptcy court, as to the amount to be surrendered by the assignee, where made on proper notice and hearing as to funds still in the assignee's hands, or voluntarily accounted for by him, may be the basis for the suit on the bond.

However, it has been apparently assumed that the assignee's bond is liable for the proper turning over of the assets assigned, whether to the State court or to the trustee in bankruptcy.

Cohen v. Am. Surety Co., 22 A. B. R. 909, 132 App. Div. (N. Y.) 917.

In any event, the surety upon the assignee's bond will not be bound by the bankruptcy court's order of accounting, where such surety has not been notified nor allowed to defend.

Cohen v. Am. Surety Co., 22 A. B. R. 909, 132 App. Div. (N. Y.) 917.

§ 1627. State Bankruptcy and Insolvency Laws Not Prohibited.

Page 993. But as to Pennsylvania, one case holds contra.

In re Crawford, 18 A. B. R. 618, 154 Fed. 769 (C. C. A. Pa.).

The following States have provisions for assignments, or for the discharge of the debtor, but not for involuntary proceedings: New Jersey, North Carolina, Oregon, Virginia, Washington, Wisconsin, Wyoming.

But these State insolvency laws discharging debtors from their obligations uniformly have been held to be applicable only to debts contracted within the State.

Page 993. *Baldwin v. Hale*, 1 Wall. 223: "Insolvent laws of one State cannot discharge the contracts of citizens of other States, because they have no extraterritorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other State voluntarily becomes a party to the proceeding, has no jurisdiction in the case. Legal notice cannot be given, and consequently there can be no obligation to appear, and of course there can be no legal default. The judgment of the Circuit Court is therefore affirmed with costs."

§ 1628. But Suspended During Existence of Federal Bankruptcy Law, as to All Classes Subjected to Latter.

Page 994, note 88. *Obiter*, *Johnson v. Crawford*, 18 A. B. R. 608, 154 Fed. 761, (D. C. Pa., affirmed sub nom. *In re Crawford*, 18 A. B. R. 618, 154 Fed. 769 C. C. A.).

§ 1629. State Insolvency and Bankruptcy Laws Ipso Facto Suspended.

Page 997, note 89. See, in addition, *In re Pickens Mfg. Co.*, 20 A. B. R. 202, 166 Fed. 585 (D. C. Ga.).

§ 1632. Bankruptcy and Insolvency Laws, and General Assignment Laws, Distinguished.

Page 1005, note 99. Compare, *In re Farrell*, 23 A. B. R. 826, 176 Fed. 505 (C. C. A. Ohio), quoted post.

Page 1006. It is to be remarked that the courts have recently renounced the doctrine of *Mayer v. Hellman*, as to the Ohio statute regulating assignments for the benefit of creditors.

In re Farrell, 23 A. B. R. 826, 176 Fed. 505 (C. C. A. Ohio): "This, [Ohio Revised Statutes, § 6335] as pointed out in *Mayer v. Hellman*, presupposes the existence of a deed of assignment and creation of a trust, and simply undertakes to regulate the trust later for the equal protection of the creditors. The right so to dispose of the property in trust is not dependent upon the statute; it is an ordinary attribute of ownership. * * * Section 6343 of the Revised Statutes of Ohio was amended twice (in 1898 and in 1902) between the times when the decisions just mentioned [*Mayer v. Hellman*, 91 U. S. 496, and *Boese v. King*, 108 U. S. 379] were rendered, and the dates of the general assignment and the filing of the petition in bankruptcy in question. * * * It cannot escape attention, moreover, that both of these changes plainly tended to remove, rather than to enhance, conflict between § 6343 and the Bankruptcy Act; * * * We therefore see no reason why the language employed in *Mayer v. Hellman* to meet the claim there made, as here, that the Bankruptcy Act suspended the 'operation of the act of Ohio regulating the mode of administering assignments,' is not quite as applicable now as it was then. * * * It follows that the present deed of assignment is valid, both as respects the common law and the statutes of Ohio."

§ 1633. Various Holdings as to What Amount to "Insolvency" Proceedings.

Page 1007, note 104. *In re Macon Lumber Co.*, 7 A. B. R. 66, 112 Fed. 322 (D. C. Ga., reversed, on other grounds, sub nom. *Carling v. Seymour Lumber Co.*, 8 A. B. R. 29, 113 Fed. 483, C. C. A. Ga.); *In re Allison Lumber Co.*, 14 A. B. R. 79, 137 Fed. 643 (D. C. Ga.); *In re Pickens Mfg. Co.*, 20 A. B. R. 202, 166 Fed. 585 (D. C. Ga.).

Page 1008. Although it has also been held that the Pennsylvania statute of July 12, 1842, is not an insolvency statute, but is merely a proceedings in aid of execution, and therefore is not ipso facto suspended by the Bankruptcy Act.

In re Crawford, 18 A. B. R. 618, 154 Fed. 769 (C. C. A. Pa., affirming *Johnson v. Crawford*, 18 A. B. R. 608, 154 Fed. 761 (C. C. Pa.): "The Pennsylvania statute of July 12, 1842, is not an insolvent law. The proceeding it provides is not designed to effect the distribution of the debtor's assets among his creditors. It is a proceeding in aid of execution. Its object is to reach property of the judgment debtor which he fraudulently conceals."

Johnson v. Crawford, 18 A. B. R. 608, 154 Fed. 761 (C. C. Pa., affirmed sub nom. *In re Crawford*, 18 A. B. R. 618, 154 Fed. 769, C. C. A. Pa.).

§ 1634. Receiverships and Winding Up of Insolvent Corporations, Whether Insolvency Proceedings.

Page 1008, note 109. Compare, *In re Electric Supply Co.*, 23 A. B. R. 647, 175 Fed. 612 (D. C. Ga.), although the decision is not based on the ground that such proceedings amount to insolvency proceedings under an insolvency law superseded by the Bankruptcy Act.

Page 1008, note 110. Compare, *In re Electric Supply Co.*, 23 A. B. R. 647, 175 Fed. 612 (D. C. Ga.).

§ 1637. Comity Requires Resort First to State Tribunal.

The rule might be different in cases of the superseding of assignees and receivers in other than State insolvency or State bankruptcy proceedings, since such proceedings are not absolutely void.

See ante, § 1620.

§ 1640. Pending Suits by Bankrupt—Substitution of Trustee.

He may, but need not, be permitted to so prosecute.

Page 1011. *Kessler v. Herklotz*, 22 A. B. R. 259 (Sup. Ct. N. Y. App. Div.): "We are of opinion, however, that the appellant is not liable for any part of the costs. He did not become a party to the action, and he did not accept the subject-matter of the litigation as an asset, nor did he intend to become in any manner responsible for the litigation without the authority of the Federal court, if that was necessary. It is well settled that the trustee in bankruptcy is not obliged to intervene in a pending action by or against the bankrupt. This is upon the ground that it may not be for the interests of the estate to make any claim on account of the matter in controversy and that the trustee in such circumstances may elect to abandon any claim thereto. *Fleming v. Courtenay*, 98 Me. 401; *Hahlo v. Cole*, 15 Am. B. R. 591, 112 App. Div. 636. All rights of action in favor of the bankrupt arising on contract vest in the trustee by virtue of the provisions of clause 6 of subdivision a of § 70, of the Federal Bankruptcy Act of 1898. * * * He may, however, allow them to proceed without intervention and accept the fruits if successful."

§ 1641. Preliminary Order of Approval Proper.

Page 1011, note 122. Also, see ante, § 899. See, in addition, *Kessler v. Herklotz*, 22 A. B. R. 257 (N. Y. Sup. Ct. App. Div.).

§ 1646. Intervening Not Usually Proper Except Where Property Involved.

Page 1013. Again, a trustee may be interested in a pending suit against the bankrupt for infringement of a patent.

Victor Talking Mach. Co. v. Hawthorne, 23 A. B. R. 234, 173 Fed. 617 (U. S. C. C. Pa.), quoted at § 1779.

§ 1650. Trustee Bound as Any Other Litigant, on Intervention.

Page 1015, note 140. Not liable for costs where he does not intervene, though case prosecuted by creditors with his acquiescence. *Kessler v. Herklotz*, 22 A. B. R. 257 (N. Y. Sup. Ct. App. Div.).

§ 1650½. Making Trustee Party Defendant.

Conversely, the trustee may, on proper application and in a proper case, be made a party defendant in a suit by another.

See post, § 1779, et seq.

§ 1652. Jurisdiction over "Adverse Claimants."

Page 1020, note 1. See, in addition, *Goodnough Mercantile & Stock Co. v. Galloway*, 19 A. B. R. 244, 156 Fed. 504 (D. C. Ore.); *In re Eurich's Fort Hamilton Brew.*, 19 A. B. R. 798, 158 Fed. 644 (D. C. N. Y.); compare, impliedly, *In re Darlington*, 20 A. B. R. 805, 163 Fed. 389 (D. C. N. Y.); *Mound Mines Co. v. Hawthorne*, 23 A. B. R. 242, 173 Fed. 882 (C. C. A. Colo.), quoted at § 1796; obiter, *In re Driggs*, 22 A. B. R. 621, 171 Fed. 897 (D. C. N. Y.), quoted at § 1678; *Babbitt v. Dutcher*, 216 U. S. 102, 23 A. B. R. 519, quoted at § 1796; *In re Zotti*, 23 A. B. R. 812, 178 Fed. 304 (D. C. N. Y., reversing 23 A. B. R. 601), quoted at § 1681; *In re Peacock*, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.).

In re Horgan, 21 A. B. R. 31, 164 Fed. 415 (C. C. A. Mass.). In this case sureties on a bail bond for the bankrupt were sustained in their objection to the jurisdiction of the court, to summarily order them to surrender moneys left with them as security where they claimed liens for expenses and for attorney's fees, though the liability on the bail was terminated by the court's exoneration of the bankrupt.

Similarly, out of line with the great weight of authority is *In re Haupt Bros.*, 18 A. B. R. 585, 153 Fed. 239 (D. C. N. Y.), wherein the court (before adjudication), ordered the receiver to take summary possession of property in the hands of relatives of the bankrupt claiming to own it. The addendum of the court that "the remedy here asked for is confessedly a most drastic one; it should not be used except in the clearest case and to prevent obvious loss through equally obvious fraud," hardly seems to lay down any workable rule for exceptions to the well-established proposition that adverse claimants in possession are not to be proceeded against summarily, nor does it furnish an excuse for the creditors' or the receiver's failure to resort to the remedies which rightfully lay open to them. Similarly out of line with the authorities, appears to be the case *In re Nechamkus*, 19 A. B. R. 189, 153 Fed. 867 (D. C. N. Y.), wherein the court ordered a transferee of a horse to surrender it, though perhaps, in this case there was no objection raised to the jurisdiction; similarly out of line appears the obiter, *In re Berkowitz*, 22 A. B. R. 227, 173 Fed. 1012 (D. C. N. J.).

Page 1021. *In re Grassler & Reichwald (Consani v. Brandon)*, 18 A. B. R. 694, 154 Fed. 478 (C. C. A. Calif.): "The only question * * * is whether the proper remedy of the trustee to recover the money which was obtained by the petitioner was a plenary suit in court or a summary proceeding such as he adopted. If the property had been in the adverse possession of the petitioner [petitioner on review] before the bankrupts filed their petition to be adjudicated bankrupts there can be no doubt that a plenary suit would have been necessary." For further quotation, see post, § 1796. *Goodnough Mercantile & Stock Co. v. Galloway*, 19 A. B. R. 244, 156 Fed. 504 (D. C. Ore.).

Page 1023. *In re Walsh Bros.*, 21 A. B. R. 14, 163 Fed. 352 (D. C. Iowa): "The application of the trustee is for a summary order requiring Burns Bros. to return to him property alleged to have been transferred and delivered to

them by the bankrupts a month before the bankruptcy proceedings were instituted. This property, therefore, has never come into the custody of the court of bankruptcy. Burns Bros. appeared before the referee and made claim to the property, and alleged facts plainly showing their title and right to it. The claim so made and asserted is not a mere colorable one, but is one that arose before the bankruptcy proceedings, and clearly appears from the allegations of the answer to be one that is adverse to the bankrupts, though it may be voidable at the election of the trustee. The application of the trustee is in the nature of an independent action by him against Burns Bros., who are not parties to the bankruptcy proceedings, to avoid the transfer because, as he alleges, it is a voidable preference. Such a suit is not a part of the 'proceedings in bankruptcy,' but is a controversy either at law or in equity between the trustee and a third party, within the meaning of § 23, cls. 'a' and 'b,' of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]). * * * Has a referee in bankruptcy jurisdiction to determine such a controversy, even with the consent of both parties? If the subject matter of a controversy is not within the jurisdiction of a referee, of course, consent will not confer it, and the court upon a petition for review will acquire none, except to determine the jurisdiction of the referee. * * * The word 'court' may include the referee. Section 1 (7). But this obviously means the referee when acting upon a matter of which is given jurisdiction by the act. The jurisdiction of the referee is prescribed by § 38, as follows: * * * "While much of the authority of the court of bankruptcy is exercised by the referee, and rightly so in proceedings in bankruptcy proper, none of these clauses, nor any other provision of the act, confers upon a referee any authority or power to act except in such proceedings. It is easier to state what are not 'proceedings in bankruptcy' than to definitely name all that are; and it is perhaps not advisable to now attempt to accurately distinguish between such proceedings and 'controversies at law and in equity between trustees as such and adverse claimants concerning the property claimed by the trustees.' It is sufficient for the present to know that it is definitely settled by the Supreme Court in the cases before cited that an action by a trustee to recover property from a third party which is alleged to have been transferred by the bankrupt prior to the bankruptcy as a preference is not a 'proceeding in bankruptcy,' within the meaning of the Bankruptcy Act. If the application of the trustee in question can be upheld as a part of the proceedings in bankruptcy, then a suit to set aside a conveyance of real estate, or an action to recover real property, or any action at law or suit in equity against a third party claiming to own the property as against the bankrupt, might also be brought before the referee, and the only requisite to his jurisdiction would be that the bankrupt once owned the property sought to be recovered. This proposition cannot be assented to. When a referee may, and when he may not, proceed summarily in bankruptcy proceedings before him, is well illustrated in two cases in the Supreme Court, viz., *Mueller v. Nugent*, * * * and *Louisville Trust Co. v. Cominger*. * * * The rule deducible from these decisions is that, where a third party holds property at the time of the bankruptcy merely as agent or bailee of the bankrupt, he may be summarily required by the referee or the court of bankruptcy to turn the property over to the trustee; but where he acquires the possession prior to the bankruptcy, and claims the right to hold the property as against the bankrupt or the trustee, then the authority of the referee, and of the court of bankruptcy in summary proceeding is limited to determining whether the claim made is colorable merely, or is in

fact adverse to the bankrupt, and according as it determines that question will it deny or retain jurisdiction of the controversy. * * * In the present case there can be no doubt that Burns Bros. set forth in their answer facts showing that they acquired possession of the property prior to the bankruptcy, and asserted a claim thereto adverse to the bankrupts, and offered evidence before the referee tending to support such claim. Upon this appearing, the referee should have declined to proceed further with the controversy and permitted the trustee to resort to a court of competent jurisdiction to recover the property, if he, or the creditors, should so elect." Quoted further at § 1796.

Cooney v. Collins, 23 A. B. R. 840, 176 Fed. 189 (C. C. A. Montana): "John W. Cooney, by his verified answer not only claims the absolute right to hold all of the property in question as against everybody, but specially alleges the reasons for his claim of ownership of it. Of course, his allegations in that behalf may not be true; still they make a case of adverse claim to the property on his part, to overcome which it was essential for the trustee to proceed in accordance with the provisions of § 23 of the Bankruptcy Act and not by summary proceedings in bankruptcy. We think the case of *Jaquith v. Rowley*, 188 U. S. 620, 9 Am. B. R. 525, is directly in point, on the authority of which the judgment of the District Court should be reversed, with directions to order the dismissal of the trustee's petition."

§ 1653. Before Amendment of 1903 Neither Summary nor Plenary Jurisdiction over Adverse Claimants Existed in Bankruptcy Court.

Page 1023. *Coder v. Arts*, 22 A. B. R. 1, 213 U. S. 223: "The Bankruptcy Act, as originally passed, did not give the bankruptcy courts jurisdiction over plenary suits to recover the property alleged to belong to the trustee in bankruptcy, except with the consent of the defendant. This was the subject of full consideration and determination in *Bardes v. First Nat. Bank*, 178 U. S. 524. Subsequent decisions of the court construed the act to give the bankruptcy courts jurisdiction over controversies concerning the property in the possession of the bankruptcy courts."

Page 1024, note 2. *Obiter*, *In re Walsh Bros.*, 21 A. B. R. 14, 163 Fed. 352 (D. C. Iowa).

§ 1654½. Whether "Adverse Claimant in Possession" Determined by Pleadings.

The bankruptcy court has jurisdiction in the summary proceedings to determine the existence of the facts requisite to give it the jurisdiction to proceed summarily.

See post, § 1863.

Nevertheless, it will only examine far enough to determine whether the facts are alleged in good faith (even though they be fraudulent) and whether, if true, they would constitute the adverse party an "adverse claimant" within the meaning of the law.

See post, § 1864.

And it has been held that the bankruptcy court is not concluded by the pleadings but may inquire into the facts to see if the claim is really adverse or merely colorably so; but if really adverse, although fraudulent and voidable, or not sustainable by the weight of the evidence, summary jurisdiction will not be assumed.

See, § 1865.

§ 1655. "Adverse Claimants" Not Confined to Absolute Owners.

Page 1029, note 6. In re Horgan, 19 A. B. R. 857, 158 Fed. 774 (C. C. A. Mont.); In re Horgan, 21 A. B. R. 31, 164 Fed. 415 (C. C. A. Mont.).

Page 1029, note 7. **Government, as to Rewards for Information Given by Bankrupt in Aid of Detection of Smugglers.**—Obiter, In re Ghazal, 20 A. B. R. 807, 163 Fed. 602 (D. C. N. Y.).

§ 1657. Adverse Claimant Obtaining Voluntary Possession from Bankruptcy Officer Whether Subject to Summary Jurisdiction.

It has been held that one gaining possession voluntarily from the receiver in bankruptcy, if he be an "adverse claimant," may not be proceeded against summarily by the trustee to regain possession, the summary jurisdiction previously existing being extinguished by the gaining of such voluntary possession afterwards. This is doubtless true where it is the trustee from whom the possession was obtained; but, on the other hand the opposite has been held where it is the receiver from whom the possession was obtained, since the receiver has no power to make a voluntary surrender.

See post, § 1801; *Whitney v. Wenman*, 14 A. B. R. 45, 198 U. S. 539, 552; obiter, In re Rose Shoe Mfg. Co., 21 A. B. R. 725, 168 Fed. 39 (C. C. A. N. Y.).

§ 1659. Attaching Creditor Receiving Proceeds, within Four Months, Adverse Claimant.

But is not such adverse claimant when he receives the property itself by virtue of a redelivery bond.

In re Cohn, 18 A. B. R. 786 (Ref. Calif.). Also, see §§ 1661, 1662.

§ 1660. Receiving Proceeds after Bankruptcy, Not "Adverse Claimant."

But where the attaching or execution creditor received the proceeds afterward and with knowledge of the filing of the petition, the creditor is not an adverse claimant; for this would be a case where it was not in the possession of the creditor at the "time of bankruptcy."

Page 1030. But the rule would be different if the property were exempt and claimed as such, even though, after the proceeds were paid over, the bankrupt attempted to waive the exemption, *In re Edwards*, 19 A. B. R. 632, 156 Fed. 794 (D. C. Ala.).

§ 1661. Proceeds Still in Officer's Hands; Neither Creditor nor Officer Adverse Claimant.

Page 1030, note 13. Also, see *In re Grassler & Reichwald*, 18 A. B. R. 694, 154 Fed. 478 (C. C. A. Calif.).

Nor is the officer an adverse claimant.

In re Cohn, 18 A. B. R. 786 (Ref. Calif.).

§ 1662. Court Officers in Possession, Adverse Claimants until Adjudication.

See, §§ 1488½, 1807.

And they are not adverse claimants after adjudication.

In re Cohn, 18 A. B. R. 786 (Ref. Calif.).

And may be summarily ordered to surrender the property in their possession.

See ante, § 1474.

§ 1663. Whether Garnishee Adverse Claimant Where Garnishment within Four Months.

The true rule would seem to be that the garnishee is an adverse claimant if he claims any interest in or lien upon the property in his possession, or if he is a mere debtor of the bankrupt; and that if he is a debtor of the bankrupt or is in possession of property under claim of a right thereto or an interest therein, he is not subject to summary process; the fact that he is a garnishee not changing the usual rules in these respects.

Page 1030. *In re Kane*, 18 A. B. R. 654, 152 Fed. 587 (D. C. Pa.): "I do not think the referee gave sufficient weight to the attachment proceedings in the common pleas of Philadelphia county. These were begun nearly three months before the petition in bankruptcy was filed, and J. Joseph Murphy was summoned as garnishee. He then held in his hands, and still holds, the sum of \$500, to which, either in whole or in part, there are several claimants, including each of the bankrupts. The money has never been in the control of the District Court, and its ownership is a fairly disputable question. Clearly, as it seems to me, the Court of Common Pleas is the proper tribunal to settle this controversy, unless all parties in interest have submitted themselves to the court in bankruptcy. The referee thought that such submission had been made, and therefore decided the case on the merits, and entered an order directing the garnishee to pay over to Mary Murphy the \$500 now in his hands. In making this order, I think the referee was in error. It may be

that Mary Murphy, Kane and Sweeney did submit themselves to the jurisdiction of the District Court, but it is plain that the garnishee declined to follow this course, and that he has an individual claim upon part of the fund."

§ 1663½. Creditors Receiving Property after Filing of Petition, Not "Adverse" When.

Creditors receiving property from the bankrupt, which was once in the custody of a receiver in bankruptcy, but had been released by him to the bankrupt under order of court (because of receiver's failure to qualify), have been held not to be adverse claimants, but to be subject to summary jurisdiction.

See § 1800. See, also, *Knapp & Spencer v. Drew*, 20 A. B. R. 355, 160 Fed. 413 (C. C. A. Neb.).

§ 1673. Mere Bailee in Possession, Not "Adverse Claimant."

Page 1033, note 31. In *re Muncie Pulp Co.*, 14 A. B. R. 70, 139 Fed. 546 (C. C. A. N. Y.), distinguished in *In re Watertown Paper Co.*, 22 A. B. R. 190, 169 Fed. 252 (C. C. A. N. Y.). But compare, § 1692.

Page 1033, note 32. But compare, § 1692.

§ 1675. Mortgagees in Actual Possession "Adverse Claimants."

Page 1033, note 34. Instance, *In re Blake*, 22 A. B. R. 612, 171 Fed. 298 (D. C. N. Y.).

Page 1033, note 37. Delivery of one key but retention of another, see ante, § 1146, note.

Page 1034, note 38. *Cooney v. Collins*, 23 A. B. R. 840, 176 Fed. 189 (C. A. Mont.), quoted at § 1865.

§ 1677. Alleged Preferential Transferee in Possession, "Adverse Claimant."

Page 1034, note 42. See, in addition, *In re Eurich's Fort Hamilton Brewery*, 19 A. B. R. 798, 158 Fed. 644 (D. C. N. Y.); *In re Peacock*, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.).

§ 1678. Assignee of Bankrupt's Wages, "Adverse Claimant."

Page 1034. In *re Driggs*, 22 A. B. R. 621, 171 Fed. 897 (D. C. N. Y.): "So far as the assignees are concerned, I have no jurisdiction over them in this case, and the validity of their assignment must be determined by plenary suit."

§ 1679. Lienholder and Secured Creditor as "Adverse Claimants."

Page 1034, note 45. See, in addition, *In re Blake*, 22 A. B. R. 612, 171 Fed. 298 (D. C. N. Y.); *Harris, trustee, v. Nat. Bank*, 216 U. S. 382, 23 A. B. R. 632; *In re Peacock*, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.).

Likewise, sureties in possession of deposits made within the four months by the bankrupt for indemnity have been held to be adverse even after exoneration of the bankrupt, if the sureties claim a lien or other interest in the fund.

In re Horgan, 21 A. B. R. 31, 164 Fed. 415 (C. C. A. Mass.).

It has been held that an attorney holding chattel mortgages belonging to the bankrupt, upon which he claims an attorney's lien for services performed before the bankruptcy, is within the summary jurisdiction of the bankruptcy court.

In re Eurich's Fort Hamilton Brewery, 19 A. B. R. 798, 158 Fed. 644 (D. C. N. Y.). See also, post, § 1823½.

But this is doubtless based upon the general doctrine that all courts have summary jurisdiction over attorneys practicing before them as regards their relations with their clients.

§ 1680. Debtors of Bankrupt "Adverse Claimants," Not to Be Proceeded against Summarily.

Page 1034, note 48. In re Zotti, 23 A. B. R. 812, 178 Fed. 304 (D. C. N. Y.), as quoted at § 1681.

§ 1681. Thus, Banks Owning "Deposits," "Adverse Claimants."

Thus, banks holding deposits of the bankrupt are debtors, and therefore adverse claimants not subject to summary jurisdiction.

In re Zotti, 23 A. B. R. 812, 178 Fed. 304 (D. C. N. Y., reversing s. c., 23 A. B. R. 601): "The bankrupt's property was the chose in action against the bank; to speak of it as 'money on deposit' is confessedly a colloquialism. * * * Here the bank has not meddled with the bankrupt's assets at all. The property was, as I have said, a chose in action to which it was an incident that the obligor should honor sight drafts. It did honor such a draft, innocently, as all sides concede, and in so doing it availed itself of the conditions of the very obligation under which the trustee now sues. Of course the trustee is subject to the same conditions when he sues as the bankrupt is under; one of these conditions is the right of the debtor bank to treat as a valid extinguishment *pro tanto* any payment made upon cheque. It is only by what seems to me a confusion of the fundamental relation between the bank and the bankrupt that I can hold liable the former. The bank in no sense transferred property of the bankrupt for it had no such property. He himself, the bank's customer, alone had any property, and that was a right to sue, subject to a condition which has occurred. I can only conclude that the order was erroneous and it must be reversed."

§ 1683. Also, Employers Holding Wages of Bankrupt Tied Up by Assignment, "Adverse Claimants."

Employers holding wages of the bankrupt tied up by assignments are adverse claimants, and may not be proceeded against summarily.

Inferentially, In re Driggs, 22 A. B. R. 621, 171 Fed. 897 (D. C. N. Y.), quoted at § 1678.

§ 1683¼. Sureties and Others Holding Deposit as Indemnity, "Adverse Claimants."

Sureties holding deposits as security are adverse claimants, not subject to summary order.

Jaquith v. Rowley, 9 A. B. R. 525, 188 U. S. 620; *In re Horgan*, 19 A. B. R. 857, 158 Fed. 774 (C. C. A. Mass.); *In re Horgan*, 21 A. B. R. 31, 164 Fed. 415 (C. C. A. Mass.).

And this is so after their exoneration from liability on the bond if they still claim a lien for expenses, etc.

In re Horgan, 21 A. B. R. 31, 164 Fed. 415 (C. C. A. Mass.).

The rule is the same where a bankrupt has deposited money to secure the release of a third party's property, where both he and the third party go into bankruptcy.

In re Squier, 21 A. B. R. 346, 165 Fed. 515 (D. C. N. Y.).

§ 1683½. Attorney of Bankrupt Paid in Advance, Whether "Adverse Claimant."

An attorney for a bankrupt, who has received payment to an unreasonable amount for services to be rendered in bankruptcy, doubtless is an "adverse claimant;" but the act in § 60d gives summary jurisdiction to the Bankruptcy Court to re-examine the transaction and determine any excessiveness. As to this apparent exception it is to be observed, first, that courts have always assumed summary jurisdiction over their officers and attorneys for the sake of preserving purity in the administration of justice; and, second, that, doubtless, the re-examination would not result in a summary order on the attorney to repay the excess if the attorney were shown to be unable to respond or were a non-resident. In these latter contingencies, the trustee would be obliged, doubtless, to sue for a judgment in a court whose judgment could be executed. In such suit, however, the order of the Bankruptcy Court determining the excess would be binding and final upon the parties.

See post, § 2099.

§ 1685. Distinction between Proceedings in Bankruptcy and "Controversies" Arising Out of Bankruptcy.

Page 1036, note 53. Compare, *In re Walsh Bros.*, 21 A. B. R. 14, 163 Fed. 352 (D. C. Iowa).

§ 1686. Jurisdiction of United States Circuit Court in Bankruptcy Matters.

Page 1037, note 54. *Obiter*, *Goodnough Mercantile & Stock Co. v. Galloway*, 19 A. B. R. 244, 156 Fed. 504 (D. C. Ore.); *In re MacDougall*, 23 A. B. R. 762, 175 Fed. 400 (D. C. N. Y.).

No Judicial Cognizance of Record in the Bankruptcy Proceedings.—Where the suit is brought in the United States Circuit Court, that court will not take judicial cognizance of the records of the United States District Court in the bankruptcy proceedings. *McDonald v. Clearwater Ry. Co.*, 21 A. B. R. 182, 164 Fed. 1007 (U. S. C. C. Idaho).

Page 1037, note 56. *Obiter*, In re *MacDougall*, 23 A. B. R. 762, 175 Fed. 400 (D. C. N. Y.).

Page 1038. Thus, the Circuit Court has been held to have jurisdiction of an action by a trustee in bankruptcy to recover usurious interest paid by the bankrupt to a national bank.

Reed v. American-German Nat. Bank, 19 A. B. R. 140, 155 Fed. 233 (U. S. C. C. Ky.): "The provision of this section which is particularly material is, therefore, that part of clause 'b' which enacts that suits by the trustee shall only be brought in the courts 'where the bankrupt * * * might have brought or prosecuted them if proceedings in bankruptcy had not been instituted.' If the bankruptcy proceeding had not been instituted, could the saddlery company have brought suit in this court to recover the usurious interest paid to defendant; it being a national banking association organized under a law of the United States, viz., the national banking act? This seems to be the statutory test established for such cases in which, and in those described in the clause of the section which we have italicized and which was added by the Amendment of 1903, the right of the trustee to sue in the Federal courts does not depend upon the consent of the person sued, though in other cases it does. * * * Under the judiciary act, jurisdiction is given generally to the Circuit Courts of the United States of cases arising under the laws of the United States. The national banking act itself, as amended, gives the Circuit Courts concurrent jurisdiction with the courts of the State having jurisdiction in similar cases of suits to recover interest knowingly collected at a higher rate than allowed by law; and, if this were all, it might well be held that the judiciary act and the national banking act, when construed together, give this court jurisdiction of a case like this. But, as the plaintiff here derives his powers and rights as trustee from the Bankruptcy Act of 1898, it has seemed to the court that his right to sue must also be tested by the provisions of that act. As we have seen, § 23b of the Bankruptcy Act gives him the right to sue here if the saddlery company could have done so, had there been no bankruptcy proceeding. The saddlery company would have had that right, as the claim exceeds \$2,000 and arises under the laws of the United States. This court, therefore, has jurisdiction, and the demurrer must be overruled, both because the plaintiff has capacity to sue and because the court has jurisdiction of the action."

But the Circuit Court will not be permitted, even by the express order of the Bankruptcy Court, to carry on controversies over assets in the custody of the bankruptcy court.

Bray v. U. S. Fidelity & Guaranty Co., 22 A. B. R. 363, 170 Fed. 639 (C. A. W. Va.).

Page 1038. *Drew v. Myers*, 22 A. B. R. 656, 81 Neb. 750, 116 N. W. 781: "It is plain from the reading of these sections that, if this action was to avoid a preference or to recover property fraudulently conveyed by the bank-

rupt, the state court would have concurrent jurisdiction with the Federal court of the same. Of all other actions brought by the trustee to recover property belonging to the bankrupt the State court retains sole jurisdiction." The rule is not quite broadly enough stated here. The Federal court also would have jurisdiction of suits to set aside any transfer which any creditor might have maintained had there been no bankruptcy.

Page 1038, note 60. Inferentially, obiter, *In re Dana*, 21 A. B. R. 683, 167 Fed. 529 (C. C. A.), quoted at § 1597. But compare, in effect contra, *Redd v. Wallace*, 21 A. B. R. 839, 145 Ala. 209, 40 So. 407, although perhaps this case goes simply to the extent that the action cannot be in equity, but must be at law.

§ 1688. But by Amendment of 1903 Jurisdiction Conferred Also in Certain Cases upon Bankruptcy Courts.

Page 1040. *Lynch v. Bronson*, 20 A. B. R. 409, 160 Fed. 139 (D. C. Conn.): "The amendment without doubt gives to this court concurrent jurisdiction with the State courts, without the consent of the proposed defendant of any suit which sets forth such facts as will bring it under either of the excepted subdivisions."

§ 1689. Cases under § 70 (e) Included Though Not Expressly Mentioned in § 23 (b).

Page 1040, note 65. *Hull v. Burr*, 18 A. B. R. 541, 153 Fed. 245 (C. C. A. Fla.); obiter, *Drew v. Myers*, 22 A. B. R. 656, 81 Neb. 750, quoted at §§ 1687, 1692; *Palmer, trustee, v. Roginsky*, 23 A. B. R. 358, 175 Fed. 883 (D. C. N. Y.); *Skewis v. Barthell*, 18 A. B. R. 429, 152 Fed. 534 (D. C. Iowa). Compare, obiter, *Harris, trustee, v. Nat. Bank*, 216 U. S. 382, 23 A. B. R. 632.

Cases under § 70 (e) Expressly Included by Amendment of 1910.—The vexed question as to whether cases under § 70 (e) are included or not has been set at rest by the Amendment of 1910.

Bankr. Act, § 23b, as amended in 1910: "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b; section sixty-seven, subdivision e; and section seventy, subdivision e."

§ 1690. Plenary Suits against "Adverse Claimants" in Bankruptcy Courts.

Page 1041, note 66. *Bowman v. Alpha Farms*, 18 A. B. R. 700, 153 Fed. 380 (D. C. N. Y.); *Gregory v. Atkinson*, 11 A. B. R. 495, 127 Fed. 183 (D. C. Mo.); *Parker v. Black*, 16 A. B. R. 202, 143 Fed. 560 (D. C. N. Y.); obiter, *Drew v. Myers*, 22 A. B. R. 656, 81 Neb. 750, 116 N. W. 781.

Page 1041, note 68. Obiter, *Drew v. Myers*, 22 A. B. R. 656, 81 Neb. 750, 116 N. W. 781.

Page 1041, note 68. See post, § 1709; *Teague v. Anderson Hdw. Co.*, 20 A. B. R. 424, 161 Fed. 165 (D. C. Ga.).

Jurisdiction to Recover from Vendee of Bankrupt, Who Knew the Facts, Property Bought by Bankrupt Through Fraudulent Misrepresentations.—In one case it has been held that the trustee succeeds to the rights of defrauded sellers to pursue property bought by the bankrupt through fraudulent misrepresentations and by him retransferred to third persons who had full knowledge of the fraud, such defrauded sellers having proved their claims as creditors and thus waived the tort. *Lynch v. Bronson*, 20 A. B. R. 409, 160 Fed. 139 (D. C. Conn.). This holding is peculiar, however. It would seem that the right of such creditors was to have pursued the property themselves, and that by waiving the right they did not confer it on the trustee, but that the trustee must depend solely upon the fraudulent nature of the transfer as between *all* the bankrupt's creditors and the vendee, rather than as between these particular sellers and the vendee.

§ 1691. Plenary Suits by Trustee Not "Proceedings in Bankruptcy," but "Controversies."

Page 1042, note 69. See, in addition, *In re Walsh Bros.*, 21 A. B. R. 14, 163 Fed. 352 (D. C. Iowa).

§ 1692. But When Not to Be Brought in Bankruptcy Court.

Page 1043, note 70. Impliedly, *In re Hutchinson & Wilmoth*, 19 A. B. R. 313, 158 Fed. 74 (C. C. A. Mich.), quoted at § 977.

Page 1043. *Hull v. Burr*, 18 A. B. R. 541, 153 Fed. 945 (C. C. A. Fla.): "Does the Amendment of 1903 affect the case at bar? The amendment makes exceptions to the limitation on the jurisdiction of the District Courts, and thereby extends their jurisdiction; but the extension does not include cases like that presented by the petition of the trustee. The amendment confers jurisdiction on the District Courts in 'suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e.' Turning to § 60, we find that subdivision 'a' defines a preference, and that subdivision 'b' provides that the trustee may sue the person receiving a preference and recover the property or its value. Under the amendment, suit for that purpose may be brought in 'any court of bankruptcy.' The case at bar involves no question of preference. Examining § 67, subd. 'e,' we find that it relates to fraudulent conveyances by the bankrupt and conveyances made within four months prior to the time of filing the petition in bankruptcy. The amendment confers jurisdiction on any court of bankruptcy of suits to recover property so conveyed. The petition of the trustee in the case at bar contains no charge of fraud, and the deed and contracts in question were executed more than four months before the beginning of the bankruptcy proceedings. It follows that the amendment quoted has no application to this case. The case, when viewed as a controversy at law or in equity, not being affected by the amendment, must be governed by the principles announced in *Bardes v. Hawarden Bank*, *supra*, which denies the jurisdiction of the District Court. The only other part of the act that might be referred to in this connection is § 70, subd. 'e.' * * * Such jurisdiction as is conferred by this language relates to suits by the trustee to 'avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided.' The petition of the trustee in the instant case does not seek to avoid a transfer. It does not allege that the deed to Hull was made under circumstances that made it voidable at the suit of his creditors. In fact, it

is not alleged in the petition that the corporation owed any debts at the date of its transfer to Hull. No charge of fraud against creditors is made. On the contrary, it is alleged that the deed to Hull was based on a large consideration, not less than \$25,000. A careful consideration of the trustee's petition convinces us that it was not intended as a suit under § 70e, and that subdivision has not been cited by learned counsel for the trustee as conferring jurisdiction. The trustee is vested by the act with all the rights and title of the bankrupt, as well as with the rights of the bankrupt's creditors, and, when he seeks to enforce rights or to recover property in another district outside of the territorial jurisdiction of the court which appointed him, he stands in the position of those whose rights he has acquired, and can resort only to the same courts, State or Federal, and is confined to the same remedies. * * * This general rule is, of course, subject to the exceptions made by the Amendment of 1903, which has been quoted in this opinion and shown not to be applicable to this case."

Drew v. Myers, 22 A. B. R. 656, 81 Neb. 750, 116 N. W. 781: "The State and Federal courts have concurrent jurisdiction of an action brought by a trustee in bankruptcy to avoid a preference or to recover property, fraudulently conveyed by the bankrupt. Of all other actions brought by the trustee to recover property belonging to the bankrupt the State court has sole jurisdiction." The rule is not completely stated by this holding, however; for jurisdiction is also extended to the Federal Court over suits to set aside any transfer that a creditor might have set aside had there been no bankruptcy. However, the case itself was rightly decided, because it would appear that the suit was not brought to set aside a "transfer."

Page 1043. Nor may suit to recover unpaid stock subscriptions be brought there.

See ante, § 977; also, see *In re Hutchinson & Wilmoth*, 19 A. B. R. 313, 158 Fed. 74 (C. C. A. Mich.); contra, *Skillin v. Magnus*, 19 A. B. R. 397, 162 Fed. 689 (D. C. N. Y.); also, contra, *In re Crystal Springs Bottling Co.*, 3 A. B. R. 194, 96 Fed. 945 (D. C. Vt.).

Nor may a suit to declare a trust in property, where no transfer by the bankrupt is alleged, be brought there.

Apparently, but obiter, *Drew v. Myers*, 22 A. B. R. 636, 81 Neb. 750, 116 N. W. 781.

Facts conferring jurisdiction on the Federal Court must be pleaded and proved; and it is not sufficient that they simply be pleaded,—the proof must support them.

Plaut, trustee, v. Gorham Mfg. Co., 23 A. B. R. 42, 174 Fed. 852 (D. C. N. Y.).

Suit may not be maintained in the District Court by the trustee to recover a leasehold interest claimed by the landlord to have been terminated by a judgment in dispossess proceedings, proof not showing the premises to be in the custody of the bankruptcy court.

Plaut, trustee, v. Gorham Mfg. Co., 23 A. B. R. 42, 174 Fed. 852 (D. C. N. Y.). For no transfer by the bankrupt was involved, nor was there any

consent to the jurisdiction, nor was the property in the custody of the Bankruptcy Court.

Thus, also, a secured creditor retaining security after, as it is claimed, the debt has been paid, may not be sued for its recovery in the Federal Court.

Harris, trustee, *v. Nat. Bank*, 216 U. S. 382, 23 A. B. R. 632: "That subdivision [Bankr. Act § 70e.] provides for avoiding transfers of the bankrupt's property which his creditors might have avoided, and for recovery of such property, or its value, from persons who are not bona fide holders for value. In this action, no such transfer is alleged; no attack is made upon a transfer by the bankrupt which would have been void as to creditors. The petition seeks to recover property held by the bank, if the allegations are true, which belonged to the bankrupt, and consequently passed to the trustee as the representative of the bankrupt's estate. The recovery sought is of property held for the bankrupt estate, which the defendant wrongfully refused to surrender."

§ 1693½. Lienholders on Property in Custody of Bankruptcy Court Maintaining Plenary Suits in District Court.

It has been held that, where the property is in the custody of the Bankruptcy Court a lienholder may institute an independent plenary action in the same District Court, to bring in the trustee and other parties and marshal the liens and for sale as in foreclosure, though not in terms a foreclosure.

Goodnough Mercantile & Stock Co. *v. Galloway*, 19 A. B. R. 244, 156 Fed. 504 (D. C. Ore.): "The relation of the parties in the case at bar is the exact reverse of that of those in that case [*Whitney v. Wenman*, 198 U. S. 539] but the principle involved appears to me to be the same. The purpose is to determine the validity of the alleged lien claimed upon the property of the bankrupt. The fund derived from the sale of the lumber and logs had passed into the hands of the trustee, and, although the contracts for the timber with the Lewises are in the hands of plaintiff by assignment as collateral, yet the corpus of the lien, to wit, the timber, whatever may be the interests of the bankrupt, has passed into the constructive possession, at least, of the trustee, so that the whole property is within the possession, actual or constructive, of the bankrupt court, and the suit is brought in that court, by the lienholder, to determine the correlative rights of the parties. The plaintiff does not in any way hold, or assume to hold, adversely to the trustee in bankruptcy, and I see no reason why a plenary suit may not be maintained by the lienholder against the trustee to determine those rights, as well as by the trustee against the lienholder. The suit is plenary in either case, and the court is in the possession of the property involved. That the case is in name one for a foreclosure does not in itself determine the jurisdiction. The court will not foreclose in the way that foreclosure proceedings are finally adjusted, but it will declare the lien, if any exists, and leave the trustee to dispose of the property, and the assets will be marshaled in accordance with the relative rights of the creditors of the estate; the legitimate lienholder being preferred, of course, to the general creditor. This disposes of the question of jurisdiction."

§ 1694. Actions in Personam for Debts Not to Be Brought in Bankruptcy Courts.

Page 1044, note 75. Compare, *In re White* (Froehling *v.* Amer. Trust & Savings Bank), 24 A. B. R. 197, 177 Fed. 194 (C. C. A. Ill.).

Page 1044. Thus, suits to recover unpaid stock subscriptions may not be brought there.

See cases cited under § 1692.

§ 1695. No Plenary Suits before Referee.

Page 1044, note 76. Compare, ante, § 545. See, in addition, *In re Walsh Bros.*, 21 A. B. R. 14, 163 Fed. 352 (D. C. Iowa), quoted ante, § 1652; *In re Overholzer*, 23 A. B. R. 10 (Ref. N. Dak.).

Page 1045, note 76. Also, compare, where it appears the referee was acting as an arbitrator, though evidently considering jurisdiction existed anyway, *In re O'Brien*, 21 A. B. R. 11 (Ref. Mass.).

Page 1045. They have no power to render judgments in personam.

Knapp & Spencer v. Drew, 20 A. B. R. 355, 160 Fed. 413 (C. C. A. Neb.). Compare, ante, § 545½.

The plenary jurisdiction conferred by the Amendatory Act of 1903 upon courts of bankruptcy of property in certain specified cases, is not to be construed as stretching to the referees.

In re Overholzer, 23 A. B. R. 10 (Ref. N. Dak.).

§ 1696. Jurisdiction by Consent.

Page 1045, note 77. Apparently, but unnecessarily, *Hatch v. Curtin*, 19 A. B. R. 82, 154 Fed. 791 (C. C. A. Mass.) although in this case no waiver nor consent was requisite since the bankrupt was in actual possession, though claiming to be holding simply as trustee for another.

Page 1046, note 78. **All Claimants Consenting, Except Garnishee.**—*In re Kane*, 18 A. B. R. 654, 152 Fed. 587 (D. C. Pa.), quoted, on other points, § 1663.

Possession Acquired by Stipulation for Preservation of Rights without Prejudice Stipulation Not to Be Repudiated.—Where the possession of property which was to be the subject of litigation was acquired by the bankruptcy court from an adverse claimant, upon the faith of a stipulation between it and the receiver, approved by the referee, that its rights should not be prejudiced thereby, the receiver, who succeeded himself as trustee, will not be permitted to repudiate the stipulation, which may have been improvidently made. *In re Newton & Co.*, 18 A. B. R. 567, 153 Fed. 841 (C. C. A. Ark.), affirmed sub nom. *Bryant v. Swofford Bros.*, 22 A. B. R. 111, 214 U. S. 279.

Page 1047. Thus, an adverse claimant in possession of goods, notes and accounts, may confer jurisdiction on the bankruptcy court by surrendering the same to the receiver; and where the surrender is made to a receiver under the stipulation that it shall be without prejudice to the

rights of the parties, the trustee subsequently appointed may not repudiate the stipulation.

Bryant v. Swofford Bros., 22 A. B. R. 111, 214 U. S. 279 (affirming *In re Newton & Co.*, 18 A. B. R. 567, 153 Fed. 841): "There seems to be no reason for a nice consideration of the powers of receivers and trustees. When the receiver was appointed he found all the property in dispute in the hands of the dry goods company, to which it had been delivered by the Newtons, as and for the property of the company, and by which it had been received as its own property. When the receiver made his demand for it the return was at first refused. The parties in the controversy then being at arms' length, agreed that if the dry goods company would give up the advantages of possession, and, instead of converting the goods, notes and accounts into cash in its own way and on its own account, permit the receiver to do so, then those goods should be deemed part of those delivered under the contract, and the notes and accounts the proceeds of other goods delivered under the contract. This arrangement was approved by the referee. The trustee has taken the property under it and has never offered to return the property, or any part of it. The property has in large part been sold or otherwise disposed of in the course of the bankruptcy administration. Under these circumstances we are of opinion that the trustee, the appellant in this case, was bound by the agreement of the receiver, that all the property in dispute should be conclusively deemed that which passed under the original conditional contract, or the proceeds thereof."

But, in case of garnishment, where the garnishee also is an adverse claimant to part of the fund, the consent must also be on his part.

In re Kane, 18 A. B. R. 654, 152 Fed. 587 (D. C. Pa.), quoted at § 1663.

Thus, also, an adverse claimant confers jurisdiction by consent when he comes into the bankruptcy court and asks for the surrender of property, or for the declaration of a lien thereon, where the property is in the custody of a trustee in another state.

In re MacDougall, 23 A. B. R. 762, 175 Fed. 400 (D. C. N. Y.).

§ 1697. Likewise Debtors Owing Money Confer Jurisdiction by Consent.

Page 1047, note 79. *In re White* (*Froehling v. Amer. Trust & Savings Bank*), 24 A. B. R. 197, 177 Fed. 194 (C. C. A. Ill.).

§ 1698. What Constitutes Consent.

Page 1049. The facts that the defendant did not voluntarily appear, but objected to the power of the court at the hearing, negative consent.

In re Horgan, 19 A. B. R. 857, 158 Fed. 774 (C. C. A. Mass.).

§ 1699. But Consent Confers Jurisdiction Only in Plenary Actions, unless Property in Custodia Legis.

Page 1049, note 95. See, in addition, *In re Walsh Bros.*, 21 A. B. R. 14, 163 Fed. 352 (D. C. Iowa), quoted ante, § 1652. Perhaps, impliedly, contra,

although it does not definitely appear that the proceedings were before the referee, *In re White* (*Froehling v. Amer. Trust & Savings Bank*), 24 A. B. R. 197, 177 Fed. 194 (C. C. A. Ill.).

Page 1050, note 95. Also, apparently contra, *In re O'Brien*, 21 A. B. R. 11 (Ref. Mass.), although in this case it was evident the referee was acting rather as an arbitrator.

Page 1050. Thus, consent of a garnishee and all lienholders, unaccompanied with delivery of the fund into the custody or control of the bankruptcy court, will be insufficient to confer jurisdiction; a fortiori, the consent of merely the lienholders is insufficient.

See § 1663; also, see *In re Kane*, 18 A. B. R. 654, 152 Fed. 587 (D. C. Pa.), quoted at § 1663.

The consent of merely the garnishee is insufficient, even where the garnishee pays the money into court, unless such garnishment were void for being a lien created within four months by legal proceedings.

Page 1050. And where the bankrupt's wife has permitted the bankrupt to surrender to the custody of the trustee certain stocks, etc., claimed by her, under an agreement that her rights of ownership shall be determined, but without objection to the jurisdiction, she has consented.

In re Bacon, 20 A. B. R. 107, 159 Fed. 424 (C. C. A. N. Y.).

And where the property once was in the custody of the bankruptcy court, but has been erroneously taken therefrom, the referee has jurisdiction summarily to order its return, under the doctrine of § 1800, post.

§ 1700. No Jurisdiction by Consent Where No Custody and Neither Litigant Party to Bankruptcy Proceedings.

But, of course this proposition is to be taken with the qualification of § 1800, that property once in the custody of the bankruptcy court but wrongfully taken therefrom, may be summarily ordered returned.

§ 1704. After "Consent" Too Late to Retract.

Page 1051, note 100. See, in addition, *In re Bacon*, 20 A. B. R. 107, 159 Fed. 424 (C. C. A. N. Y.).

§ 1705. "Ancillary Bankruptcy Proceedings Maintainable.

"Ancillary" bankruptcy proceedings in another district are maintainable.

Babbitt, trustee, v. Dutcher, 23 A. B. R. 519, 216 U. S. 102: "On the authority of these decisions it must be, and is, conceded that under the Bankruptcy Acts of 1841 and 1867 ancillary jurisdiction, both in summary pro-

ceedings and in plenary suits, existed in all District Courts within their respective districts; and the question really is whether the provisions of the Act of 1898 are to the contrary, or, as appellee's counsel puts it, show an intention on the part of Congress to restrict such jurisdiction so as to cut off the inferences drawn from the language of the earlier acts. But neither the Act of 1867 nor the Act of 1898 expressly confers or expressly negatives ancillary jurisdiction in courts other than the court of adjudication. The provisions as to summary jurisdiction in the two acts are substantially identical, and, it appears to us, should receive the same construction."

Page 1051, note 101. See, in addition, *In re Dempster*, 22 A. B. R. 751, 172 Fed. 353 (C. C. A. Mo.).

Bankr. Act, § 2, as amended in 1910; "That the courts of bankruptcy, as hereinbefore defined, * * * are hereby invested, within their respective territorial limits as now established * * * with such jurisdiction at law and in equity as will enable them to * * * (20) exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy." *In re Madison Steel Co.*, 216 U. S. 115, 23 A. B. R. 614; (1867) *Lathrop v. Drake*, 91 U. S. 516; (1867) *Sherman v. Bingham*, Fed. Cases, No. 12,762, 7 Bank. Reg. 490; (1867) *In re Tiffet*, Fed. Cases, No. 14,034, 19 N. B. Reg. 201; (1867) *McGehee v. Hentz*, Fed. Cases, No. 8,794; *In re Peiser*, 7 A. B. R. 690, 115 Fed. 199 (D. C. Pa.); *In re Sutter*, 11 A. B. R. 632, 131 Fed. 654 (D. C. N. Y.); *In re Benedict*, 15 A. B. R. 232, 140 Fed. 55 (D. C. Wis.). Apparently obiter, *In re Owings*, 15 A. B. R. 475, 140 Fed. 739 (D. C. N. C.); *In re Nelson Co.*, 18 A. B. R. 66, 149 Fed. 590 (D. C. N. Y.); *In re Richardson* Fed. Cases, No. 11,774; (1867) *Marckson v. Heaney*, Fed. Cases, No. 9,098, 1st Dill. 497. Contra (before decision of United States Supreme Court in *Babbitt v. Dutcher*, supra), *In re Van Hartz*, 15 A. B. R. 747, 142 Fed. 726 (C. C. A. N. Y.); also, contra (before the decision of *Babbitt v. Dutcher*, supra), *In re Granite City Bank*, 14 A. B. R. 404, 137 Fed. 818 (C. C. A. Iowa); also, contra (before decision of *Babbitt v. Dutcher*, supra), *In re Williams*, 10 A. B. R. 538, 123 Fed. 321 (D. C. Tenn.); contra (before *Babbitt v. Dutcher*, supra), *Foundry Co. v. Foundry Co.*, 10 A. B. R. 624, 124 Fed. 403 (D. C. Tenn.); contra, *In re Tybo Mining & Reduction Co.*, 13 A. B. R. 62, 132 Fed. 699 (D. C. Nevada); also, contra (before the Supreme Court's decision in *Babbitt v. Dutcher*, supra), *In re Williams*, 9 A. B. R. 744, 120 Fed. 38 (D. C. Ark.); also contra, *In re Dunseath & Son Co.*, 22 A. B. R. 75, 21 A. B. R. 742, 168 Fed. 973 (D. C. Pa.); also contra, *Hull v. Burr*, 18 A. B. R. 541, 153 Fed. 945 (C. C. A. Fla.).

§ 1706. But May Marshal Liens and Sell Property in Actual Custody Though in Another State.

Page 1054, note 102. **Setting Apart Dower in Another State.**—It has been held, however, that the court in bankruptcy wherein the proceedings are pending has jurisdiction to set apart dower and determine rights in land in the custody of the trustee or bankrupt in another State. *Hurley v. Devlin*, 18 A. B. R. 627, 151 Fed. 919 (D. C. Kan.), quoted at § 1706½; *Thomas v. Woods*, 23 A. B. R. 132, 173 Fed. 585 (C. C. A. Kans.), quoted at § 1706½.

Page 1054. Likewise as to real estate.

Thomas v. Woods, 23 A. B. R. 132, 173 Fed. 585 (C. C. A. Kans.), quoted at § 1706½; *In re MacDougall*, 23 A. B. R. 762, 175 Fed. 400 (D. C. N. Y.);

compare, also, *Wood v. Henderson*, 210 U. S. 246, 20 A. B. R. 1; compare, *In re Muncie Pulp Co.*, 18 A. B. R. 56, 151 Fed. 732; compare, *Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 171 Fed. 43 (C. C. A.); compare, *Dempster v. Waters-Pierce Oil Co.*, 22 A. B. R. 751, 172 Fed. 353 (C. C. A.).

Although the decision of the Supreme Court in *Babbitt v. Dutcher* [quoted at § 1705] holds ancillary jurisdiction to exist, and the Amendment of 1910 expressly confers ancillary jurisdiction, yet such right of the court of original jurisdiction, to marshal liens and to sell property in actual custody, though in another State, doubtless still exists.

§ 1706½. How as to Real Estate in Another State.

But it is exceedingly doubtful that the bankruptcy court wherein the adjudication of bankruptcy was had may marshal liens upon, or determine rights in, real estate located in another State. Nevertheless, it has been held that dower rights may be so determined where the trustee has actual custody of the real estate in the other State and the bankruptcy has died pending the bankruptcy.

Hurley v. Devlin, 18 A. B. R. 627, 151 Fed. 919 (D. C. Kan.): "From the facts as stated, and from the very nature of the jurisdiction possessed by this court in bankruptcy proceedings, I am of the opinion the jurisdiction and power to determine the rights of the widow to dower in the property of her bankrupt husband, deceased during the pendency of the proceedings under the Bankruptcy Act, is exclusively in this court; that the State courts of Illinois and Missouri do not possess such jurisdiction; that the ancillary bill presented to this court by the trustees, and the order of this court made thereon restraining the resident widow from further prosecuting such suits brought by her in the State courts where the property is located, were rightfully filed and made, and that the motion to set aside such order must be overruled and denied." Quoted further at § 1166½.

And this view was upheld by the Circuit Court of Appeals where the bankruptcy was still alive.

Thomas v. Woods, 23 A. B. R. 132, 173 Fed. 585 (C. C. A. Kans.): "The objection of the appellant that the trial court was without jurisdiction of the property [real estate], because it was not situated in the District of Kansas, has no merit. Upon the filing of a petition in bankruptcy, all property held by or for the bankrupt is brought within the custody of the court of bankruptcy, and upon adjudication, that court is vested with jurisdiction to determine all liens and interests affecting it. This jurisdiction is co-extensive with the United States."

§ 1707. Property in Other States Not in Actual Custody, to Be Protected Only By Independent Suit or Ancillary Proceedings.

Property not in the actual custody of the receiver or trustee in bankruptcy, located in other districts than the one where the bankruptcy proceedings are pending, can be protected only by separate suits brought

within such districts, or by ancillary proceedings therein instituted; and neither summary nor plenary proceedings can be maintained in the original bankruptcy case to reach such property in other districts.

Page 1054, note 103. In *re Williams*, 9 A. B. R. 741, 120 Fed. 38 (D. C. Ark.), although the force of this case is diminished by its denial of ancillary jurisdiction; compare, as to homestead, obiter, *Thomas v. Woods*, 23 A. B. R. 132, 173 Fed. 585 (C. C. A. Kans.).

But it seems that real estate located in another district may be in the custody of the bankruptcy court, so that marshaling of liens thereon may be had in the original bankruptcy proceedings, without the institution of ancillary proceedings.

In *re MacDougall*, 23 A. B. R. 762, 175 Fed. 400 (D. C. N. Y.).

Thomas v. Woods, 23 A. B. R. 132, 173 Fed. 585 (C. C. A. Kans.): "The objection of the appellant that the trial court was without jurisdiction of the property, because it was not situated in the district of Kansas, has no merit. Upon the filing of a petition in bankruptcy, all property held by or for the bankrupt is brought within the custody of the court of bankruptcy, and, upon adjudication, that court is vested with jurisdiction to determine all liens and interests affecting it. This jurisdiction is co-extensive with the United States."

§ 1708. Before Adjudication, Bankruptcy Receiver No Power in Another District.

Before adjudication the bankruptcy receiver may not go into another State and institute proceedings there for the recovery of property.

Page 1055. In *re Dunseath & Son Co.*, 22 A. B. R. 75, 168 Fed. 973 (D. C. Pa.). "The weight of authority is that the receiver appointed by the District Court of one district cannot maintain an action in the District Court of another district to recover assets in the hands of strangers. The extraterritorial power of a receiver was carefully considered in the case of *Clark v. Booth*, 17 How. 327, and it was there decided that the receiver possessed no such power. This case was referred to in the case of *Hale v. Allinson*, 188 U. S. 56, where Mr. Justice Peckham in commenting on the case of *Clark v. Booth*, said: 'We do not think anything has been said or decided in this court which destroys or limits the controlling authority of that case.' In our own circuit Judge McPherson, sitting in the Eastern district of Pennsylvania, in the case of *In re National Mercantile Agency*, 128 Fed. 639, 12 Am. B. R. 189 (D. C.), decided that a receiver in bankruptcy under an order to collect and take possession of all the assets of an alleged bankrupt is not authorized to bring suits in a district other than the one in which he was appointed, and shows that this position is sustained by the highest authority. We must therefore conclude that the receiver in the case at bar cannot maintain a suit in this district. Under the prevailing authorities he certainly cannot by a summary proceeding such as is brought in this case either restrain the state officers or recover the assets of the bankrupts from the hands of strangers."

The proper practice is for creditors, during the meanwhile, themselves to institute the ordinary remedies of creditors, or for ancillary proceedings to be instituted in aid of the receiver.

Babbitt, trustee, v. Dutcher, 23 A. B. R. 519, 216 U. S. 102; *In re Madison Steele Co.*, 216 U. S. 115, 23 A. B. R. 614; Bankr. Act, amended 1910, § 2 (20).

§ 1709. After Adjudication, Trustee (and Perhaps Also Receiver) May Institute Proceedings in Another District.

After adjudication the trustee and perhaps the receiver, appointed in one district, however, may go into another district and institute replevin suits or fraudulent transfer suits.

Lawrence v. Lowrie, 13 A. B. R. 297, 133 Fed. 995 (D. C. Pa.); *Teague v. Anderson Hdw. Co.*, 20 A. B. R. 424, 161 Fed. 165 (D. C. Ga.); impliedly, but obiter, *Hull v. Burr*, 18 A. B. R. 541, 153 Fed. 945 (C. C. A. Fla.).

Or any other actions necessary to protect the property there; but a receiver may not so do, unless he be authorized by order of court, for he has only such power as the court that appoints him chooses to give; and, unless he is authorized to leave the court of original jurisdiction and sue elsewhere, he is not competent to bring such suit.

Of course, ancillary proceedings may be instituted in another district in aid of the receiver or trustee.

§ 1709½. Scope of Ancillary Proceedings.

Any District Court in bankruptcy in the exercise of ancillary jurisdiction in aid of another bankruptcy court may grant injunctions, stay proceedings and enforce compositions.

(1867) *In re Tift*, 19 Nat. Bankr. Reg. 201.

It may also order the summary delivery of property and documents.

Babbitt v. Dutcher, 23 A. B. R. 519, 216 U. S. 102; *In re Madison Steele Co.*, 23 A. B. R. 614, 216 U. S. 115.

And enforce the examination of bankrupts and witnesses, and marshal liens, the same as the original bankruptcy court could have done had the parties been within the jurisdiction.

(1867) *In re Tift*, 19 Nat. Bankr. Reg. 201.

§ 1710. Other Actions Maintainable by Trustee.

The trustee of course may maintain other suits than those brought to recover property fraudulently or preferentially transferred.

See post, §§ 1724, 1729, et seq.

§ 1711. Whether May Maintain Partition Proceedings.

But it is doubtful whether the trustee may institute partition proceedings, although to realize upon a bankrupt partner's share.

Holding that he may not maintain partition. *Hobbs v. Frazier*, 56 Fla. 796, 21 L. R. A. (N. S.) 105, 22 A. B. R. 684.

§ 1716. Creditors May Not Bring Independent Plenary Actions in Bankruptcy Court.

Page 1058, note 118. Also, compare, *In re Haupt Bros.*, 18 A. B. R. 585, 153 Fed. 239 (D. C. N. Y.).

§ 1721. May Sue in State Court.

Page 1061, note 123. Instance, *Cohn, trustee, v. Small*, 18 A. B. R. 817, 120 App. Div. 211; instance, suing on bankrupt's contract for supplying money to manufacturing concern. *Monroe v. Bushnell*, 22 A. B. R. 587, 158 Mich. 115, 122 N. W. 508; *Drew v. Myers*, 22 A. B. R. 656, 81 Neb. 750, 116 N. W. 781, quoted at §§ 1687, 1692.

§ 1723. May Sue in Bankruptcy Court for Recovery of Property Transferred by Bankrupt.

Page 1062, note 125. Also, see §§ 1688, 1709.

§ 1724. May Institute Suits against Debtors to Recover Money Judgments, etc.

He may sue in equity for an accounting.

Instance, *Monroe v. Bushnell*, 22 A. B. R. 587, 158 Mich. 115, 122 N. W. 508.

§ 1725. Nature of Plenary Suits against "Adverse Claimants."

Page 1063, note 126. See, in addition, *Westall v. Avery*, 22 A. B. R. 673, 171 Fed. 626 (C. C. A. N. C.), quoted at § 1753.

Prior Agreement of Receiver to Sale by Adverse Claimant, Effect of.—Where the receiver in bankruptcy, not himself in possession, stipulates that the adverse claimant may himself sell the property involved, the trustee, subsequently instituting suit to set aside the original transfer to the adverse claimant, is, in general, bound by the price obtained. *Ommen, trustee, v. Talcott*, 23 A. B. R. 572, 175 Fed. 261 (D. C. N. Y.).

Bankruptcy Court Authorizing Receiver to Stipulate with Adverse Claimant for Sale of Property.—The bankruptcy court may authorize the receiver to make a stipulation for the sale by an adverse claimant of property in the possession of such adverse claimant. *Ommen, trustee, v. Talcott*, 23 A. B. R. 572, 175 Fed. 261 (D. C. N. Y.). And the trustee will be bound thereby, *ibid*.

Of course, the trustee may sue also on other causes of action than those for the recovery of property or its value; thus he may sue at law for a money judgment or in equity for an accounting, etc.

See ante, § 1724.

§ 1726. Receivers May Be Appointed.

Page 1063, note 127. Compare (where referee said to possess jurisdiction), *In re O'Brien*, 21 A. B. R. 11 (Ref. Mass.).

§ 1729. Trustee Not Confined to Suits in Equity, and in Proper Case May Sue at Law for Recovery of Property or Its Value.

Page 1064. *Burns v. O'Gorman*, 17 A. B. R. 815, 150 Fed. 226 (U. S. C. C. R. I.): "A trustee in bankruptcy may sue in trover for a conversion of goods occurring either after or before bankruptcy."

Page 1064, note 131. See, in addition, *Warmath v. O'Daniel*, 20 A. B. R. 101, 159 Fed. 87 (C. C. A. Tenn.), quoted at § 1730; *Cohn, trustee, v. Small*, 18 A. B. R. 817, 120 App. Div. N. Y. 211.

Thus, he may for the recovery of a preference.

Cohn, trustee, v. Small, 18 A. B. R. 817, 120 App. Div. N. Y. 211.

§ 1730. And Should Sue at Law unless Remedy Inadequate.

And the trustee should sue at law unless his remedy at law is inadequate.

Page 1064. *Warmath v. O'Daniel*, 20 A. B. R. 101, 159 Fed. 87 (C. C. A. Tenn.): "The question on this appeal which arises on the first two of the assignments of error is whether the court below was right in overruling the appellant's contention on his demurrer that the suit was not properly brought in equity for the reason that there was a plain, adequate, and complete remedy by an action at law. The objection was taken at the threshold, and the question is not embarrassed by the laches of the defendant in raising it. We think the court should have sustained the demurrer. The judgment sought was for a definite sum of money, precisely that which the court by its decree awarded to the complainants. And the whole sum was recoverable, if any of it was; for the assets of the estate would not come near the amount of the debts. There was no contingency in the liability, or apportionment of the burden among several defendants to be made by the judgment. The response of the court to the demand of the complainants was simply an allowance or refusal of it. Nor was there any embarrassment in the procedure. The evidence produced would be, and was in this case, as completely available in an action at law as in a court of equity. No injunction was sought or required. The issue was one which a jury could readily understand and decide under proper instructions from the court in respect to the law. It is suggested that the court must first set aside the transfer before it could proceed to judgment, and that it is the peculiar province of a court of equity to set aside unlawful transfers. This is an ingenious, but unsubstantial figment. No distinct or formal preliminary action was required or contemplated by the statute. If the defendant had obtained part of the estate which should have come to all the creditors, proof of that fact would entitle the trustees to recover it. Perhaps there may be cases where a declaration of the court may be necessary to completely fulfill all requirements, as where the transfer has been accomplished by a deed or other solemn instrument which may be made matter of record, or is a muniment of title the existence

of which would indicate ownership and the right to sell and convey or mortgage, or do such other things with it as belong to ownership. But in the present case nothing is stated in the bill which makes such a proceeding necessary, nor indeed is anything more required than in any ordinary action at law where the plaintiff is always bound to establish the facts which create the liability, whereupon, and without more, the court gives judgment for the sum he is entitled to recover. And that was what occurred in the present instance. There was no preliminary declaration that this transfer be set aside. The suggestion made would be the adoption of a devise for evading the statute forbidding a resort to a court of equity. The right of a defendant to have his liability determined in an action at law is a substantial one, the value of which is recognized and protected by the statute (§ 723, Rev. St.), which declares that 'suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law.' The defendant is thereby given an opportunity to have his controversy tried by a jury, a privilege of sufficient importance to be secured by the Constitution and guarded by this positive statute. * * * Even in cases of trust, when the conditions had been reduced to the simple fact that a certain sum of money was due from the trustee on account of his trust, a court of law was the proper forum, and a bill in equity would not lie."

But the defendant may waive the trial by jury.

Warmath v. O'Daniel, 20 A. B. R. 101, 159 Fed. 871 (C. C. A. Tenn.).

And the objection that the trustee does not sue at law comes too late when first made after submission of an adverse report of a special master.

Mitchell v. Mitchell, 17 A. B. R. 382 (D. C. N. Car., affirmed in 20 A. B. R. 924, 147 Fed. 230 C. C. A.).

§ 1730½. **Facts Conferring Federal Jurisdiction to Be Pleaded and Proved.**

Where the suit is brought in the United States District Court, the facts conferring jurisdiction must be pleaded and proved.

Plaut, trustee, v. Gorham Mfg. Co., 23 A. B. R. 42, 174 Fed. 852 (D. C. N. Y.).

Thus, either, that it is brought to recover property or the proceeds of property transferred by the bankrupt, fraudulently, preferentially or in such manner as that a creditor under State law might be entitled to recover the same.

See ante, § 1692.

Or that the property was in the custody of the bankruptcy court.

See ante, § 1692.

Or that the defendant is consenting to the jurisdiction.

See ante, § 1692.

§ 1730¾. Special Masters.

Where the suit is in equity, a special master may be appointed under the usual equity rules.

Instance, *Ommen, trustee, v. Talcott*, 23 A. B. R. 572, 175 Fed. 261 (D. C. N. Y.).

"Requests to Find Facts" Unknown in Federal Equity Practice.—*Ommen, trustee, v. Talcott*, 23 A. B. R. 572, 175 Fed. 261 (D. C. N. Y.): "‘Requests to find facts’ are, so far as I can find after considerable investigation, wholly unknown in equity practice in the Federal courts, and in this instance are undoubtedly borrowed from the practice of the New York Code, which was found once so intolerably burdensome as to be repealed, and which, having been now re-enacted, with the hope of giving a larger scope of review to the New York Court of Appeals, has again become a most vexatious annoyance to the judges. While, no doubt, only those exceptions to the final report are good which were taken by objection to the draft report, the objections will themselves come up with the final report, and ordinarily will not be regarded at all, unless some point should be made as to the validity of the exceptions. It is, in my judgment, better that a report read as a narrative, and certainly it should not be cut up with statements as to what the master declined to find."

Proper Practice in Accounting before Special Master.—*Ommen, trustee, v. Talcott*, 23 A. B. R. 572, 175 Fed. 261 (D. C. N. Y.).

§ 1731. Petition to Show Inadequacy of Assets.

The petition must show that the trustee has not sufficient assets in his hands to satisfy creditors.

Page 1064. *Prescott v. Galluccio*, 21 A. B. R. 229, 164 Fed. 618 (D. C. N. Y.): "It must appear that the property of the bankrupt is not sufficient to pay his creditors in full. This should be alleged, and there will be an amendment accordingly."

In States where a distinction is made between existing and subsequent creditors, as to sharing in the proceeds after the transfer is set aside or otherwise, the bill, it is said, should set forth the debts and the times they were created. *Teague v. Anderson Hdw. Co.*, 20 A. B. R. 424, 161 Fed. 165 (D. C. Ga.).

Page 1064, note 131. **Trustee Proper Plaintiff in Stockholder's Liability Suit, for Unpaid Stock Subscriptions.**—*Thrall v. Union Mard Tobacco Co.*, 22 A. B. R. 287, 54 Ohio Law Bull. 732 (Ohio Com. Pleas).

Lis Pendens of Trustee's Suit.—*In re Goldberg*, 22 A. B. R. 503 (N. Y. Sup. Ct.).

Page 1065. Of course inadequacy of assets need not be alleged where the action is one which the bankrupt himself might have maintained.

Drew v. Myers, 22 A. B. R. 656, 81 Neb. 750, 116 N. W. 781: "Where a trustee in bankruptcy seeks to recover the property of the bankrupt in an action which the bankrupt might have prosecuted but for the intervention of the bankruptcy, he is not required to allege that he has not sufficient assets of the estate in his hands to pay the liability."

ties thereof. Such allegation is only necessary when the action is brought to avoid a preference or fraudulent conveyance made by the bankrupt. The rule enunciated in *Flint v. Chaloupka* and the cases cited to support the same is restricted to cases brought by the trustee to avoid preferences or to recover property conveyed by the bankrupt in fraud of the creditors. The reason for the rule is that such actions are essentially in the nature of creditors' bills, and that the insufficiency of the property left in the debtor's hands after making fraudulent conveyances is an essential element of the right of the creditor to question such conveyances. Here the plaintiff claims that defendant's father, who was an officer of the bankrupt corporation, taking advantage of this position, withdrew or possibly embezzled some \$500 of its funds, which he turned over to the defendant, his son, and which was by him deposited in the defendant bank. In such a case the bankrupt, but for the appointment of the trustee, could have maintained this action to recover such money. We think it safe to say that the trustee of a bankrupt may maintain any action which the bankrupt might have maintained but for the intervention of the bankruptcy, and that it is not necessary in such a case for him to state that the property already in his hands is insufficient to pay the debts of the bankrupt. It is only when he brings an action which is in the nature of a creditor's bill that he is required to make such allegation."

§ 1732. Return of Execution Unsatisfied, Not Always Pre-requisite.

Page 1065, note 133. See, in addition, *Thomas v. Roddy*, 19 A. B. R. 873, 122 N. Y. App. Div. 851; obiter, *Ryker v. Gwynne*, 21 A. B. R. 95 (N. Y. Sup. Ct. Special Term).

§ 1738. Whether Transfer Voidable Only as to Some Creditors, Nevertheless, Avoided as to All.

Where a conveyance which is not void as to all creditors but only as to a part of the creditors, is set aside and thereby property recovered, it is probable that, in the absence of local law to the contrary, the conveyance being set aside, it is set aside for all purposes and all creditors are entitled to share therein, although as to some so sharing the conveyance would not have been void.

However, this is largely a matter of State law.

See ante, §§ 1140, 1225¼, 1265. Also, *In re Gray*, 3 A. B. R. 647, 62 N. Y. Supp. 618; (1867) *Smith v. Kehr*, 7 Nat. Bank Reg. 97.

Impliedly, *In re Kohler*, 20 A. B. R. 89, 159 Fed. 871 (C. C. A. Ohio), quoted at § 1225½. But compare, *Moore v. Green*, 16 A. B. R. 48, 145 Fed. 480 (C. C. A. W. Va.).

In States where the law makes such a distinction, it has been held that the petition or bill is demurrable unless it sets forth the debts and the dates of their creation.

Teague v. Anderson Hdw. Co., 20 A. B. R. 424, 161 Fed. 165 (D. C. Ga.).

§ 1742½. Conspiracy to Defraud.

Action may be brought against several for conspiracy to defraud creditors.

See post, § 2328½.

And the petition will not be demurrable for failure to specify which one of them actually received the property.

Strasburger v. Bach, 19 A. B. R. 732, 157 Fed. 918 (D. C. Ills.).

§ 1743. Property to Be Shown to Belong to Estate.

The property involved must be shown to be of a kind that would pass to the trustee.

In re *Leech*, 22 A. B. R. 599, 171 Fed. 622 (C. C. A. Ky.).

§ 1745. Fraud, a Question of Fact.

"Fraud" is a question of fact, to be deduced from the surrounding circumstances.

In re *Elletson Co.*, 23 A. B. R. 530, 174 Fed. 859 (D. C. W. Va.).

§ 1746. Burden of Proof.

Page 1071, note 150. In re *Elletson Co.*, 23 A. B. R. 530, 174 Fed. 859 (D. C. W. Va.).

Page 1071, note 151. **Judicial Cognizance of Records of Bankruptcy Court.**—None in United States Circuit Court. *McDonald v. Clearwater Ry. Co.*, 21 A. B. R. 182, 164 Fed. 1007 (U. S. C. C. Idaho).

§ 1747. Schedules and General Examination of Bankrupt Inadmissible against Transferee.

Page 1071, note 152. Compare, obiter, *Mattley v. Wolfe*, 23 A. B. R. 673, 175 Fed. 619 (D. C. Neb.).

Page 1071. *Taylor v. Nichols*, 23 A. B. R. 310, 134 App. Div. (N. Y.) 787: "These schedules and part of the evidence so given by him in the bankruptcy proceeding were offered in evidence by the plaintiff upon the trial for the purpose of establishing the insolvency of the said Nichols at that time. To this offer the defendant objected, that as to him they were hearsay and that he was not bound by these declarations. The objections were overruled, the evidence was admitted, and the defendant excepted to the ruling. We are unable to see upon what ground this evidence was competent. It was the declaration of a bankrupt in a proceeding in which it does not appear that this defendant was a party. As to this defendant the evidence would seem clearly to be hearsay and inadmissible."

§ 1750½. Badges of Fraud and Latitude of Evidence.

The badges of fraud are to be considered together, for facts consid-

ered separately may be entirely insufficient to establish fraud, whilst considered together they may form an incontestible chain of proof of it.

In *re Larkin*, 21 A. B. R. 711, 168 Fed. 100 (D. C. N. Y.).

Houck v. Christy, 18 A. B. R. 330, 152 Fed. 612 (C. C. A. Kans.): "Moreover, we think the evidence before recited brings the case well within the rule that badges of fraud, altogether inconclusive if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof of fraudulent intent on the part of both vendor and vendee."

And great latitude should be allowed in the admission of evidence, for questions of fraud can scarcely ever be proved by direct evidence.

In *re Larkin*, 21 A. B. R. 711, 168 Fed. 100 (D. C. N. Y.).

In *re Luber*, 18 A. B. R. 476, 152 Fed. 492 (D. C. Pa.): "In the investigation of questions of fraud, as a rule, great latitude is allowed in the admission of evidence, in order that the jury may be able to determine from all the circumstances whether the transaction was fraudulent or not. Questions of fraud can scarcely ever be proved by direct evidence, hence the necessity for the admission of all the circumstances fairly connected with the transaction."

§ 1750¾. Possession as Prima Facie Proof of Ownership.

Possession of personal property draws with it the presumption of ownership.

In *re Diamond*, 19 A. B. R. 811, 158 Fed. 370 (D. C. Ala.); In *re Mayer*, 19 A. B. R. 480, 156 Fed. 432, 157 Fed. 836 (D. C. Pa.), quoted at § 554½.

§ 1751½. Election of Remedies.

It has been held that where a trustee, knowing the facts, has procured an order on the bankrupt for a surrender of the proceeds of an alleged fraudulent transfer still in his hands, the trustee will be held to have elected to affirm the transfer, in a subsequent suit against the alleged fraudulent transferee.

Thomas v. Sugerman, 19 A. B. R. 509, 157 Fed. 669 (C. C. A. N. Y.): "If the complainant was entitled to set the transfer aside as fraudulent, he could have recovered the accounts from Sugerman, but would have had to return to him the price or any part of it paid to the bankrupt which the complainant had received. This is because the right of the creditors was simply to be made whole. For the same reason, he would not have had to credit Sugerman with anything paid by Sugerman to the bankrupt which he, the complainant, had not actually received from the bankrupt. Of course, if the trustee had found the \$30,000 in the bankrupt's deposit box and taken it into his possession, or if the bankrupt had voluntarily paid the sum to him, the mere receipt of the money would not amount to an election by the trustee to affirm the transfer. But that is not the case. The trustee here, with a full knowledge of all the facts alleged in a formal proceeding that the bankrupt had in his possession and was concealing money, and by that proceeding he has, so to speak, created a fund. Nor can we adopt the appellant's theory

that in this proceeding the trustee was merely seeking to get in the bankrupt's estate in order to determine, after it was in his hands, whether to affirm or to repudiate the transfer to Sugerman. The papers and proceedings show nothing of the kind, but, on the contrary, that he was seeking to get the money as a part of the bankrupt's estate to be distributed among the creditors. The case presents an election between inconsistent rights. It makes no difference that the defendant Sugerman was not a party to the proceeding in which the complainant charged the bankrupt with the money paid for the accounts transferred by him, or that the complainant actually recovered nothing in that proceeding. This act confirmed the title to those accounts in Sugerman." But see, dissenting opinion in same case. * * * "It is conceded that if the bankrupt had kept the \$30,000 in a private safe in some deposit company, and, upon learning of the appointment of the trustee, had delivered it to the latter, receipt of it would not constitute an election, and I cannot see how the situation is changed by the circumstance that the bankrupt delivers it in obedience to an order to show cause, or turns over only part of it because he has squandered the remainder. It would seem to be a disastrous rule to apply that, whenever a trustee insists that a bankrupt shall turn over all the property in his possession, he thereby ratifies by election all sorts of transactions which the bankrupt may have had with the persons from whom he got the property; and I am not satisfied that the authorities cited require such an extension of the doctrine of election."

§ 1753. Suing in United States District Court, Suit Follows Usual Course.

Page 1072. *Westall v. Avery*, 22 A. B. R. 673, 171 Fed. 626 (C. C. A. N. C.): "But independent of this, it is also well settled that a proceeding instituted by a bankrupt's trustee to set aside fraudulent conveyances or illegal preferences is not a proceeding in bankruptcy but, while ancillary to such proceeding and authorized by the Bankruptcy Act to be instituted in either the Federal District Court or in a State court of competent jurisdiction, it must be governed, so far as pleading and practice are concerned, by the laws and rules of the court wherein it is instituted. * * * And further, it is to be borne in mind, that the equity practice of the Federal courts is independent of, and unaffected by State laws as to procedure in State courts. *Payne v. Hook*, 7 Wall. 430, 19 L. Ed. 261; *Scott v. Neely*, 140 U. S. 106, 35 L. Ed. 358. In Federal courts the rules of the High Court of Chancery in England are recognized as 'the common law of chancery' and an authoritative exposition of the principles, rules and usages belonging to courts of equity except so far as they may be modified by Federal statute and by rules promulgated by the Supreme Court. *Penn'a v. Wheeling &c., Bridge Co.*, 13 How. 563, 14 L. Ed. 249. Finally it is to be observed, that Federal courts, both when exercising general jurisdiction and also when exercising the special one conferred by the Bankruptcy Act in this particular, require suits to set aside deeds and contracts as fraudulent to be instituted in equity."

Thus, whether the reference of issues to a person constitute him, under the circumstances, a special master or an arbitrator, is to be decided by the rules of the forum.

Westall v. Avery, 22 A. B. R. 673, 171 Fed. 626 (C. C. A. N. C.).

§ 1753¼. **Whether, Where No Jury, Court to Take Evidence Considered Incompetent, etc.**

It has been held to be the duty of the court, where no jury is called, to take all the evidence, even if considered by the court to be incompetent, immaterial, or otherwise inadmissible, in that a reviewing court may not be obliged to remand the case for admission of the rejected evidence, exception being made, however, of cases where the testimony is privileged or the evidence so clearly incompetent or irrelevant as that its production or admission would amount to abuse of process.

Missouri Elec. Co. v. Hamilton-Brown Co., 21 A. B. R. 270, 165 Fed. 283 (C. C. A. Mo.): "A proceeding in bankruptcy is a proceeding in equity, and it is the duty of examiners, masters, referees, and the court, when taking evidence in controversies therein in the absence of a jury, to take, record, and in case of an appeal, to return to the reviewing court, all the evidence offered by either party, that which they hold to be incompetent or immaterial as well as that which they deem competent and relevant, to the end that, if the appellate court is of the opinion that evidence rejected should have been received, it may consider it, render a final decree, and thus conclude the litigation without remanding the suit to procure the rejected evidence. From this rule evidence plainly privileged, the testimony of privileged witnesses and evidence which clearly and affirmatively appears to be so incompetent, irrelevant, and immaterial that it would be an abuse of the process or power of the court to compel its production or permit its introduction, are excepted."

§ 1753½. **But Bankruptcy Court Has Full Equity Powers.**

The bankruptcy court, in such suits, exercises full equity powers and is not confined to the mere avoidance of the transfer and decree for the recovery of the property, but may protect and enforce rights of the parties in other particulars.

Allen v. McMannes, 19 A. B. R. 276, 156 Fed. 615 (D. C. Wis.).

And in proceedings in equity instituted by the trustee the rules of equity practice established by the United States Supreme Court are to be followed as nearly as may be.

Gen. Ord. No. 37.

§ 1753¾. **Statutory Prerequisites to "Maintaining Suits."**

State statutes prohibiting parties from maintaining or instituting suit until they have complied with certain registry or deposit requirements, etc., have no applicability to suits in the federal courts; the federal court may accept the substantive rights of the parties as it finds them under the State statutes; but will itself determine what shall be the prerequisites to the maintenance of suits in its own forum.

In re Dunlop, 19 A. B. R. 361, 156 Fed. 545 (C. C. A. Minn.): "This statute has received the consideration of the highest judicial tribunal of Minnesota,

and it has held that such a foreign corporation cannot maintain an action in the courts of that State to recover the purchase price of goods sold by it in the transaction of business in the State without complying with the conditions of this statute * * * or for the recovery of moneys collected for it by its agent on account of the sale of its goods and evidenced by the agent's note. * * * The reason which induced the Supreme Court of Minnesota to reach these conclusions, as we understand its opinions, was not that the contracts upon which the actions were brought were void because violative of the statute, but it was that the State had the undoubted right to exclude foreign corporations which would not submit themselves to the jurisdiction of the courts of the State from the privilege of enforcing rights and litigating controversies in these courts, and that it had clearly done so in the cases which have been cited. But the provision of the State statute which forbids the maintenance of suits in the courts of that State was not intended to apply to, and it does not affect, suits and proceedings in the Federal courts. A State is without power to prohibit or condition the exercise by a foreign corporation of its right to institute and defend its suits in the national courts and to invoke their independent judgment upon its controversies in the cases and in the manner prescribed by the Constitution and laws of the United States, which are the supreme law of the land."

But compare, apparently contra, in principle, *In re Montello Brick Works*, 20 A. B. R. 855, 163 Fed. 621 (D. C. Pa.); compare, *In re Duplex Radiator Co.*, 15 A. B. R. 324, 142 Fed. 906 (D. C. N. Y.). See also, ante, § 803½; compare, ante, § 35.

§ 1754. Allegation of Diverse Citizenship Not Requisite.

But the facts constituting it such a cognizable controversy must be pleaded and proved.

Compare, analogously, to same effect, § 1730½.

§ 1755. Service on Nonresidents When Suit in United States District Court.

Page 1073, note 161. **Stakeholder.**—In one case it was held that where a mere stakeholder who claimed interest in the fund or profits issued and the adverse claimant intervened or was made party, the stakeholder might be relieved from costs, and (if proper according to State law), might even be allowed counsel fees. *Caten v. Eagle Ass'n*, 23 A. B. R. 130, 177 Fed. 996 (D. C. Pa.).

§ 1756. Security for Costs and Injunction Bond When Suit in United States District or Circuit Court.

Security for costs will not be required of receivers or trustees suing in independent actions in the United States District Courts, at least in the same jurisdiction wherein appointed, if there are sufficient assets in the estate unless the suits are not brought in good faith.

See, in addition, *In re Baird*, 17 A. B. R. 448, 112 Fed. 960 (D. C. Pa.). As to security for costs when suit in State court, see post, § 1760.

But such security may be required where brought by a nonresident trustee in the United States Circuit Court.

Osborne v. Pa. Ry. Co., 20 A. B. R. 277, 159 Fed. 301 (U. S. C. C. Pa.).

§ 1757. Answering under Oath Requiring Testimony to Overcome.

Page 1073, note 163. See, in addition, *Dravo v. Fabel*, 132 U. S. 489.

§ 1758. If Suit in United States District Court, Party Not to Impeach Own Witness.

Page 1073. Compare, instance, *Entwisle v. Seidt*, 19 A. B. R. 185, 155 Fed. 864 (D. C. N. Y.): "The witnesses called on behalf of the complainants are the defendants, and the persons engaged as principals in the various transactions. Their examination was conducted apparently on the theory that they were biased witnesses, to such an extent that the complainant would not be bound by the statements made, and the direct-examination is in almost all cases in reality cross-examination. But the complainant has presented no proofs showing any of the facts alleged, outside of the testimony of these witnesses produced by himself, and aside from the general situation there is nothing brought out to show bias nor fraudulent motives on the part of the parties to the transaction. The attorneys for all the parties have so violated the rules of evidence that the most of the testifying has been done by the attorneys, apparently without objection, and it is impossible from a reading of the testimony as transcribed to form an opinion as to whether the witnesses were telling the truth, or whether they were following the lead of the testimony put into their mouths by the questions of the attorneys. On the whole testimony, it would appear that the complainant is bound by the statements of his own witnesses, and in every instance these statements show a valid consideration and an actual transfer of property. There is no extraneous or disinterested testimony to prove the contrary. As to the mortgage in question the testimony shows plainly that the transaction occurred exactly as claimed by the bankrupt. It appears that the defendant Cohen, assignee of the mortgage, is a brother-in-law of the bankrupt, and the apparent object of the action, as far as the mortgage is concerned, is to show that Cohen purchased a valid mortgage for the benefit of the bankrupt, and, inferentially, with funds supplied by the bankrupt. But no evidence whatever is furnished as to these surmises, and no examination of the defendant Cohen, as to the source of the funds with which he purchased the mortgage, and no evidence of other witnesses as to where the money used by him was obtained, is offered. The complainant's case as to this mortgage rests merely upon the contradictory statements and the rather lame explanations of motive on the part of the defendant Cohen, who, nevertheless, is shown by the testimony to have actually purchased for a valid consideration the assignment of the mortgage in question."

Page 1073, note 164. See, in addition, *Dravo v. Fabel*, 132 U. S. 489.

§ 1759½. No Demurrer to Answer in Federal Court.

If the suit be brought in the federal court no demurrer to the answer will lie; but such a demurrer may be treated as an application to set the

cause down for hearing on bill and answer, or as an exception to the answer for impertinence or for failure to answer fully.

See ante, *Goldman v. Smith*, 1 A. B. R. 266, 93 Fed. 182 (D. C. Ky.).

Vitzthum v. Large, 20 A. B. R. 666, 162 Fed. 685 (D. C. Iowa): "This proceeding is quite irregular, and if stipulations like these are to be observed it will enable the parties to a suit in equity to abrogate entirely the equity rules, and require the court to proceed in equity causes as in actions at law. While the equity rules should not be so strictly enforced as to do injustice to either party, a reasonable adherence to them is necessary to orderly procedure, and to enable the court to bring the parties to final issues upon the merits. Under the practice as prescribed by the State statute, which counsel desire to have observed, a demurrer admits the allegations of the pleading demurred to for the purpose of the demurrer only, and if the demurrer is overruled, and the party demurring shall answer or reply, which he may do, the ruling on the demurrer shall not be considered as an adjudication of any question raised by the demurrer, and no pleading shall be held sufficient because of a failure to demur thereto. Code Iowa 1897, §§ 3564, 3565. Such a practice is so at variance with the equity procedure in the national courts that parties should not be permitted to introduce it into those courts to the exclusion of the procedure prescribed by the equity rules. A demurrer to an answer in equity is unknown to the equity practice, and the only way of testing the sufficiency of an answer in equity as a defense to the bill is to set the cause down for hearing upon bill and answer. *Banks v. Manchester*, 128 U. S. 224-250, * * *. In *re Sanford Fork & Tool Co.*, 160 U. S. 247-257, * * *; 1 *Bates*, Fed. Eq., sec. 216. A formal demurrer filed to an answer may, however, be treated by the court, in the absence of objections to so doing, as an application to set the cause down for hearing upon bill and answer, or as an exception to the answer for impertinence, or for failure to answer fully according as its contents may present the one or the other of these questions."

§ 1760. Where Trustee Sues in State Court, Suit Follows Usual Course and Parties Have Usual Rights, There.

And is bound to make proof in accordance with the State.

Impliedly, *Miller v. Acid & Fertilizer Co.*, 21 A. B. R. 416, 211 U. S. 496: "Undoubtedly, the trustee, in prosecuting the suit to judgment, was obliged to prove to the existence of the facts which were essential under the State law, since, to hold otherwise would be but to decide that he could recover without proof of his right to do so."

And the rules of procedure of the State court will control.

Westall v. Avery, 22 A. B. R. 673, 171 Fed. 626 (C. C. A. N. Car.).

Page 1074, note 169. That he need not give security, in New York, or at any rate that no ex parte order therefor will lie, see *Ryker v. Gwynne*, 21 A. B. R. 95 (Sup. Ct. N. Y. Sp. Term); *Kronheld v. Leibman*, 79 N. Y. Supp. 1083.

§ 1762. Each Element of Preference to Be Alleged and Proved.

Each element of the preference must be alleged and proved.

In *re Leech*, 22 A. B. R. 599, 171 Fed. 622 (C. C. A. Ky.), quoted at § 1277.

§ **1763. Insolvency at Time of Transfer.**

Thus, the petition to recover the preference must allege that the bankrupt was, at the time, insolvent.

In re Leech, 22 A. B. R. 599, 171 Fed. 622 (C. C. A. Ky.), quoted ante at § 1277.

§ **1766. Antecedent Debt.**

Page 1075, note 177. Definition of "Antecedent Debt."—See ante, §§ 123, 1314.

§ **1768. Burden of Proof of Each Element on Trustee.**

Page 1076, note 180. See ante, §§ 775½, 1403½; In re Pfaffinger (arising, however, on objection to allowance of claim), 18 A. B. R. 807, 154 Fed. 528 (D. C. Ky.); partially to same effect, Allen v. Gray, 21 A. B. R. 828 (N. Y. Sup. Ct.); Getts v. Janesville Grocery Co., 21 A. B. R. 5, 163 Fed. 417 (D. C. Wis.); Calhoun County Bank v. Cain, 18 A. B. R. 509, 152 Fed. 983 (C. C. A. W. Va.); but compare, where transfer is to a relative, In re Sanger, 22 A. B. R. 145, 169 Fed. 722 (D. C. W. Va.).

Page 1076. Tumlin v. Bryan, 21 A. B. R. 319, 165 Fed. 166 (C. C. A. Ga.): "The burden of proof is on the complainant, and, unless he shows by sufficient evidence the elements of a voidable preference, he is not entitled to recover. He must prove that the bankrupts (1) while insolvent, (2) within four months of the bankruptcy, (3) made a transfer of the property, e. g., a payment of money, (4) and that the creditor receiving the payment was thereby enabled to obtain a greater percentage of his debt than other creditors of the same class; and it must also be proved, (5) that the person receiving the payment or to be benefited thereby, had reasonable cause to believe that it was thereby intended to give a preference."

§ **1770. Nor Tender Back.**

Page 1076, note 183. Obiter, Drew v. Myers, 22 A. B. R. 656, 81 Neb. 750, quoted at § 1192.

§ **1770½. On Surrender, Creditor Entitled to Prove Claim for Share of Dividends.**

After the transfer has been set aside, the creditor is entitled to prove his claim for sharing in dividends.

See ante, § 772; Templeton, Trustee, v. Kehler, 23 A. B. R. 39, 173 Fed. 574 (D. C. Pa.); Page v. Rogers, 21 A. B. R. 496, 211 U. S. 581.

§ **1770¼. Or, Dividend May Be Offset.**

And if the suit be in the bankruptcy court wherein the estate is being administered, the decree may provide for applying the dividends on the amount ordered surrendered, the preferential transferrer being entitled to his dividend, in any event.

Page *v. Rogers*, 21 A. B. R. 496, 211 U. S. 581: "Now that this litigation has come to an end, and the defendant has been compelled to surrender the preference which he received, he is entitled to prove his claim and to receive a dividend on it upon an equality with other creditors. *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 13 Am. B. R. 552, 49 L. Ed. 790, 25 Sup. Ct. Rep. 443. In view of the fact that this suit was brought in the bankruptcy court itself, and a final decree is to be entered by the judge of that court, it is entirely practicable to avoid the circuitous proceeding of compelling the defendant to pay into the bankruptcy court the full amount of the preference which he has received, and then to resort to the same court to obtain part of it back by way of dividend."

But if the suit be in another court it has been held that the preferred creditor may not offset but must surrender first and then prove his claim for dividends on the whole amount.

Templeton v. Kehler, 23 A. B. R. 39, 173 Fed. 574 (D. C. Pa.).

However, even where the suit be thus in another court, it probably is the better rule that if the suit be in a court of equity the preferred creditor may still retain his prospective dividend the court sometimes requiring the giving of a bond as a condition of such retention.

Ommen, Trustee, v. Talcott, 23 A. B. R. 570, 175 Fed. 259 (D. C. N. Y.). See also, §§ 775, 1178, 1179½.

§ 1770¾. Amendment.

Amendments are permitted, under the ordinary rules. Permission to amend may be refused where the amendment tendered fails to state a cause of action.

Johnson v. Anderson, 11 A. B. R. 294, "* * * the court in the exercise of a reasonable discretion, properly refused to allow the plaintiff to amend his petition, where the amendment tendered failed to allege that the defendant to whom the payment was made by the insolvent within four months before the filing of the petition in bankruptcy, had reasonable ground to believe that by such payment a preference was intended."

§ 1770½. Procedure to Follow Procedure of Forum.

Whether the suit be instituted in the State or in the federal court, the procedure follows the usual course of procedure of the court where the action is pending.

Westall v. Avery, 22 A. B. R. 673, 171 Fed. 626 (C. C. A. N. Car.): "It is also well settled that a proceeding instituted by a bankrupt's trustee to set aside fraudulent conveyances or illegal preferences is not a proceedings in bankruptcy but while ancillary to such proceedings and authorized by the Bankruptcy Act to be instituted in either the Federal District Court or in a State Court of competent jurisdiction, it must be governed, so far as pleading and practice are concerned, by the laws and rules of the court wherein it is instituted."

§ 1770¾. Interest.

The preferential transferee is chargeable with interest, although it is not clear as to the time from which the interest should begin, whether from the date of the transfer, the date of demand, or the date of notice.

Compare *Ommen, Trustee, v. Talcott*, 23 A. B. R. 572, 175 Fed. 261 (D. C. N. Y.): "First as regards the question of interest. By December 19th, 1902, the defendant had received clear intimation that the receiver regarded his possession as wrongful, for he attempted by summary order to obtain possession. It is, of course, quite true, at least in theory, that a subsequent trustee might not agree with the receiver, but I am satisfied that the defendant took his chances in retaining possession after that time, and that no demand was necessary. From then he became a trustee ex maleficio, having seized from the estate property which he had no right to retain, and which he knew was being claimed. Interest must therefore be charged against him at least from the time when he sold the property, and I can see no reason why he should not pay interest at the legal rate. Were he a duly constituted trustee he would be obliged to pay only such interest as he in fact received or should have got, but I think it will not be contended that he has any such exemption from the time when his retention became wrongful. A question does arise as to interest between December 15th, 1902, and the date of sale of the property, which was all substantially completed by the end of June, 1903. As this suit was in the first instance to obtain the property itself and not an action of conversion, I do not think that interest should be charged against the defendant while the property remained in specie. While the contract authorized the sale, it certainly did not mean to authorize his possession either of the property or of the proceeds. I shall, therefore, charge him with interest at six per cent. from the date of the sale of each article and from the collection of each account."

§ 1770%. Reimbursement for Expenses, etc.

It has been held that the preferential transferee may not be given compensation nor expenses for care of the property after notice or demand by the trustee.

Ommen, trustee, v. Talcott, 23 A. B. R. 572, 175 Fed. 261 (D. C. N. Y.): "As to the items of 'discharge,' prior to January 15th, they must be all disallowed in accordance with the well-settled rule that any services rendered, or disbursements made, by a trustee ex maleficio, are made upon his own account, and cannot be credited to him when he comes to account in a court of equity. There is nothing unjust in this. The defendant wrongfully seized the goods and at once began selling them, which he had no right to do, and which he knew he would be held liable for doing. In selling them he made certain disbursements, but they were not made at the request of the trustee or of receiver or of any other person. By all rules of equity they must be held to be purely voluntary, and he cannot credit himself with them."

§ 1771. Referee's Order of Allowance or Disallowance, Res Judicata.

Page 1076. In *re Osborne's Sons*, 24 A. B. R. 65, 177 Fed. 184 (C. C. A. N. Y.): "In it depositors in an insolvent national bank in the hands of the

comptroller of the currency whose claims had been paid in full were held entitled to interest on the ground that when their claims were proved to the satisfaction of the comptroller they were to be treated as judgments. Mr. Justice Swayne said at page 438: "The fiftieth section of the National Banking Act, 13 Stat. 113, requires the comptroller of the currency to apply the moneys paid over to him by the receiver 'on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction.' The act is silent as to interest upon the claims before or after proof or judgment. Can it be doubted that a judgment, if taken, would include interest down to the time of its rendition? Section 996 of the Revised Statutes, page 182, declares that all judgments in the courts of the United States shall bear the same rate of interest as judgments in the courts of the States respectively where they are rendered. Interest is allowed by the law of New York upon judgments from the time they are perfected. Rev. Code of N. Y. (Ed. 1859), Vol. III, page 637. If these claims had been put in judgment, whether in a court of the United States or in a State court of that State, the result as to interest upon the judgment would have been the same. It was unnecessary to reduce them to judgment, because they were proved to the satisfaction of the comptroller. After they were so proved, they were of the same efficacy as judgments, and occupied the same legal ground. Hence, they are within the equity, if not the letter of these statutes, and bear interest as judgments would have done. Sedg. on Constr., 311, 315." We think that allowed claims in bankruptcy are as much entitled to be treated as judgments. Section 57 of the Bankruptcy Act provides that the proof of debts shall be in writing signed and sworn to by the creditor, stating the consideration and other particulars, and when this proof is filed in the court or before the referee the claim shall be allowed unless objected to. The subject is further regulated by General Order XXI and by forms prescribed by the Supreme Court."

§ 1773. Referee Not to Impeach Own Order.

But he may be permitted to testify that entries in his record book were not authorized by him.

Scofield v. U. S. ex rel. Bond, 23 A. B. R. 259, 174 Fed. 1 (C. C. A. Ohio).

§ 1774½. Adjudication of Bankruptcy for Fraudulent Transfer Whether Res Adjudicata on Trustee's Suit.

It has been held, though in an obiter, that an adjudication of bankruptcy on the ground of a fraudulent transfer is not *res adjudicata* in a suit by the trustee to recover the property.

Obiter, *In re Larkin*, 21 A. B. R. 711, 168 Fed. 100 (D. C. N. Y.).

Estoppel in One Case by Pleadings Filed in Another Case.—Analogously *Long v. Lackman*, 14 A. B. R. 172 (D. C. Colo.).

§ 1776. Whether Adjudication in Bankruptcy Res Adjudicata as to Insolvency When Act Committed, if Insolvency Essential Element.

Page 1078, note 188. *Whitwell, trustee, v. Wright*, 23 A. B. R. 747 (N. Y. Sup. Ct. App. Div.). But compare, ante, §§ 1362, 445.

§ 1776¼. **Adjudication Not Binding on Those Not Entitled to Oppose.**

The adjudication of a partnership is not binding either as to the existence of the partnership or the ownership of the alleged partnership assets as against a trustee in bankruptcy of one of the alleged partners.

Manson *v.* Williams, 22 A. B. R. 22, 213 U. S. 453, quoted ante, § 445.

§ 1776½. **General Adjudication, Where Several Acts Charged, Not Res Adjudicata.**

Where the adjudication is general in its terms and several distinct acts are charged, it is not res adjudicata as to any act.

See ante, § 446½; also, see *In re Letson*, 19 A. B. R. 506, 157 Fed. 78 (C. C. A. Okla.).

§ 1777⅛. **No Collateral Attack on Adjudication.**

The adjudication of bankruptcy may not be attacked by an alleged preferential or fraudulent transferee in a suit by the trustee to set aside the transfer, so long as the record of adjudication on its face does not affirmatively show lack of jurisdiction.

Page 1078. *Huttig Mfg. Co. v. Edwards*, 20 A. B. R. 349, 160 Fed. 619 (C. C. A. Iowa): "The manufacturing company attacks the validity of the adjudication that D. Winter was a bankrupt upon the ground that one of the three petitioners in the involuntary proceeding was not a creditor, but since the attack was made in a proceeding by the trustee to annul a preference it is a collateral, not a direct, one. An adjudication of bankruptcy is entitled to the same verity and is no more to be impeached collaterally than other judgments or decrees of courts of competent jurisdiction. It cannot be assailed by the defendant in a suit by the trustee to recover or avoid a preference upon the ground that one of the petitioners was not in fact a creditor of the bankrupt. When the record shows jurisdiction the adjudication of bankruptcy is subject to impeachment only by a direct proceeding in a competent court. *Michaels v. Post*, 21 Wall. 398, 22 L. Ed. 520; *Sloan v. Lewis*, 22 Wall. 150, 22 L. Ed. 832."

Also, see ante, §§ 30, 437, 441½, 450.

§ 1777¼. **Nor on Regularity of Appointment.**

Nor may the regularity of the receivers' or trustees' appointment be attacked in a proceedings by adverse claimants to recover possession of property.

Ross v. Stroh, 21 A. B. R. 644, 165 Fed. 628 (C. C. A. Pa.).

§ 1777½. **Bankruptcy Court's "Call" or "Assessment" on "Unpaid Stock Subscription."**

The findings of the bankruptcy court, in exercising its jurisdiction to make "calls" or "assessments" upon "unpaid stock subscriptions" to bank-

rupt corporations are conclusive upon the stockholder in the subsequent plenary suit against him to enforce the same, upon the questions of the necessity and percentage of the "call" or "assessment;" and incidentally upon the amounts of the corporate indebtedness and assets respectively, and, probably, if he has been duly notified, also upon the amounts paid in by other stockholders.

In re Remington Automobile Co., 18 A. B. R. 389, 153 Fed. 345 (C. C. A. N. Y.), quoted ante, § 977.

But, it would seem, on principle, that the effect of the "call" or "assessment" by the bankruptcy court would extend no further than to the matters mentioned, and would extend no further than would that of the bankrupt corporation itself, had it made the call or assessment, since the trustee succeeds merely to the bankrupt in performing this function and the stockholder is entitled to have his rights determined in a plenary suit; the proceedings in the bankruptcy court being incapable of as broad an effect as in the ordinary tribunals which have jurisdiction to render personal judgments against stockholders as well as to make "calls" for unpaid stock subscriptions of insolvent corporation.

Also, see ante, § 977.

§ 1777¾. Miscellaneous Holdings as to Res Adjudicata.

It has been held that failure to oppose the entry of decree of title in the State Registration Court within the statutory time, is no bar to the trustee's suit to set aside the transfer as preferential.

Morris v. Small, 20 A. B. R. 138, 160 Fed. 142 (D. C. Mass.).

Former adjudication as to bankrupt's use of trust funds, when does not conclude infant beneficiary. In re Tucker, 18 A. B. R. 378, 153 Fed. 91 (D. C. Mass.).

SUBDIVISION "E."

ELECTION OF REMEDIES IN ACTIONS BY OR AGAINST TRUSTEES.

§ 1779. May Be Made Party Where State Court Has Custody of Res.

Page 1079, note 2. Compare ante, §§ 1646, 1650½.

Thus, they have been permitted to make him a party defendant to a suit for infringement of a patent.

Page 1079. Victor Talking Machine Co. v. Hawthorne, 23 A. B. R. 234, 173 Fed. 617 (D. C. Pa.): "The complainant now asks leave to file a supplemental bill to make the trustee a party to the suit, and the application is resisted, on the ground that the suit for infringement seeks redress for a tort, with which the bankrupt's estate has no concern, since a claim for damages

founded upon a tort, unconnected with a contractual liability, cannot be proved against the assets and is not affected by the discharge. *Re Boston, etc., Iron Works (C. C.)*, 23 Fed. 880; *Re United Button Co. (D. C.)*, 15 Am. B. R. 390, 140 Fed. 495. It is therefore contended that the trustee should not be compelled to appear in such suit and spend the money of the estate in litigation, which may be prolonged and expensive, and can in no way benefit the creditors. It will be observed, however, that the present motion does not attempt to compel the trustee to make an active defense. It merely asks permission to make him a party, leaving him free to take such action thereafter as he may be advised, or as the bankruptcy court may direct. Certainly he is not bound to defend the suit, if the interest of the estate will not be affected by the litigation; but I can see no good reason for declining to make him a party of record, in order that he may be bound by the decree, so far as that result may properly follow. For example, part of the relief prayed for—the delivery of infringing apparatus to be destroyed—may apply to some of the bankrupt's property that has come into his hands; and in other respects, also, it is impossible to decide upon this motion whether or not the bill may injuriously affect the estate in his charge. In a given case it is readily conceivable that a decree for the complainant might seriously injure a valuable patent belonging to the bankrupt but not directly involved in the suit, and it might therefore be desirable to defend the action. This and like matters are for the trustee's consideration in the first instance, and he may then take whatever steps may seem most advantageous. The order that is now to be entered will only permit the complainant to make him a party. What else, if anything, he should be compelled or permitted to do, is a matter for future consideration by the proper court."

§ 1780. May Be Sued in Personam for Conversion or Trespass for Wrongful Seizure or Detention.

Page 1079, note 3. Compare, impliedly, *In re Roberts*, 22 A. B. R. 908, 169 Fed. 1022 (C. C. A. N. Y.), quoted at § 1781.

Security for Costs on Appeal.—If the trustee be successful his adversary may appeal only on giving the usual bond; and the bankruptcy court will not aid him by staying the trustee. *In re National Lock & Metal Co.*, 19 A. B. R. 106, 155 Fed. 690 (D. C. N. Y.).

Page 1080, note 4. Compare, facts in *In re Grainger*, 20 A. B. R. 166, 160 Fed. 69 (C. C. A. Calif.); compare, impliedly, *In re Roberts*, 22 A. B. R. 908, 169 Fed. 1022 (C. C. A. N. Y.), quoted at § 1781.

It has also been held that the receiver may be sued in personam in the State court for rent of premises where he had made himself personally liable therefor, the facts in the case, however, being somewhat peculiar. *In re Brooklyn Improvement Co. v. Lewis*, 24 A. B. R. 122 (App. Div. N. Y.).

Page 1080. Or for trespass for wrongful seizure of property belonging to another.

Berman v. Smith, 22 A. B. R. 662, 171 Fed. 735 (D. C. Ga.): "There is no question that suit may be brought in the State courts for wrongful acts of officers of the bankruptcy court, where they go entirely beyond their duties as such officers and are guilty of conduct which is actionable in its character, particularly as against third persons."

·Or for wrongfully detaining property belonging to another.

Instance, *Orr Co. v. Cushman*, 18 A. B. R. 535 (City Court of N. Y.). But compare, *In re Empire Cons. Co.*, 19 A. B. R. 704, 157 Fed. 495 (D. C. N. Y.).

Page 1080. Thus he may be sued in personam for damages for wrongfully detaining property from a landlord.

Page 1080. *In re Hunter*, 18 A. B. R. 477, 151 Fed. 904 (D. C. Pa.): "The landlord having, therefore, been entitled to the possession of his property on April 1st, and the trustee having refused to surrender, the latter became a trespasser and was liable in damages. The direct and immediate consequence of its refusal was that the new tenant threw up the lease, and, as the landlord was not able to find another tenant within the term, he lost the rent for three months. For this sum I think the trustee would be directly and personally liable to be sued."

But compare limitations of rule that such occupancy constitutes trespass. *In re Rubel*, 21 A. B. R. 566, 166 Fed. 131 (D. C. Wis.): "The claimant's attorneys cite the case of *Hunter* (D. C.), 18 Am. B. R. 477, 151 Fed. 904, and insist that it is applicable and controlling here. An examination of this case will show that the lease of the bankrupt had expired before the trustee went into possession, and therefore he was held by the court to be a trespasser. In the instant case the receiver and the trustee entered under the lease, and therefore could not be held to be trespassers. The notice to quit provided for by the Wisconsin statute which was served upon the receiver was ineffectual to change the status of the parties. The receiver is not invested with the title, but is a mere custodian, without discretion, and until the trustee was appointed on the 29th day of April there was no legal representative of the estate who was clothed with title or authority in regard to the same. It appears that the trustee occupied the property only two days. The sale was made, and confirmed by the court on the 30th day of April, at which time the trustee abandoned his possession. There was then no reason why the petitioner might not have entered and taken possession on the evening of the 30th day of April. Certainly greater expedition could not have been expected. The fact that the petitioner permitted the purchaser of the stock of goods to remain in the store until the 15th day of May is not to be charged against the trustee."

§ 1780½. Also for Debt Contracted as Receiver.

There is no reason to suppose that the receiver or trustee may not be sued in plenary action in personam for debts contracted in carrying on the receivership.

Instance *Orr Co. v. Cushman*, 18 A. B. R. 535 (City Court of N. Y.). But compare, *In re Empire Cons. Co.*, 19 A. B. R. 704, 157 Fed. 495 (D. C. N. Y.).

But in such cases it has been held that he may not be sued except in his capacity as receiver, unless he specially binds himself or unless he exceeds his authority.

In re Kalb & Berger Mfg. Co., 21 A. B. R. 393, 165 Fed. 895 (C. C. A. N. Y.): "While, ordinarily, a receiver acting within his powers is not personally liable upon his contracts, yet he may so contract as to bind himself; and if

he acts beyond his powers he necessarily assumes individual responsibility. The action in the Municipal Court in so far as it was against the defendant personally could not be stayed by the District Court. The power conferred by the Bankruptcy Act to determine controversies with respect to the collection and distribution of the bankrupt estate, cannot be extended to confer jurisdiction to stay proceedings against officers in their individual capacities. It may be that in this case the receiver acted within the scope of his authority and was not personally liable. If so the Municipal Court will undoubtedly decide in his favor. * * * The order of the District Court staying the action in the Municipal Court in so far as it was brought against the receiver as such, presents a more difficult question, in view of the fact that leave does not appear to have been granted to bring such action."

§ 1781. Such Suits Generally Not Enjoined by Bankruptcy Court.

And such actions will not be restrained by the bankruptcy courts.

In re Roberts, 22 A. B. R. 908, 169 Fed. 1022 (C. C. A. N. Y.): "The State suit is brought against the receiver and his clerk personally. The question raised here has already been decided by this court in In re Kalb & Berger Manfg. Co., 21 Am. B. R. 393, 165 Fed. 895. The order of the bankruptcy court, restraining the prosecution of suit in the State Court, is reversed."

In re Kalb & Berger Mfg. Co., 21 A. B. R. 393, 165 Fed. 895 (C. C. A. N. Y.): "The power conferred by the Bankrupt Act to determine controversies with respect to the collection and distribution of the bankrupt estate, cannot be extended to confer jurisdiction to stay proceedings against officers in their individual capacities."

§ 1782. But May Be Enjoined, if Equity Demands it.

Page 1081. Thus, a landlord has been restrained from prosecuting a suit in personam against the trustee, sounding in tort, where the court found it was but an indirect method of obtaining rent for use and occupation, claim for which the landlord had delayed presenting as part of the expenses of administration until almost all the funds of the estate had been paid out.

In re Empire Cons. Co., 19 A. B. R. 704, 157 Fed. 495 (D. C. N. Y.).

Page 1081. But the receiver or trustee may only be sued in personam, or where the property is not in the custody of the bankruptcy court. Any suit against the receiver or trustee, instituted to recover property in his custody as such, will be restrained.

See post, § 1798; *Berman v. Smith*, 22 A. B. R. 662, 171 Fed. 735 (D. C. Ga.).

§ 1783. May Be Sued without Leave of Bankruptcy Court.

Page 1081, note 9. See, in addition, In re Kanter & Cohen, 9 A. B. R. 372, 121 Fed. 984 (C. C. A. N. Y.).

But may be sued "as receiver," without leave, only in respect to some act or transaction of his in carrying on the business; and if he be not

carrying on the business or if the matter be not one occurring in the carrying on of the business, he may not be sued except on leave.

Page 1081. In *re Kalb & Berger Mfg. Co.*, 21 A. B. R. 393, 165 Fed. 895 (C. A. N. Y.): "Suits against receivers, as a general rule, cannot be brought in any other court than that of their appointment, without leave previously obtained from such court. An exception to this rule exists under certain conditions in case of Federal receivers. The statute (Act March 3, 1887, and August 13, 1888) provides in substance that a receiver appointed in a Federal court may be sued without leave of the court 'in respect to any act or transaction of his in carrying on the business connected with' the property in his charge. It is held that this statute applies to receivers appointed in bankruptcy proceedings as well as other Federal receivers. In *re Kanter and Cohen*, 9 Am. B. R. 372, 121 Fed. 984; In *re Smith*, 9 Am. B. R. 603, 121 Fed. 1014; In *re Kelley Dry Goods Co.*, 4 Am. B. R. 528, 102 Fed. 747. But such receivers cannot be sued without leave unless they are carrying on the business of the bankrupt estate, as they may be authorized to do by the bankruptcy court. In the present case, however, it does not appear that the receiver was authorized to carry on or was carrying on the business. In this transaction he merely arranged for the storage of certain machinery which had come into his possession as receiver. His act related to the care and preservation of the property but had no relation to any business carried on by him. In our opinion the contract of the receiver for the use of the premises was not an act or transaction in carrying on the business, within the meaning of the statute. The action against the receiver as such having been brought without leave of the court which appointed him—the District Court—was properly enjoined by that court. This having been done the District Court went forward and determined the terms of the contract between the parties and the amount due thereunder."

§ 1784. Need Not Be Sued in Official Capacity, but Merely as Individual.

At least in cases where he has personally obligated himself or exceeded his authority.

Compare ante, §§ 1780, 1780½, 1783.

§ 1786½. Or May Order Indemnity Direct from Estate to Injured Party without Judgment.

Or the bankruptcy court may, where all the parties are before it, order such indemnity paid direct to the injured party without the necessity of a judgment against the trustee.

In *re Hunter*, 18 A. B. R. 477, 151 Fed. 904 (D. C. Pa.): "Ordinarily, no doubt, a claim for damages against a trustee should first be prosecuted to judgment, in order that he may have an opportunity to make defense against the charge of wrongdoing; but, as the present trustee is a party to this proceeding with a full opportunity to be heard, and has made no sufficient defense, and as all parties in interest are before the court, I feel justified in treating the case as if recovery had already been had against the trustee. If, therefore, the bankrupt estate ought to indemnify the trustee, I see no reason why the indemnity should not be paid directly to the landlord."

§ 1788½. Nor May the Trustee Be Controlled in His Discretion, in the Administration of the Estate by Proceedings Brought in Another Court.

Nor may the trustee be controlled in his discretion in the administration of the estate, by proceedings brought in another court. Thus, the bankrupt will not be permitted to enjoin the trustee by a suit in equity in the State court, from carrying out a compromise of a controversy with the bankrupt's wife.

In *re* Kranich, 23 A. B. R. 550, 174 Fed. 908 (D. C. Pa.). Also, see §§ 1910½, 898¾.

§ 1796. Possession of Res, Test of Summary Jurisdiction.

Page 1089, note 1. See, in addition, In *re* Moody, 12 A. B. R. 724, 131 Fed. 525 (D. C. Iowa), quoted at § 1797; obiter, In *re* Rudnick, 20 A. B. R. 33, 160 Fed. 903 (C. C. A. N. Y.); impliedly, Knapp & Spencer Co. *v.* Drew, 20 A. B. R. 355, 160 Fed. 413 (C. C. A. Neb.); impliedly, In *re* Walsh Bros., 20 A. B. R. 472, 159 Fed. 560, 163 Fed. 352 (D. C. Iowa), quoted at § 1488; In *re* Landis, 18 A. B. R. 483, 151 Fed. 496 (D. C. Pa.), quoted at § 1800; In *re* Coffey, 19 A. B. R. 148 (Ref. N. Y.); Goodnough Mercantile & Stock Co. *v.* Galloway, 19 A. B. R. 244, 156 Fed. 504 (D. C. Ore.); partially, Clemishaw *v.* Int. Shirt and Collar Co., 21 A. B. R. 616, 165 Fed. 797 (D. C. N. Y.); impliedly (attempted settlement before bankruptcy, undistributed portions of settlement money still in hands of lender's agent, no jurisdiction in bankruptcy court), In *re* Smyth, 21 A. B. R. 853, 167 Fed. 871 (D. C. Pa.); Bray *v.* U. S. Fidelity & Guaranty Co., 22 A. B. R. 363, 170 Fed. 639 (C. C. A. W. Va.), quoted at § 1813; impliedly, In *re* Bluestone Bros., 23 A. B. R. 264, 174 Fed. 53 (D. C. W. Va.), quoted at § 1908; In *re* MacDougall, 23 A. B. R. 762, 175 Fed. 400 (D. C. N. Y.); In *re* New England Breeders' Club, 23 A. B. R. 689, 175 Fed. 501 (D. C. N. H.); In *re* Elletson Co., 23 A. B. R. 530, 174 Fed. 859 (D. C. W. Va.), quoted at § 1888; obiter, In *re* Peacock, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.).

As to jurisdiction to re-examine prepayments to attorneys in bankruptcy, see post, § 2099.

As to jurisdiction to vacate or modify orders "after term," see §§ 439, 858.

No "terms of court" in bankruptcy, see §§ 439, 858, notes.

Summary jurisdiction not precluded, in proper cases, by existence also of plenary jurisdiction, In *re* Holbrook Shoe & Leather Co., 21 A. B. R. 511, 165 Fed. 973 (D. C. Mont.).

Page 1089. *Murphy v. Hoffman*, 211 U. S. 562, 21 A. B. R. 487: "Before going further it is well to ascertain the principles of law which are applicable to the situation. The Bankrupt Act * * * as originally enacted, did not confer jurisdiction on the District Courts of the United States over suits brought by trustees in bankruptcy to assert title to property as assets of the bankrupt, or to set aside transfers made by the bankrupt in fraud of the creditors or by way of preference, unless by consent of the defendant. *Bardes v. First Nat. Bank*, 178 U. S. 524, 4 Am. B. R. 163, * * *; *Frank v. Vollkommer*, 205 U. S. 521, 17 Am. B. R. 806. * * * The act, however, preserves the jurisdiction, otherwise existing by statute, of the courts of the United States, though it is limited to courts where the bankrupt himself could have prosecuted the

action. *Bush v. Elliott*, 202 U. S. 477, 15 Am. B. R. 656. * * * But, where the property in dispute is in the actual possession of the court of bankruptcy, there comes into play another principle, not peculiar to courts of bankruptcy, but applicable to all courts, Federal or State. Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court, having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property, and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them. *Wabash R. Co. v. Adelbert College*, 208 U. S. 38, 54, * * * Accordingly, where property was in the possession of the bankrupt at the time of the appointment of a receiver, it was held that the bankruptcy court had jurisdiction to determine the title to it as against an adverse claimant, and that the receiver had no right to deliver it to him without the order of the court. *Whitney v. Wenman*, 198 U. S. 539, 14 Am. B. R. 45. * * * On the day the opinion in the *Bardes* case was announced the same justice delivered the opinion of the court in *White v. Schloerb*, 178 U. S. 542, 4 Am. B. R. 178, * * * a case in which the facts were essentially those of the case at bar. Certain persons, co-partners in trade, were adjudicated bankrupts and the case was sent to a referee in bankruptcy. They had a stock of goods in a store, the entrance to which was locked by the referee. Certain other persons claimed title to part of the stock of goods as obtained from them by a fraudulent purchase, which had been rescinded. After the adjudication, these persons brought an action of replevin of the goods against the bankrupt in a State court, which was executed. It was held that replevin would not lie in the State court, and that the District Court had jurisdiction by summary proceedings to compel the return of the property seized. The court said: "The goods were then in the lawful possession of and custody of the referee in bankruptcy, and of the bankruptcy court, whose representative and substitute he was. Being thus in the custody of a court of the United States, they could not be taken out of that custody upon any process from a State court." The last two cases cited proceed upon and establish the principle that when the court of bankruptcy, through the act of its officers, such as referees, receivers, or trustees, has taken possession of a res, as the property of a bankrupt, it has ancillary jurisdiction to hear and determine the adverse claims of strangers to it, and that its possession cannot be disturbed by the process of another court. And see *Skilton v. Codington*, 15 Am. B. R. 810, 185 N. Y. 80, 85, 86, 113 Am. St. Rep. 885, 77 N. E. 790, and *Frank v. Vollkommer*, which, by implication, approve the same principle."

Page 1090. *Babbitt v. Dutcher*, 216 U. S. 102, 23 A. B. R. 519: "There are two classes of cases arising under the Act of 1898 and controlled by different principles. The first class is where there is a claim of adverse title to property of the bankrupt based upon a transfer antedating the bankruptcy. The other class is where there is no claim of adverse title based on any transfer prior to the bankruptcy, but where the property is in the physical possession of a third party or of an agent of the bankrupt, or of an officer of a bankrupt corporation, who refuses to deliver it to the trustee in bankruptcy. In the former class of cases a plenary suit must be brought, either at law or in equity, by the trustee, in which the adverse claim of title can be tried and

adjudicated. In the latter class it is not necessary to bring a plenary suit, but the bankruptcy court may act summarily and may make an order in a summary proceeding for the delivery of the property to the trustee, without the formality of a formal litigation. The former class falls within the ruling in the case of *Bardes v. Hawarden Bank*, 178 U. S. 524, 4 Am. B. R. 163, and in the case of *Jaquith v. Rowley*, 188 U. S. 620, 9 Am. B. R. 523, which hold that such a suit can be brought only in a court which would have had jurisdiction of a suit by the bankrupt against the adverse claimant, except where the defendant consents to be sued elsewhere. In the latter class of cases a plenary suit is not necessary, but the case falls within the rule laid down in *Bryan v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 623, and *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224, which held that the bankruptcy court could act summarily."

In *re Grassler v. Reichwald*, 18 A. B. R. 694, 154 Fed. 478 (C. C. Calif.): "The only question, therefore, presented for our consideration on this petition is whether the proper remedy of the trustee to recover the money which was obtained by the petitioner was a plenary suit in court or a summary proceeding such as he adopted. If the property had been in the adverse possession of the petitioner before the bankrupts filed their petition to be adjudicated bankrupts there can be no doubt that a plenary suit would have been necessary. But assuming, as we may under the record, the facts to have been, as it is claimed by the respondent herein that they were, that certain property of the bankrupts was taken upon a void attachment and that the money realized on the sale thereof was paid to the petitioner on a judgment entered in his favor by default against the bankrupts several weeks after they had filed their petition in the District Court to be adjudicated bankrupts, and that this was known to the petitioner, we think there can be no question that under the provisions of § 2 (7) and § 67f of the Bankruptcy Act, authorizing the referee to compel the surrender of funds to the trustee, the proceeding had before the referee in this case was permissible. *Bryan v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 523; *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224; In *re Breslauer* (D. C.), 10 Am. B. R. 33, 121 Fed. 910; In *re Goldberg* (D. C.), 10 Am. B. R. 97, 121 Fed. 578. And, if the referee could lawfully make the order, it follows that the court below could deal with the petitioner as for contempt, and commit him to imprisonment for refusal to obey the order."

In *re Epstein*, 19 A. B. R. 89, 156 Fed. 42 (C. C. A. Colo.): "A court of bankruptcy may, by summary process, require those who assert title to, or an interest in, property which has rightfully come into its possession and control as part of the bankrupt's estate, to present their claims to that court, and, the notice being reasonable, may proceed to adjudicate the merits of such claims."

Page 1091. *Loeser v. Bank & Trust Co.*, 20 A. B. R. 845, 163 Fed. 212 (C. C. Ohio): "It involved the claim of the bank under a chattel mortgage to assets in the possession of the bankrupt's trustee. The bankrupt court, under the broad powers conferred by § 2 of the Bankruptcy Act, had the power to determine controversies relating to the estate of the bankrupt in its possession, whether the controversy related to the title or to liens thereon or rights therein. The property here involved had been surrendered by the bank to the trustee; the bank reserving its rights against the proceeds of sale. Having the actual possession, it mattered nothing whether the trustee instituted a proceeding to bring the bank in for the determination of the

controversy, or whether the bank had intervened by petition to assert its rights."

Coder v. Arts, 22 A. B. R. 1, 213 U. S. 223: "The Bankruptcy Act, as originally passed, did not give the bankruptcy courts jurisdiction over plenary suits to recover the property alleged to belong to the trustee in bankruptcy, except with the consent of the defendant. This was the subject of full consideration and determination in *Bardes v. First Nat. Bank*, 178 U. S. 324, 4 Am. B. R. 163. * * *. Subsequent decisions of this court construed the act to give the bankruptcy courts jurisdiction over controversies concerning the property in possession of the bankruptcy courts."

In re Rose Shoe Mfg. Co., 21 A. B. R. 725, 168 Fed. 39 (C. C. N. Y.): "It is clear the returned merchandise came into the actual possession of the receiver as a part of the bankrupt's property, * * *. And being in the custody of the receiver the merchandise was in the possession of the bankruptcy court which had the right when such possession was disturbed, to regain it by summary proceedings and to adjudicate with respect to all claims concerning the property."

Mound Mines Co. v. Hawthorne, 23 A. B. R. 242, 173 Fed. 882 (C. C. A. Colo.): "The law is now settled that the interest of a third party in property claimed to belong to the bankrupt estate, which, at the time of the institution of the proceedings in bankruptcy, is in the possession of such third person, claiming an interest therein, can only be determined by an original suit brought for that purpose. Where, however, property which is in the possession of a bankrupt at the time of the bankruptcy proceedings, and passes as part of his estate into the possession of the trustee in bankruptcy, and a third party claims an interest therein, the referee may, by a summary proceeding, require such third party to appear in the bankruptcy court, present his claim, and the referee adjudicate the rights of the parties in respect thereof."

Page 1092. Inferentially and obiter, *In re Bacon*, 20 A. B. R. 107, 159 Fed. 424 (C. C. A. N. Y.): "The property in question was in the actual custody of the trustee, having been turned over to him by the bankrupt himself, when the claim of title was examined into. Having elected to go on with such examination without taking any steps to review the orders under which it was conducted, petitioner [the bankrupt's wife] cannot now be heard to question the jurisdiction. If consent were necessary to give jurisdiction, such consent will be inferred from the circumstances that she proceeded under the order of July 15, 1905, without seeking to review it. In disposing of the case on this ground, however, we are not to be understood as expressing the opinion that such consent was necessary. The situation of the case as presented, renders it unnecessary to decide that question, to which the briefs and arguments were mainly addressed."

Plaut, Trustee, v. Gorham Mfg. Co., 20 A. B. R. 269, 159 Fed. 754 (D. C. N. Y.): "The complaint alleges that the receiver occupied the premises for the month of August, 1906, and that the defendant, the Gorham Mfg. Co. wrongfully dispossessed him in September, under a dispossession warrant issued by a magistrate without jurisdiction, and has since been in possession. I think that these allegations show that this court has jurisdiction. I understand the test to be whether the property is or has been in the possession of an officer of the bankruptcy court. If it is in such possession, claimants can be cited into the bankruptcy court to determine the validity of any claims or liens asserted against it. *In re Rochford*, 10 Am. B. R. 608, 124 Fed. 182:

In re Kellogg, 10 Am. B. R. 7, 121 Fed. 333; In re Epstein, 19 Am. B. R. 89, 156 Fed. 42. If it has been in such possession and has been wrongfully withdrawn from such possession, suits may be brought in the bankruptcy court to recover it. *Whitney v. Wenman*, 198 U. S. 539, 14 Am. B. R. 45. It is in the cases where property claimed to belong to the bankrupt is and always has been in the possession of another party that this court has no jurisdiction, as held in *Bardes v. Bank*, 178 U. S. 524, 4 Am. B. R. 163, unless the property has been fraudulently or preferentially transferred as provided for in the amendments of the Bankrupt Act in 1903."

Obiter, In re Walsh Bros., 21 A. B. R. 14, 163 Fed. 352 (D. C. Iowa): " * * * where the court has acquired possession in the course of such proceedings * * * the power inheres in the court of bankruptcy, as in every court exercising equitable jurisdiction to inquire and determine in a proper way the ownership of or right to the property in its custody, and award it accordingly, and this, though the property may have been wrongfully seized and brought into its custody." Quoted further at § 1652.

And it is even said that jurisdiction attaches to this end even though the property has been wrongfully seized and brought into custody.

Obiter, In re Walsh Bros., 21 A. B. R. 14, 163 Fed. 352 (D. C. Iowa), quoted at § 1796, citing *Krippendorff v. Hyde*, 110 U. S. 276; obiter, In re Moody, 12 A. B. R. 724, 131 Fed. 525 (D. C. Iowa), quoted at § 1797.

Even where the State court had taken possession of property, real estate, by its receiver, before bankruptcy, in a foreclosure suit, and where there was no claim made of a preferential transfer or any invalidity of liens for other causes, yet the State court receiver having voluntarily surrendered possession, the bankruptcy court was held, on indisputable grounds, to have complete jurisdiction to marshal liens and determine all rights of parties, even to the extent of enjoining the further prosecution of the foreclosure suit itself.

In re Dana, 21 A. B. R. 683, 167 Fed. 529 (C. C. A.): "The principal question arising on this petition to revise is whether a District Court of the United States, in which proceedings in bankruptcy are pending, and which is in the actual possession of certain real property conceded to belong to the bankrupt, has jurisdiction to determine the amount and the order of priority of liens thereon, and to liquidate such liens, to the end that the property may be sold free of incumbrances, and in aid thereof to enjoin the lienholders from prosecuting the foreclosure of their liens in a suit brought in a State court before the commencement of the bankruptcy proceedings, but within four months thereof; and this, though the lienholders object to such jurisdiction, and it is not contended that their liens are preferential or fraudulent, or invalid for any other reason. Bearing in mind the property was the property of the bankrupt, the title to which had passed to the trustee in bankruptcy, and that it was in the actual possession of the District Court of the United States, we think an affirmative answer should be given upon the authority of In re Schermerhorn [quoted supra]; In re Epstein, 19 A. B. R. 89, et seq. * * * Indeed, it appears that before the injunction in question was awarded, the State court, which by its receiver had actual possession of the property, voluntarily surrendered it to the receiver appointed in the bankruptcy proceedings upon request being made."

§ 1797. Jurisdiction Once Attaching, Complete for All Purposes.

Page 1093. *Murphy v. John Hofman Co.*, 21 A. B. R. 487, 211 U. S. 562: "When the court of bankruptcy, through the act of its officers, such as referees, receivers or trustees, has taken possession of a res, as the property of the bankrupt, it has ancillary jurisdiction to hear and determine the adverse claims of strangers to it and its possession cannot be disturbed by the process of another court."

Page 1093, note 2. See, in addition, *Goodnough Mercantile & Stock Co. v. Galloway*, 19 A. B. R. 244, 156 Fed. 504 (D. C. Ore.); *In re Bacon*, 20 A. B. R. 107, 159 Fed. 424 (C. C. A. N. Y.); *Plaut v. Gorham Mfg. Co.*, 20 A. B. R. 269, 159 Fed. 754 (D. C. N. Y.), quoted at § 1796; impliedly, *Knapp & Spencer Co. v. Drew*, 20 A. B. R. 355, 160 Fed. 413 (C. C. A. Neb.); impliedly, *In re Walsh Bros.*, 20 A. B. R. 472, 159 Fed. 560, 163 Fed. 352 (D. C. Iowa), quoted at § 1488½; *Cleminshaw v. Shirt & Collar Co.*, 21 A. B. R. 616, 165 Fed. 797 (D. C. N. Y.); *In re Dana*, 21 A. B. R. 683, 167 Fed. 529 (C. C. A.), quoted at § 1796; impliedly, *Graphophone Co. v. Leeds & Catlin Co.*, 23 A. B. R. 337, 174 Fed. 158 (C. C. N. Y.), quoted post, § 1806¼; *In re MacDougall*, 23 A. B. R. 762, 175 Fed. 400 (D. C. N. Y.); *In re New England Breeders' Club*, 23 A. B. R. 689, 175 Fed. 501 (D. C. N. H.).

Page 1097. *In re Epstein*, 19 A. B. R. 89, 156 Fed. 42 (C. C. A. Colo.): "The question of jurisdiction is not free from doubt but we are of opinion that the result of the cases is that a court of bankruptcy may by summary process require those who assert title to or an interest in, property which has rightfully come into its possession and control as part of the bankrupt's estate to present their claims to that court, and, the notice being reasonable, may proceed to adjudicate the merits of such claims."

Page 1098. But in some cases it has been held that if it once determines the right of possession to be in an adverse claimant, the bankruptcy court is without jurisdiction to order its distribution, and may only order it surrendered to such claimant.

In re Smyth, 21 A. B. R. 853, 167 Fed. 871 (D. C. Pa.). Compare similar rule, § 1032.

§ 1798. All Action to Be Taken in Bankruptcy Court.

And all action in regard to property in its custody must be taken (unless, perhaps, in some cases, the bankruptcy court permits otherwise) in the bankruptcy court.

See, in addition, *Plaut v. Gorham Mfg. Co.*, 20 A. B. R. 269, 159 Fed. 754 (D. C. N. Y.), quoted at § 1796; *In re Walsh Bros.*, 20 A. B. R. 472, 159 Fed. 560, 163 Fed. 352 (D. C. Iowa), quoted at § 1488½; impliedly, *In re Empire Construction Co.*, 19 A. B. R. 704, 157 Fed. 495 (D. C. N. Y.); *Bray v. United States, Fidel. & Guaranty Co.*, 22 A. B. R. 363, 170 Fed. 639 (C. C. A. W. Va.), quoted at § 1813; *Graphophone Co. v. Leeds & Catlin Co.*, 23 A. B. R. 337, 174 Fed. 158 (U. S. C. C.), quoted post, § 1806¼; *In re Max Goldman*, 23 A. B. R. 497, 174 Fed. 579 (C. C. A. Ohio); *In re New England Breeders' Club*, 23 A. B. R. 689, 175 Fed. 501 (D. C. N. H.).

§ 1798½. Thus Replevin Suits Not Maintainable.

Thus, adverse claimants to property in the possession of the bankruptcy court may not resort to replevin.

Murphy v. John Hofman Co., 21 A. B. R. 487, 211 U. S. 562 (quoted further at §§ 1796, 1797): "On the whole case, we are of the opinion that the seizure of these goods on a writ of replevin from another court was an unlawful invasion of the possession of the court of bankruptcy, which cannot be justified by the assertion, entirely unsupported by the evidence, that *Murphy* was then holding the goods, not as an officer of the court, but as an individual. For this reason the judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion."

See post, § 1875, and cases cited ante, § 1797; *White v. Schloerb*, 4 A. B. R. 178, 178 U. S. 542, quoted at § 1797; *Berman v. Smith*, 22 A. B. R. 662, 171 Fed. 735 (D. C. Ga.).

But may petition in the bankruptcy case for an order on the receiver or trustee to surrender the property claimed.

Instance, *Ross v. Stroh*, 21 A. B. R. 644, 165 Fed. 628 (C. C. A. La.).

§ 1799. Thus, Landlord's Forcible Detainer Suits Not Maintainable, nor Distraint.

Page 1099, note 4. See, in addition, *In re Schwartzman*, 21 A. B. R. 885 (D. C. S. C.); *Plaut v. Gorham Mfg. Co.*, 20 A. B. R. 269, 159 Fed. 754 (D. C. N. Y.), quoted at § 1796.

Page 1099, note 5. See, in addition, *Plaut v. Gorham Mfg. Co.*, 20 A. B. R. 269, 159 Fed. 754 (D. C. N. Y.), quoted at § 1796.

Page 1099. Although, probably an independent suit for damages in personam against the trustee might be maintained, for the wrongful detention after bankruptcy and election of trustee.

See ante, §§ 986, 1780; also, see *In re Hunter*, 18 A. B. R. 477, 151 Fed. 904 (D. C. Pa.).

But in one case such independent suit, though alleged to be sounding in tort, was restrained because the landlord had waited until almost the entire estate was distributed without presenting his claim for use and occupation and was using this indirect means to get his rent.

In re Empire Cons. Co., 19 A. B. R. 704, 157 Fed. 495 (D. C. N. Y.).

Nor will levy of distraint be permitted.

See § 1589.

In re Bishop, 18 A. B. R. 635, 153 Fed. 304 (D. C. S. Car.): "While a voluntary proceeding in bankruptcy is in effect equivalent in some respects to an assignment for the benefit of creditors, there is this essential difference—that inasmuch as the adjudication of bankruptcy is a judicial act, and thereby the property is taken in custodia legis, the landlord cannot distraint upon such property. It would be a contempt of the court for any constable or any other agent of the landlord to interfere with the possession of the court. If such a levy was attempted, the landlord would gain nothing by it."

§ 1800. Property Taken Out of Custody, etc., after Bankruptcy, Summarily Ordered Returned.

And property taken out of the custody of the bankruptcy court, or the possession of which was acquired after bankruptcy by persons not bona fide purchasers at judicial sale, may be ordered returned and even summarily ordered returned.

Page 1099. In *re Landis*, 18 A. B. R. 483, 151 Fed. 896 (D. C. Pa.): "I regret to differ from the learned referee, but I am constrained to do so on two grounds: The first is that the horses were in the actual custody of the District Court, acting by its receiver, and that Cleaver's conduct in taking them away by force was wholly without warrant. This wrongful removal might have been summarily redressed, and the order asked for by the referee might have been granted for this reason alone."

Page 1099, note 6. Instance, replevin by third person from sheriff holding under attachment that was nullified by the bankruptcy, where sheriff notified by referee, In *re Wash Bros.*, 20 A. B. R. 472, 159 Fed. 560, 163 Fed. 352 (D. C. Iowa), quoted at § 1488½; instance, sheriff surrendering attached property to a third party claimant, after oral notice of bankruptcy and of restraining order and receivership, In *re Lufty*, 19 A. B. R. 614, 156 Fed. 873 (D. C. N. Y.).

And a State court's officer, who replevies after he has orally been notified of the appointment of a receiver, is guilty of contempt.

In *re Wilk*, 19 A. B. R. 178, 155 Fed. 943 (D. C. N. Y.).

Thus, where, after an involuntary petition was filed but before a receiver could qualify, the bankrupt secured an order dismissing the receiver and returning the property in his hands to the bankrupt, which forthwith made a settlement with most of its creditors and paid over to them money, but the bankruptcy petition was not dismissed and subsequently other creditors intervened and procured adjudication of bankruptcy, it was held that the referee had summary jurisdiction to order the money returned to the trustee.

Knapp & Spencer v. Drew, 20 A. B. R. 355, 160 Fed. 413 (C. C. A.): "According to the pleadings and the proof the proceeding was one to secure a redelivery to the court of property formerly in its custody, and which it then had a right and duty to administer. The appellant in taking the money from the bankrupt after proceedings in bankruptcy had been instituted against him violated the spirit and purpose of the Bankruptcy Act by attempting to prevent the administration of the estate by the proper court after it had taken jurisdiction over it and had already taken the money in question into actual possession through its receiver. Not only so, but the officers of appellant in doing what they did, if the same was knowingly and fraudulently done, committed an offense denounced by § 29b, subd. 4, Bankruptcy Act * * * which reads: 'A person shall be punished by imprisonment for a period not to exceed two years upon conviction of the offense of having knowingly and fraudulently * * * received any material amount of property from a bankrupt after the filing of a petition, with intent to defeat this

act.' Appellant clearly had no such adverse claim or right to the money as exonerated it from liability to summary proceedings for its restoration to the estate from which it had been improperly taken."

Babbitt, trustee, *v. Dutcher*, 216 U. S. 102, 23 A. B. R. 519: "It was not stated in the opinion whether the assignment was prior or subsequent to the proceedings in bankruptcy. If prior thereto, then neither the court where the bankruptcy proceedings were pending nor any other court could grant a summary order disposing of the title of the adverse claimant claiming title to the policy by assignment. That could only be determined in a plenary suit, and would fall within the rule in the *Bardes* and *Jaquith* cases. But if the assignment was subsequent to the bankruptcy proceedings, then it would be a nullity and would be disregarded by the bankruptcy court and possession could be given to the trustee by a summary order, as in the *Bryan* and *Mueller* cases."

§ 1801. Even Property Voluntarily Surrendered by Bankruptcy Receiver Recoverable.

Page 1099, note 7. See ante, § 1657.

Page 1100. In *re Rose Shoe Mfg. Co.*, 21 A. B. R. 725, 168 Fed. 39 (C. C. A. N. Y.): "Although the referee has found that the bank took the merchandise from the possession of the receiver without his knowledge or consent, yet if it be assumed that the receiver turned it over, still the bankruptcy court was not deprived of jurisdiction. The receiver had no authority to turn over the property."

And if the property has been sold, the proceeds may be summarily ordered surrendered.

Page 1100. In *re Rose Shoe Mfg. Co.*, 21 A. B. R. 725, 168 Fed. 39 (C. C. A. N. Y.): "Nor does the fact that the bank sold the shoes change the situation. The proceeds stood in their place. The court had power to direct the turning over of such proceeds to the trustee. In *Trust Nat. Bank v. Chic. Title and Trust Co.*, 14 A. B. R. 102, 198 U. S. 280, the Supreme Court said: 'The sale in the circumstances did not change the situation. The proceeds stood in the place of the property and the order returning the proceeds was equivalent to an order returning the property.'"

But where a receiver has, with the apparent assent of the bankruptcy court, vacated premises claimed by the landlord, and the landlord has made peaceable entry thereon, the trustee cannot by summary proceedings oust the landlord and retake possession.

Page 1100. In *re Rothschild*, 18 A. B. R. 682, 154 Fed. 194 (C. C. A. N. Y.): "The argument here has been widely extended, involving a discussion as to the general powers and limitations of courts of bankruptcy, when proceedings affecting rights of the bankrupt have been begun in a State court before the filing of the petition. It is unnecessary to enter upon any such discussion, since we are clearly of the opinion that after the representative of the bankrupt's estate (the receiver) has, with the apparent assent of the bankruptcy court, vacated premises of which a third party is claiming possession, and such third person has thereupon made peaceable entry thereon, a subsequently appointed representative of the estate (the trustee) cannot

oust the third party and retake possession thereof by any such summary proceeding as this, either in a bankruptcy court or in any other court of whose procedure we have any knowledge."

§ 1802. Whether Recovery Be Plenary or Summary.

Page 1100, note 8. Instance, apparently plenary, but point not involved, *Plaut v. Gorham Mfg. Co.*, 20 A. B. R. 269, 159 Fed. 754 (D. C. N. Y.).

Page 1100, note 9. Compare, *In re Rothschild*, 18 A. B. R. 682, 154 Fed. 194 (C. C. A. N. Y.).

Page 1100. The better rule would seem to be that summary jurisdiction exists, if the right itself exists.

Knapp & Spencer Co. v. Drew, 20 A. B. R. 355, 160 Fed. 413 (C. C. A. Iowa), quoted at § 1800.

§ 1804. Purchasers at Sales by Trustees or Receivers Subject to Summary Jurisdiction.

Purchasers at judicial sales by trustees and receivers are subject to the summary jurisdiction of the bankruptcy court.

But compare, incidentally, *In re Bailey*, 19 A. B. R. 470, 156 Fed. 691 (D. C. N. Y.); also, see post, § 1962.

§ 1805. Obstructive Suits Brought after Bankruptcy Court Acquires Custody.

Page 1101, note 11. And compare apparently erroneous application of this principle in *Cruchet v. Red Rover Mining Co.*, 18 A. B. R. 814, 155 Fed. 486 (C. C. Mass.), quoted at § 399, the court evidently overlooking the fact that, before adjudication, the remedies of creditors are unaffected by the mere pendency of an involuntary petition. As to property not in custodia legis, see ante, § 399; also, that decisions under the law of 1867 would not be quite in point, since under that act the title of the assignee in bankruptcy revested to the date of the filing of the petition, not as under the present act, merely to the date of the adjudication, see § 1117.

Thus, the State court will not be permitted to restrain the trustee in bankruptcy, at the suit of the bankrupt, from carrying out a proposed compromise of a controversy with the bankrupt's wife.

In re Kranich, 23 A. B. R. 550, 174 Fed. 908 (D. C. Pa.).

§ 1806. Thus, Foreclosure Suits, Where Bankruptcy Court Already Has Custody.

Page 1101, note 12. See § 1161.

Page 1101. And where the bankruptcy court has actual possession, though acquired by surrender from a State receiver, it has been held to have jurisdiction to marshal liens, etc., even on real estate, though a suit in foreclosure has been already started before the bankruptcy.

In re Dana, 21 A. B. R. 683, 167 Fed. 529 (C. C. A.).

But such could not be the rule, of course, if the receiver in the foreclosure proceedings had not surrendered possession to the bankruptcy court.

See ante, § 1582.

However, the rule properly goes no further than to prevent the ousting of the bankruptcy court from its possession of the property; for, inasmuch as the bankruptcy court has not itself jurisdiction to "foreclose" a mortgagor's equity of redemption (see post, § 1972), but may only sell free and clear of liens, obviously, where formal foreclosure is desired, the mortgagee must be permitted to maintain suit therefor in the State court, even though the property itself remain in the custody of the bankruptcy court.

In *re Victor Color & Varnish Co.*, 23 A. B. R. 177, 175 Fed. 1023 (C. C. A. N. Y.): "We are clearly of the opinion that the holder of the chattel mortgage was entitled to have his day in court, in a suit to foreclose it, and that so much of the order as refused him leave to begin such a suit, on the ground that the property was in the hands of a receiver in bankruptcy, must be reversed. It was entirely proper, however, for the bankruptcy court to refuse to give petitioner immediate possession of the property; it should remain in the custody of the receiver till the suit is determined, although, of course, if all parties agree, it may be sold and the proceeds held by the receiver. Order modified."

§ 1806¼. Attempts to Control Bankruptcy Administration by Injunctions, etc., in Other Suits.

Attempts to control the bankruptcy court in its disposition of assets, allowance of claims, etc., by injunctions or other orders in other suits will not be permitted. Thus, where the defendant in a pending patent infringement suit becomes bankrupt, the court in which the infringement suit is pending will leave all questions as to the priority of claims against the bankrupt and of the payment of moneys from its estate, to the jurisdiction of the bankruptcy court, which is exclusive; nor will the bankruptcy receiver or trustee be compelled to render any active assistance to the complainant in the infringement suit other than to produce the bankrupt's books, under subpoena.

Graphophone Co. v. Leeds and Catlin Co., 23 A. B. R. 337, 174 Fed. 158 (U. S. C. C. N. Y.): "It is not for this court to say what moneys the receiver shall or shall not pay out. All questions as to priority of claims and as to payment of moneys in the custody of the District Court should be submitted to that court for determination. If the claim be one not provable in bankruptcy presumably that court will make no provision for its payment. If it be a provable claim it is equally presumable that whatever funds there may be in the hands of receiver, over and above the expenses of administering the estate, will be retained, until all provable claims are liquidated and all questions of priority (if any arise) are determined. The whole matter is exclusively in the jurisdiction of the bankruptcy court. The receiver owes no

active duty to complainant to expend the money of the estate in an effort to ascertain the facts asked for. Undoubtedly the receiver will afford all reasonable facilities, as he said he would, for the examination of the records which contain the information sought for. Personally he knows nothing about it. And the officers and employees of defendant may be produced by subpoena before the master at the same time as the books, and interrogated on the subject."

§ 1806½. Interference Otherwise than by Suit.

Not merely interference by suit or other legal process but other form of interference with the custody of the bankruptcy court is forbidden. Thus, the mere procuring of a tax deed from the county authorities, after the bankruptcy, has been held violative of the custody of the bankruptcy court.

In re Epstein, 19 A. B. R. 89, 156 Fed. 42 (C. C. A. Colo.): "We do not mean that property in the course of administration under the Bankruptcy Act is exempt from taxation, or freed from tax liens or claims theretofore fastened upon it (*Swarts v. Hammer*, 194 U. S. 441, 11 Am. B. R. 708, and cases *supra*), but that it is in custodia legis, and that any act interfering with the court's possession, or with its power of control and disposal, and done without its sanction, is void. The general rule is practically conceded, but it is said that the procurement of the tax deed was not such an interference, because it merely perfected an incipient title, and did not disturb the possession. The distinction does not impress us. The issuance of the deed was the principal act connected with the sale. If effective, it extinguished the right of redemption, which was still alive, transferred to the vendee the title and right of possession, became prima facie evidence of the validity of the sale and the proceedings anterior to it, and started the statute of limitations to running against any claim to the contrary. The attempt to thus strip the court of all but the naked possession was plainly an interference with its power of control and disposal, and consequently was of no effect without its sanction, although the possession was not then disturbed."

But it is difficult to see how such a mere perfecting of legal rights could constitute interference with the court's custody. On the same principle it would seem that the mere perfecting of mechanic's liens by the filing of the affidavit after the bankruptcy would likewise constitute interference—a position not at all tenable.

See § 1582.

§ 1807. What Constitutes "Custodia Legis" and "Assumption of Jurisdiction."

Page 1101, note 13. See, in addition, In re Bacon, 20 A. B. R. 107, 159 Fed. 424 (C. C. A. N. Y.), a case of the trustee's possession; instance receiver's possession, *Plaut v. Gorham Mfg. Co.*, 20 A. B. R. 269, 159 Fed. 754 (D. C. N. Y.), quoted at § 1796; instance, receiver's possession, In re Landis, 18 A. B. R. 483, 151 Fed. 896 (D. C. Pa.); instance, receiver's possession, In re Hughes, 22 A. B. R. 303, 170 Fed. 809 (D. C. N. J.); instance, receiver's possession, though not qualified as to bond, *Knapp & Spencer v. Drew*, 20 A.

B. R. 355, 160 Fed. 413 (C. C. A. Neb.), quoted at § 1800; referee's possession [sheriff holding under nullified attachment lien at referee's request], In re Walsh Bros., 20 A. B. R. 472, 159 Fed. 560, 163 Fed. 352 (D. C. Iowa): instance, bankrupt's possession, In re Coffey, 19 A. B. R. 148 (Ref. N. Y.); instance receiver's possession acquired by surrender from a receiver in state foreclosure suit, In re Dana, 21 A. B. R. 683, 167 Fed. 529 (C. C. A.); receiver's possession, In re Rose Shoe Mfg. Co., 21 A. B. R. 725, 168 Fed. 39 (C. C. A. N. Y.).

Page 1101. *Murphy v. John Hofman Co.*, 21 A. B. R. 487, 211 U. S. 562: "When the court of bankruptcy, through the act of its officers, such as referees, receivers or trustees, has taken possession of a res, as the property of the bankrupt, it has ancillary jurisdiction to hear and determine the adverse claims of strangers to it and its possession cannot be disturbed by the process of another court."

Thus, it is broadly stated that the filing of the bankruptcy petition is itself an assumption of jurisdiction.

Compare, post, § 1808.

Page 1102. In re Walsh Bros., 20 A. B. R. 472, 159 Fed. 560, 163 Fed. 352 (D. C. Iowa): "The adjudication also operated as a seizure of the property [although a sheriff was still in possession under levy made within the four months] and it was in custodia legis from that time."

Page 1102, note 14. Compare, In re Peacock, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.), wherein the court recognizes the qualification in its final decision as well as in its argument, although apparently giving adhesion to the unlimited and broadly stated rule first above mentioned.

Page 1105, note 15. But compare, *Knapp & Spencer v. Drew*, 20 A. B. R. 355, 160 Fed. 413 (C. C. A. Neb.).

Page 1105. However, if a receiver be appointed meanwhile before the State court's officer has actually seized the property, the fact that between the entry of the order of appointment and the filing of the receiver's bond, the seizure under writ of replevin is made by the State court's officer, will not operate to give jurisdiction to the State court, if the property seized was taken from the possession of the bankrupt.

In re Alton Mfg. Co., 19 A. B. R. 805, 158 Fed. 367 (D. C. R. I.), quoted ante, § 1582. However, if the assignee in this case had possession, the seizure would have been a seizure from the assignee rather than from the custody of the bankruptcy court, for until adjudication the assignee's possession was not superseded. See ante, § 1609.

The bankrupt being a party to the involuntary petition, is bound by the decree even before its entry or the giving of the bond, and he straightway holds for the receiver, though before such appointment his holding might not be held to be that of the bankruptcy court.

Page 1105, note 16. See, in addition, *Mound Mines Co. v. Hawthorne*, 23 A. B. R. 242, 173 Fed. 882 (C. C. A. Colo.), quoted at § 1796.

Page 1108. It has also been held that the possession of a sheriff under a levy made within the four months is not only not adverse but is so much that of the bankruptcy court itself that third parties may not, after adjudication of bankruptcy, replevy from the sheriff under claim of title, where at any rate the referee has notified him to hold for the bankruptcy court and he has assented.

In *re Walsh Bros.*, 20 A. B. R. 472, 159 Fed. 560, 163 Fed. 352 (D. C. Iowa): "The sheriff in an affidavit says that he was informed by the referee of the adjudication in bankruptcy and requested by him to hold the property for the referee until a trustee could be appointed, but that he continued to hold it under the writ of attachment. If he did continue to so hold it, he held it wrongfully; for the attachment was dissolved by the adjudication, and he could not thereafter rightly hold it, except for the referee or the court of bankruptcy. It is wholly immaterial whether or not he agreed with the referee to so hold it. If he remained in possession of the property, he could rightly do so only as custodian for the court of bankruptcy. It is clear, however, that he retained it at the request of the referee, and was therefore in fact the custodian of it for the time being for the court of bankruptcy, and the taking of the property from him was the taking of it directly from that court."

Page 1108. And similarly that third parties to whom he had surrendered possession after oral notice of the bankruptcy, and of the granting of a restraining order and of a receivership, are within the summary jurisdiction and may be required to return the property.

In *re Deeb Lufty*, 19 A. B. R. 614, 156 Fed. 873 (D. C. N. Y.).

Again it has been held that, where, during the pendency of an involuntary petition, between the entry of a decree appointing a receiver in bankruptcy and the filing of his bond, an officer of the State court takes possession of goods of an alleged bankrupt under a writ of replevin, such seizure is an unauthorized interference with the possession of the bankruptcy court.

In *re Alton Mfg. Co.*, 19 A. B. R. 805, 158 Fed. 367 (D. C. R. I.).

But where there had been an attempted settlement before bankruptcy, and at the time of bankruptcy, a portion of the settlement money was still undistributed in the hands of the lender's agent, who had been making the distribution, it was held the bankruptcy court had no jurisdiction over the fund except to release the trustee's claim thereto.

Inferentially, not directly, In *re Smyth*, 21 A. B. R. 853, 167 Fed. 871 (D. C. Pa.).

The trustee in bankruptcy may have custody of property situated in another State.

See ante, § 1705, et seq.; also, *Thomas v. Woods*, 23 A. B. R. 132, 173 Fed. 585 (C. C. A.), quoted at § 1706; In *re MacDougall*, 23 A. B. R. 762, 175 Fed. 400 (D. C. N. Y.).

§ 1808. As to Adjudication in Bankruptcy "Ipso Facto" Passing Bankrupt's Property into Custodia Legis.

Page 1108, note 20. In *re Peacock*, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.). This case is not contra to the author's views as expressed in the latter part of paragraph 1215, although the court apparently gives adhesion to the unlimited doctrine that "immediately upon and by virtue of the adjudication, all the property of the bankrupt, wherever situate and in whosoever's possession it may be, passes into the custody of the court, and upon the appointment of a trustee vests in him," the court saying: "This is undoubtedly correct and is fully sustained by the authorities cited." The proposition is not correct and never has been correct, for property does not pass "into the custody of the court" regardless of "whosoever's possession it may be in." The facts of the case and the decision of the court are wholly in conformity with the correct view, as laid down in § 1215, limiting the maxim to cases where actual custody has first been obtained.

See, in addition, In *re Walsh Bros.*, 20 A. B. R. 472, 159 Fed. 560, 163 Fed. 352 (D. C. Iowa); In *re Youngstrom*, 18 A. B. R. 572, 153 Fed. 97 (C. C. A. Colo.); In *re Hughes*, 22 A. B. R. 303, 170 Fed. 809 (D. C. N. J.). See also, § 1807, where some cases are cited wherein it is said the mere filing of the petition has such effect.

§ 1809. Real Estate Generally Considered in Bankrupt's Possession.

Page 1109, note 21. Instance, In *re O'Brien*, 21 A. B. R. 14 (Ref. Mass.), though based on different grounds in the opinion. But compare, In *re Bailey*, 19 A. B. R. 470, 156 Fed. 691 (D. C. N. Y.), where a trustee in bankruptcy sold at judicial sale land which the State claimed as being land under water.

Page 1109. And, even if a suit in foreclosure has already been instituted, yet if the receiver for the State court voluntarily surrenders possession to the bankruptcy court, the bankruptcy court will acquire thereby complete jurisdiction to marshal liens and determine all rights to the property, even to the extent of enjoining the further prosecution of the foreclosure suit.

In *re Dana*, 21 A. B. R. 683, 167 Fed. 529 (C. C. A.), but this case seems to base its decision on the fact that the foreclosure suit was begun within four months of the bankruptcy, a wholly immaterial consideration, since the basis of the jurisdiction was simply possession of the res.

§ 1811. Whether Action to Be in Bankruptcy Proceedings Themselves, or Separate Plenary Action Maintainable in United States District Court.

Page 1110. The possession by the bankruptcy court of the res gives it jurisdiction to determine all controversies in relation thereto, and such controversies may be and occasionally have been carried on by separate

proceedings, in the nature of plenary actions in the District Court itself.

Instance, *Cleminshaw v. Int. Shirt & Collar Co.*, 21 A. B. R. 616, 165 Fed. 797 (D. C. N. Y.).

Page 1110. Adverse claimants likewise may resort to the District Court although such practice is not to be favored so long as the res is already in the custody of the referee.

Instance, *Cleminshaw v. Int. Shirt & Collar Co.*, 21 A. B. R. 616, 165 Fed. 797 (D. C. N. Y.).

Page 1110. Thus, a mortgagee who alleged that he had been induced to release his mortgage lien by the false and fraudulent statements of the officers of the bankrupt corporation, has been permitted to institute a plenary action in the District Court, wherein the bankruptcy proceedings were pending, for the purpose of effecting a re-establishment of his lien.

Cleminshaw v. Int. Shirt & Collar Co., 21 A. B. R. 616, 165 Fed. 797 (D. C. N. Y.).

§ 1812. Nor in State Court, nor in United States Circuit Court.

Nor, on reason, may a separate plenary action be begun in the State court or in a federal court other than the bankruptcy court, while the property is in the custody of the bankruptcy court.

Bray v. U. S. Fidelity & Guaranty Co., 22 A. B. R. 363, 170 Fed. 639 (C. C. A. W. Va.).

§ 1813. Bankruptcy Court Permitting Controversies over Property in Its Possession to Be Carried on Elsewhere.

Page 1111. Also as to mortgages, for their foreclosure.

In re *Victor Color & Varnish Co.*, 23 A. B. R. 177, 175 Fed. 1023 (C. C. A. N. Y.), quoted ante, § 1806.

Page 1111, note 30. Instance, partially, In re *Nat. Lock & Metal Co.*, 19 A. B. R. 106, 155 Fed. 690 (D. C. N. Y.).

Page 1111. Likewise, the bankruptcy court has refused to hear summarily the question of title to lands claimed by the State to belong to the public as being land under water and has required plenary action to be instituted therefor.

In re *Bailey*, 19 A. B. R. 470, 156 Fed. 691 (D. C. N. Y.).

Page 1111. And the better rule undoubtedly is that neither the State court nor the United States Circuit Court has jurisdiction even by express permission of the bankruptcy court, to maintain an action the object of which is to reach and determine priorities in the distribution

of the assets of a bankrupt's estate in the custody of the bankruptcy court, as the jurisdiction of the bankruptcy court is original and exclusive and it has no authority to confer jurisdiction on another court.

But compare, §§ 1584, 1584½.

Bray v. U. S. Fidelity & Guaranty Co., 22 A. B. R. 363, 170 Fed. 639 (C. A. W. Va.): "If otherwise complainant had the right to assert a lien upon the property of the bankrupt contract company, such right could not be availed of by a suit in the Circuit Court, the object of which was to reach and determine priorities in the distribution of assets in the custody of the bankrupt court. Practically the effect of complainant's suit in the Circuit Court is to stay proceedings in the matter of the Evansville Contract Company, bankrupt, in the District Court, and to undertake to determine priorities or preferences in an estate in the custody and control of the latter court. This the Circuit Court is not empowered to do, for the jurisdiction of the District Courts in bankruptcy in this respect is original and exclusive. * * * Complainant's counsel insist that, as the fund sought to be subjected to the complainant's lien is within the territorial limits of the district, jurisdiction of the Circuit Court therefore attaches; but this fund which constitutes the res in this case is the estate of the bankrupt in the hands of the trustees, and in our opinion property or funds in custodia legis under the orders and decrees of a court of competent jurisdiction cannot be made the basis of jurisdiction in another court in an effort to establish liens upon such fund or property or otherwise deal with it. The District Court sitting in bankruptcy having this entire fund in custody and having complete jurisdiction to administer it, the Circuit Court has no power by its decree or order to interfere with it, nor is this want of power supplied by the order of the District Court permitting complainant's bill to be filed, for, if the Circuit Court was without jurisdiction, the District Court is not authorized to confer it."

Page 1112. Similarly, the bankruptcy court has surrendered possession of vessels to the admiralty court to avoid complications in the assertion of libels, but has insisted on the costs and expenses of the bankruptcy court in their preservation being a lien upon the vessels upon such surrender.

In re Hughes, 22 A. B. R. 303, 170 Fed. 809 (D. C. N. J.).

§ 1814½. Adverse Claimants Not to Be Defeated by Bankruptcy Court Surrendering Custody.

Adverse claimants to property in the custody of the bankruptcy court are entitled to have that court pass upon their rights and may not be defeated by the bankruptcy court's relinquishment of custody.

Thus, where a trustee in bankruptcy has notice of an adverse claimant's rights to property in his custody, he is not relieved from responsibility to the adverse claimant by an order of the bankruptcy court confirming a composition and ordering the property turned back to the bankrupt, such adverse claimant not having notice.

In re Cadenas & Coe, 24 A. B. R. 135, 178 Fed. 158 (D. C. N. Y.).

In re Cadenas & Coe, 24 A. B. R. 135, 178 Fed. 158 (D. C. N. Y.): "Therefore, the trustee, being charged in general with equities upon the fund, put it out of his hands without seeking to protect those equities by reserving any part of the fund or of the consideration. If he did this without knowledge of the existence of the claim, I do not consider that the terms of the order charged him; but, if he had adequate knowledge of the claim, he was in the same position as any other person who with knowledge of existing equities attaching to a res disposes of the res—that is, he became responsible as trustee to the person injured. This correspondence leaves no doubt that the trustee had the fullest notice of the claim before the composition was confirmed and went on without advising the petitioner of the composition till he supposed it was too late. Could there be a more absolute disregard of the petitioner's rights guaranteed him specifically by this court?"

§ 1815. When Summary Order Will Lie on Bankrupts, and Persons Not Adverse Claimants—In General.

Page 1113, note 36. Obiter, In re Peacock, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.).

§ 1815½. Existence Also of Plenary Jurisdiction Does Not Preclude.

The fact that the bankruptcy court also has plenary jurisdiction which might be exercised in the case does not preclude the exercise of summary jurisdiction.

In re Holbrook Shoe & Leather Co., 21 A. B. R. 511, 165 Fed. 973 (D. C. Mont.): "Jurisdiction by bill in the nature of plenary suit obtains, as was held in *Whitney v. Wenman*, 198 U. S. 539; but such jurisdiction does not preclude litigation of the rights of parties in bankruptcy proceedings, as distinguished from controversies by independent suits, where the trustee applies for an order requiring one to turn over property in his possession, basing the application upon the ground that the property so held belongs to the bankrupt, and is held without color of right."

§ 1816. Outstanding Claims by Third Parties on Property in Hands of Bankrupt or Agent, Summary Jurisdiction Not Divested.

Page 1113, note 37. See, in addition, *New River Coal Land Co. v. Ruffner*, 21 A. B. R. 474, 165 Fed. 881 (C. C. A. W. Va.), quoted at § 1610.

Page 1114. Also where it was claimed that the bankrupt was holding the property as trustee for another.

Instance (but jurisdictional questions eventually waived), *Hatch v. Curtin*, 19 A. B. R. 82, 154 Fed. 791 (C. C. A. Mass.).

§ 1819. Summary Orders on Bankrupt.

Page 1115, note 43. See, in addition, In re Mize, 22 A. B. R. 577, 172 Fed. 945 (D. C. Ala.); In re Cramer, 23 A. B. R. 637, 175 Fed. 879 (D. C. Mass.), quoted at § 1850; obiter, In re Peacock, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.).

Page 1117. In re Baum, 22 A. B. R. 295, 169 Fed. 410 (C. C. A. Ark.): "An adjudication in bankruptcy operates to transfer to the trustee the title to all of the property of the bankrupt which was subject to distribution among his creditors, and, if it appears to the satisfaction of the court that property of the bankrupt's estate is in the control or possession of the bankrupt, a lawful order for its delivery may be made."

§ 1820. No Matter in What Capacity Bankrupt Holds.

Page 1118, note 44. Hatch v. Curtin, 19 A. B. R. 82, 154 Fed. 791 (C. C. A. Mass.), where the bankrupt had possession of notes, etc., and proceeds of same, which were claimed to be held simply as trustee, jurisdictional questions later being waived, however.

§ 1821. Officers of Bankrupt Corporation, Subject.

Babbitt, trustee, v. Dutcher, 216 U. S. 102, 23 A. B. R. 519: "Respondents, as officers of the bankrupt company, asserted no adverse claim, but denied that the corporate records and stock books were 'documents relating to the property of the bankrupt,' and asserted that therefore the trustee in bankruptcy was not entitled to their possession. We have no doubt that the books and records in question passed, on adjudication, to the trustee, and belong in the custody of the bankruptcy court, and, there being no adverse holding, that the bankruptcy court had power upon a petition and rule to show cause to compel their delivery to the trustee."

Page 1118, note 48. See post, § 1823½.

Page 1118, note 49. But it has been held that where an attorney for a creditor who is subsequently employed by the bankrupt to file his bankruptcy petition and schedules, receives, on the morning of the day on which they are filed, full collection of the claim, which he immediately turns over to his client, the creditor, that the trustee must pursue the creditor, not the attorney, at least in the absence of fraud on the attorney's part, although in the decision the court seems to concede that, if the facts were sufficient, a summary order would lie, notwithstanding the money no longer was in the attorney's possession. In re Martin & Co., 20 A. B. R. 705, 167 Fed. 236 (D. C. N. Y.), quoted at § 1413, note.

§ 1822. Summary Orders on Agents and Others.

Page 1119, note 50. Obiter, In re Peacock, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.).

Page 1119. Thus, as to the books and documents of a bankrupt corporation in the hands of its officer in another district.

Babbitt v. Dutcher, 216 U. S. 102, 23 A. B. R. 519, quoted at § 1821.

Page 1120. Thus as to the wife's possession where her possession colorable merely.

In re Friedman, 18 A. B. R. 712, 153 Fed. 939 (D. C. N. Y., affirmed in 20 A. B. R. 37, 161 Fed. 260 C. C. A.): "The story of Celia Friedman is inherently preposterous, as well as demonstrably false. I am convinced that she received (contemporaneously with the sale) \$3,850, and has since acted

as the confederate of her hiding husband. Considering the relationship between Mrs. Friedman and Levinson, and the connection by marriage with Wiltchick, I am convinced that the three have been acting in concert to protect the proceeds of the Friedman fraud from creditors. * * * It may be admitted that the District Court on the bankruptcy side has no power summarily to try a question of title, if any real question of title exists. It may also be admitted that the same court has no power summarily to order the appropriation by a receiver or a trustee of property obtained from the bankrupt either by fraud upon him or in pursuance of his intent to hinder, delay or defraud his creditors, if any property was so obtained. But if property which had once been in the possession of the bankrupt is found in the possession of any person, and such person is, in the opinion of the court, very clearly but a cover or receptacle for that property which as between that other person and the bankrupt is still the property of the bankrupt, or if (to vary the simile) the person who holds property which was formerly in the possession of the bankrupt is but the alter ego of the bankrupt, then a summary order is proper, and no pretended instruments of transfer, no apparatus of conveyances, should prevail."

In re Eddleman, 19 A. B. R. 45, 154 Fed. 160 (D. C. Ky.): "The bankrupt, however, rushed all the \$2,057.29 over to his wife, and we see no reason why she might not be regarded as his agent and stakeholder in respect to it, and it is clear that when the petition in bankruptcy was filed, and when the adjudication was made, she had in her hands of money belonging to the bankrupt the difference between \$2,057.29 and \$1,605, viz., \$452.29. It is not too much to assume that this sum was in easy reach of the husband. Certainly it was his property, and belonged to the bankrupt's estate eo instanti the adjudication. Under section 29 of the act, it might have been a somewhat serious matter to interfere with it. We shall not assume that any criminal act was committed with respect to it, but shall assume that it remains intact. Courts could not tolerate, and this court would be far from encouraging, any practices by which bankrupt debtors could convert their property into money on the eve of failure and deliver it over to wives, and then insist that the latter are adverse claimants, hoping thus to evade the powers of the bankruptcy tribunals. Under such circumstances, the wife should be regarded as agent of the husband, and treated accordingly."

Page 1120. Thus as to other relatives.

In re Friedman, 20 A. B. R. 37, 161 Fed. 260 (C. C. A. N. Y., affirming 18 A. B. R. 712).

§ 1823. Corporation Agent of Bankrupt, Subject Thereto.

Page 1120. In re Berkowitz, 22 A. B. R. 227, 173 Fed. 1012 (D. C. N. J.): "I regard it as a serious reflection upon the administration of the Bankruptcy Act when a merchant can organize a corporation, transfer all of his assets to the corporation, continue his business in the same manner as he had before such transfer except for a change in the name over his door, and after he has been adjudicated a bankrupt, continue to conduct his business as theretofore except for the change of the name under which he is doing business. Under such circumstances, where the bankruptcy court has before it the sworn testimony of the bankrupt as to the transaction whereby he disposed of his property to the corporation, and where that evidence shows that the transfer was null and void, it seems to me that without regard to the

authorities cited above, the court could summarily take possession of the property upon the theory that the corporation is not a third party setting up an adverse claim of title, but rather is holding the property as the agent of the bankrupt." See further also, *In re Berkowitz*, 22 A. B. R. 231, 173 Fed. 1012.

§ 1823½. Bankrupt's Attorney, When Subject Thereto.

It has been impliedly held that the attorney for the bankrupt may be subject thereto.

Impliedly, *In re Gilroy & Bloomfield*, 14 A. B. R. 627, 140 Fed. 733 (D. C. N. Y.): *In re Martin & Co.*, 20 A. B. R. 705, 167 Fed. 236 (D. C. N. Y.), quoted at § 1423; apparently contra, but perhaps simply so on the facts, *In re Davis Tailoring Co.*, 16 A. B. R. 486, 144 Fed. 285 (D. C. N. J.).

Even where claiming a lien on papers of his client for services performed before the bankruptcy.

In re Eurich's Fort Hamilton Brewery, 19 A. B. R. 798, 158 Fed. 644 (D. C. N. Y.). Also, see ante, § 1679.

But such holdings have doubtless been based, partly, at any rate, on the general doctrine that courts have summary jurisdiction over attorneys practicing at the bar, in their relations with their clients.

§ 1825. Lienholder in Possession after Satisfaction of Lien.

Page 1121. But sureties holding indemnity from the bankrupt, after exoneration of the bankrupt or satisfaction of his liability, are adverse claimants, if still asserting for themselves a lien for expenses, etc.

In re Horgan, 21 A. B. R. 31, 164 Fed. 415 (C. C. A. Mass.).

§ 1827. Custodians and Court Officers in Possession under Nullified Legal Proceedings, Not Adverse Claimants.

Page 1122, note 59. See ante, §§ 540, 1474, 1661. And see "Conflict of Jurisdiction," § 1662.

Page 1124. Indeed, it was held in one case that it was contempt of the bankruptcy court to replevy property, after bankruptcy, that was still being held by a sheriff who had seized it under an attachment within the four months period, where the sheriff had been notified by the referee.

In re Walsh Bros., 20 A. B. R. 472, 159 Fed. 560, 163 Fed. 352 (D. C. Iowa), quoted at §§ 1488½, 1807.

Indeed, court officers in possession under nullified legal liens are so far from being considered as holding adversely to the bankruptcy court, that where such officers surrender the property to a third party claimant, such third party himself is subject to summary jurisdiction and may be

ordered to return the property precisely as if taken from the custody of the bankruptcy court itself.

In re Deeb Lufty, 19 A. B. R. 614, 156 Fed. 873 (D. C. N. Y.).

§ 1829. Court Officers Holding under Nullified Legal Proceedings Subject to Summary Order.

Page 1125, note 63. See, in addition, In re Cohn, 18 A. B. R. 786 (Ref. Calif.).

§ 1833. Summary Orders to Surrender Assets Not New Function.

Page 1128. Inferentially, In re Holland, 23 A. B. R. 835, 176 Fed. 624 (D. C. N. Y.): "The situation is much similar to that existing in proceedings supplementary to execution upon a judgment in a court of law, where authority is given by statute to impose a fine equal to the amount of the execution, with costs, and to imprison the party in contempt until the fine is paid."

§ 1835. Bankrupt Ordered to Execute Necessary Papers.

The bankrupt may be ordered to execute assignments, applications and other papers necessary to obtain possession or title.

Page 1128, note 67. See ante, §§ 460, 969, 1009, 1115; In re Hurlbut, 13 A. B. R. 50, 135 Fed. 504 (C. C. A. N. Y.), quoted at § 1115; In re Becker, 3 A. B. R. 412, 96 Fed. 407 (D. C. Pa.); In re Eurich, 4 A. B. R. 89, 101 Fed. 231 (D. C. Pa.); In re Coleman, 14 A. B. R. 461, 136 Fed. 818 (C. C. A. N. Y.), quoted ante, § 1009; In re Wolff, 21 A. B. R. 452, 165 Fed. 984 (D. C. N. Y.); In re Diack, 3 A. B. R. 723, 100 Fed. 770 (D. C. N. Y.); Fisher v. Cushman, 4 A. B. R. 646, 103 Fed. 867 (C. C. A. Mass.), quoted at § 1115; In re Wright, 18 A. B. R. 193, 292, 151 Fed. 361 (D. C. N. Y.); (1867) In re Ketcham, 1 Fed. 840; In re Madden, 6 A. B. R. 614, 110 Fed. 348 (C. C. A. N. Y.); In re Burnstine, 12 A. B. R. 596, 131 Fed. 828 (D. C. Mich.); In re Phelps, 15 A. B. R. 170 (Ref. N. Y.).

Page 1128. In re Wiesel & Knaup, 23 A. B. R. 59, 173 Fed. 718 (D. C. Pa.): "This license the receiver advertised and sold, and it is the duty of the bankrupts to assist the receiver in securing a transfer to the purchaser, so far as they are able to render such assistance. Up to the time of their discharge, they can be compelled, by summary order of court, to give the receiver any information they may possess or render him any assistance they can in the transfer of possession of property belonging to the bankrupt estate."

§ 1836. Referee Has Jurisdiction to Make Summary Order.

Page 1128, note 68. Compare, same as to marshaling liens, etc., post, § 1888.

Thus, the referee has like jurisdiction on others not holding adversely.

Knapp & Spencer v. Drew, 20 A. B. R. 355, 160 Fed. 413 (C. C. A. Neb.), quoted at § 1800.

Page 1129, note 69. See, in addition, *In re Cohn*, 18 A. B. R. 786 (Ref. Calif.). Compare, same as to marshaling liens, etc., post, § 1888.

Page 1129, note 70. See, in addition, *In re Cohn*, 18 A. B. R. 786 (Ref. Calif.).

§ 1837. Written Petition Requisite.

Page 1130. *In re Ruos* (No. 2), 21 A. B. R. 257, 164 Fed. 749 (D. C. Pa.): "If it had appeared in the course of this inquiry that the bankrupt probably controlled or was possessed of money or property that rightfully belonged to his estate, the correct proceeding to compel delivery would have been begun by presenting a petition making definite averments upon this subject and offering a definite issue. To such a petition the bankrupt would have been entitled to reply, and upon the issue raised by his answer both parties would have had the right to offer evidence, not only that which had been already taken, but such further evidence as might be relevant. The facts would thus appear, and the proper order would have the necessary support. Here, however, there was neither an appropriate petition nor an answer thereto, and therefore no issue to which the evidence can be definitely applied. On such a record I must decline to make an order that might be followed by the imprisonment of the bankrupt."

Page 1130. Thus, as to a mortgagee who has (though under mistaken advice of counsel) waived title to goods under the mortgage, and yet receives the same from the receiver in bankruptcy and is ordered to surrender them.

Inferentially (matter of contempt), *In re Cole*, 20 A. B. R. 761, 163 Fed. 180 (C. C. A. Me.).

§ 1838. Reasonable Notice on Respondent, Requisite.

Page 1132. Thus, notice must be served on an assignee or receiver from whom surrender is demanded.

Loveless v. Southern Grocer Co., 20 A. B. R. 180, 159 Fed. 415 (C. C. A. La.).

The notice may be by "order to show cause" [see post, § 1890], of the granting of which order to show cause, however, no notice is necessary.

In re (Philip) *Brady*, 21 A. B. R. 364, 169 Fed. 152 (D. C. Ky.): "While a notice might not have been improper, it was not at all necessary because the show-cause order itself gives notice and affords an opportunity on a certain named future day to show cause why the special relief sought should not be granted. The order, per se, gives him his day in court."

§ 1838½. Order to Show Cause.

The ordinary notice is that of an "order to show cause."

See post, §§ 1890, 1982.

§ 1839. Due Hearing Requisite.

Page 1132, note 77. See, in addition, *Loveless v. Southern Grocer Co.*, 20 A. B. R. 180, 159 Fed. 415 (C. C. A. La.), quoted at § 1611½. As to what was not lack of reasonable notice and due hearing, see *In re Friedman*, 20 A. B. R. 37, 161 Fed. 260 (C. C. A. N. Y.).

Page 1133, note 78. See ante, "Discovery of Assets," § 1555. Also, see § 1747.

Page 1133, note 81. See, in addition, *In re Ruos* (No. 2), 21 A. B. R. 257, 164 Fed. 749 (D. C. Pa.), quoted at § 1837.

Page 1133. Where a party has had an opportunity to call and examine his witnesses and the matter is closed, he should not be permitted to reopen the case for the introduction of evidence which he subsequently concludes would have been an advantage to him, unless for special reasons.

In re Booss, 18 A. B. R. 658, 154 Fed. 494 (D. C. Pa.), quoted at § 553½.

§ 1840. Courts Proceed with Great Caution in Granting Summary Orders.

Courts exercise this power of ordering the turning over of property with the greatest caution, lest the imprisonment for contempt which would follow the failure to comply with an order to turn over property might rather amount to imprisonment for debt.

In re Mize, 22 A. B. R. 577, 172 Fed. 945 (D. C. Ala.).

Page 1134. *In re Lesaius*, 21 A. B. R. 23, 163 Fed. 614 (D. C. Pa.): "No doubt in cases of this kind an order is not to be made except with caution and upon convincing evidence, lest a commitment for disobedience on contempt proceedings to follow should in effect be nothing more than imprisonment for debt."

Page 1134, note 83. See, in addition, *In re Lesaius*, 21 A. B. R. 23, 163 Fed. 614 (D. C. Pa.). Compare, analogously, post, § 2339.

Page 1135. *In re Holland*, 23 A. B. R. 835, 176 Fed. 624 (D. C. N. Y.): "But the more serious question is whether the contempt of court has been willful, and whether there is ability to repay, because, in the absence of either of these elements, an order directing punishment for contempt, by compelling the payment in indebtedness through the compulsion of imprisonment (it being apparent that, if the person in contempt is unable to pay, the money to release him must be raised by other people), would be perilously close to imprisonment for debt or crime, and no authority for that method of collection can be found under the laws of the United States."

In re Dickens, 23 A. B. R. 660, 175 Fed. 808 (D. C. Ala.): "This proceeding cannot be invoked as a means of coercing payment of debts, or to punish the bankrupt for transferring his property with the intent to hinder, delay, or defraud his creditors, if such be the fact."

In re Marks, 23 A. B. R. 911, 176 Fed. 1018 (D. C. Pa.): "Unless he has the physical ability to comply, he should not be committed for contempt; in practical effect, although perhaps not in legal contemplation, this would revive the abolished penalty of imprisonment for debt."

§ 1841. Punishment for Disobedience of Summary Order, Not Imprisonment for Debt.

Page 1135, note 84. In re Holland, 23 A. B. R. 835, 176 Fed. 624 (D. C. N. Y.).

Page 1136. In re Friedman, 18 A. B. R. 712, 153 Fed. 939 (D. C. N. Y., affirmed in 20 A. B. R. 37 C. C. A.): "The opposition to the punishment of the persons proceeded against for contempt is really based upon a proposition perfectly sound in itself, but, I think, inapplicable to the matter in hand. A person who has no money should not be punished for contempt in failing to turn over money. But the very point of this proceeding is that it is the opinion of the court that the persons proceeded against have the money and do not tell the truth when they assert their inability to pay. Instances are numerous where this same objection was made in limine, and the court became satisfied in time, either that the parties incarcerated had spent the money, or trusted it to still other persons who had made away with it, and thereupon the prisoners were released. But if any person into whose possession money is traced can avoid the legitimate consequence of the possession of that money by swearing that he no longer has it, or never had it, the administration of justice would become a farce."

§ 1842. Clear, Certain, Convincing or Satisfactory Proof, or Proof Beyond Reasonable Doubt, Requisite.

Page 1137, note 86. See, in addition, In re Lesaius, 21 A. B. R. 23, 163 Fed. 614 (D. C. Pa.); instance held proof insufficient, In re (Wolfe) Adler, 21 A. B. R. 371, 170 Fed. 634 (D. C. Okla.); instance, In re Baum, 22 A. B. R. 295, 169 Fed. 410 (C. C. A. Ark.).

Page 1138, note 87. See, in addition, In re Berman, 21 A. B. R. 139, 165 Fed. 383 (D. C. Pa.); In re Mize, 22 A. B. R. 577, 172 Fed. 945 (D. C. Ala.).

Page 1139. In re Dickens, 23 A. B. R. 660, 175 Fed. 808 (D. C. Ala.): "The authorities are agreed that a bankrupt should not be committed for contempt for failing to obey an order requiring him to turn over money or property to his trustee, unless the court is satisfied beyond a reasonable doubt of his present ability to comply with the order."

Page 1140. In re Cramer, 23 A. B. R. 637, 175 Fed. 879 (D. C. Mass.): "A consideration of the facts set forth by the referee in his report and of the evidence which accompanies the report has led me to believe that the referee must have acted, in refusing the order asked for, upon the theory that proof beyond a reasonable doubt was necessary to sustain a finding that there had been any concealment of property from the trustee. But that a fair preponderance of evidence in favor of such a conclusion is enough seems to me sufficiently well settled, at least in this Circuit. In re Cole (C. C. A.), 16 Am. B. R. 302, 144 Fed. 392. * * * That there was such a preponderance of evidence in this case I find myself unable to doubt."

However, the court should not make the order unless, on the same evidence, if the order be disobeyed, the court would punish for contempt.

Impliedly, In re (Wolfe) Adler, 21 A. B. R. 371, 170 Fed. 634 (D. C. Okla.): "Ordinarily in cases of this character where the bankrupt conceives the order of the referee to be invalid, he refuses to obey the order,

whereupon the referee certifies the facts to the judge, for a summary hearing, and punishment as for contempt, if he finds the fact warrants it. While this case comes up on petition of the bankrupt to review the order of the referee, it practically raises the questions which would come up on a citation for contempt, for the reason that unless the order is one the enforcement of which can properly be effected by imprisonment for contempt, it would be a futile order to make, and the case will therefore be treated as one in which an order has been disobeyed and is before this court in a contempt proceeding. * * * If I am correct in the conclusion that the evidence upon which this order is based is not sufficient to warrant this court to order the bankrupt imprisoned for contempt, should he fail to obey it, then it follows that the order should not have been made. An order which cannot be enforced is a dead letter. The order will therefore be annulled and set aside."

§ 1843. Bankrupt's Sworn Denial, Not Conclusive.

Page 1140, note 90. Analogously (contempt), *In re Lasky*, 20 A. B. R. 729, 163 Fed. 99 (D. C. Ala.).

Page 1141. *In re Friedman*, 18 A. B. R. 712, 153 Fed. 939 (D. C. N. Y., affirmed in 20 A. B. R. 37, 161 Fed. 260 C. C. A.): "But if any person into whose possession money is traced can avoid the legitimate consequence of the possession of that money by swearing that he no longer has it, or never had it, the administration of justice would become a farce."

In re Marks, 23 A. B. R. 911, 176 Fed. 1018 (D. C. Pa.): "Certainly, his bare denial of present ability to pay may be properly regarded with suspicion, and he may be required to satisfy the court with clearness that obedience to the order is wholly beyond his power. Such situations must be dealt with as they arise; no general rule can be laid down, and each case must stand upon its own facts."

§ 1844. But Almost Incontestible Evidence Requisite to Overcome It.

Page 1141, note 91. But compare, inferentially contra, *In re Lasky*, 20 A. B. R. 729, 163 Fed. 99 (D. C. Ala.), quoted at § 1850; instance where evidence found insufficient, *In re (Wolfe) Adler*, 21 A. B. R. 371, 170 Fed. 634 (D. C. Okla.); impliedly, *In re Dickens*, 23 A. B. R. 660, 175 Fed. 808 (D. C. Ala.), quoted at §§ 1840, 1842, 1845.

§ 1845. Proof of Present Possession or Control Requisite.

Page 1142, note 92. See, in addition, *In re Ruos* (No. 2), 21 A. B. R. 257, 164 Fed. 749 (D. C. Pa.); impliedly, *In re (Wolfe) Adler*, 21 A. B. R. 371, 170 Fed. 634 (D. C. Okla.); *In re Mize*, 22 A. B. R. 577, 172 Fed. 945 (D. C. Ala.); impliedly, *In re Berman*, 21 A. B. R. 139, 165 Fed. 383 (D. C. Pa.); *In re Holland*, 23 A. B. R. 835, 176 Fed. 624 (D. C. N. Y.), quoted at §§ 1833, 1840.

Analogously, in contempt proceedings, *In re Marks*, 23 A. B. R. 911, 176 Fed. 1018 (D. C. Pa.), quoted at § 1857.

Page 1143. Impliedly (on contempt for failure to surrender), *In re Rogowski*, 21 A. B. R. 553, 166 Fed. 165 (D. C. Ga.): "If the rule be adopted, announced in some cases, that where a bankrupt shortly before his failure has

on hand a large stock of merchandise, and when proceedings in bankruptcy are instituted he is found to have but a small amount of goods, the stock being depleted to such an extent that it could not have occurred in the ordinary course of business, and there are circumstances to indicate that the goods have been purposely and fraudulently removed so as to prevent their going into the hands of the trustee in bankruptcy, that then the court may require the bankrupt to produce the goods or give some reasonable explanation of their disappearance, and on his failure so to do may hold him for contempt, then a case is made out by the record here. * * * On the other hand, if the rule be that, notwithstanding such condition of things as indicated above, the receiver, trustee, or creditor proceeding against the bankrupt is unable to point out any particular property or cash so removed, and its location, definitely and specifically, contempt proceedings are not justified, then no case is made here. I think the latter rule has been adopted by the Circuit Court of Appeals for this Circuit in *Samel v. Dodd*."

In *re Baum*, 2? A. B. R. 295, 169 Fed. 410 (C. C. A. Ark.): "The court, of course, could not require the petitioner to do an impossible thing and then punish him for refusing to perform it. Therefore, from the fact that the court ordered him to pay over the money, it must necessarily have had before it testimony sufficient to satisfy it of his ability to comply."

Page 1145. In *re Dickens*, 23 A. B. R. 660, 175 Fed. 808 (D. C. Ala.): "The order of the referee in this case is that the bankrupt shall turn over to the trustee in bankruptcy the sum of \$20,000. I do not find in the record sufficient evidence to justify an order requiring the bankrupt to turn over to the trustee the specific sum of \$20,000. As I understand the evidence and the contention of the petitioner, an order requiring the bankrupt to turn over \$40,000 or \$50,000, or more, might as well have been made. There is no evidence clearly or satisfactorily showing that the bankrupt had the sum of money named in his possession or control on November 4, 1909, when the order was made, or on October 26, 1909, when the petition praying said order was filed, or that he recently had such sum of money prior thereto. There is evidence in the record that at some time prior to said dates the bankrupt was shown, in a certain proceeding in the State Chancery Court, to have been short in the sum of \$20,000 and more in his accounts with the English Manufacturing Company, of which he was the surviving partner, conducting its business. But that fact falls far short of establishing the fact that he had that sum of money in his possession on or about October 26, 1909. We may surmise from the evidence that he had that amount of money or much more in the past year or two; but conjecture, or speculation, or mere inferences, are not sufficient in this proceeding. There must be clear and convincing proof on which the court must act in making an order for contempt."

§ 1850. Presumption of Continued Possession When Property Once Traced and Shortage Unexplained.

Page 1146, note 99. See, in addition, In *re Lesaius*, 21 A. B. R. 23, 163 Fed. 614 (D. C. Pa.); In *re Leverton*, 19 A. B. R. 426, 155 Fed. 925 (D. C. Pa.); In *re Friedman*, 18 A. B. R. 712, 153 Fed. 939 (D. C. N. Y., affirmed in 20 A. B. R. 37), quoted at § 1863; *Seigel v. Cartel*, 21 A. B. R. 140, 164 Fed. 691 (C. C. A. Iowa), quoted at § 2501½.

Page 1147. In *re Averick*, 22 A. B. R. 518, 170 Fed. 521 (D. C. Pa.): "As

shown by his bills and invoices, he had bought for the fall trade goods to the amount of \$10,427.19; and had on hand at the beginning of the season, as found by the referee, stock in the two stores of the value of \$5,000, \$4,000 at Susquehanna and \$1,000 at Sidney. He paid out some \$3,025 to creditors on various accounts in the three months preceding his bankruptcy, and had \$1,100 of other cash expenses; besides losing \$300 by sales on credit. These figures show \$4,202.19 worth of goods unaccounted for, which the bankrupt must either have in his possession and keep back from his trustee, or else have disposed of them and put the money in his pocket. The conclusion so reached depends of course on the evidence and the deductions made from it, of which there can be no just criticism, provided the figures taken are accurate. That brand new goods of over \$10,000 went into these stores within the few months immediately preceding bankruptcy is not and cannot be denied, being proved by the bills or invoices. * * * The value of the goods which the bankrupt had when he failed is put in the schedules, where he would be inclined to make the most of them, at \$6,800. According to the appraisers they were worth only \$4,800, and they were sold by the trustee the latter part of January, after taking out the \$300 exemption, at \$3,900. It is now claimed, that at cost prices with which comparison is to be made, they were worth \$7,600. But all things considered, the estimate of the bankrupt, when he made up his schedules, may well be taken. There was no controversy then, as there is now, and he had no purpose to serve in fixing the value except possibly to enhance it. * * * What is there, then, to relieve the bankrupt from the logic of the situation? He lost no money by speculation, had investments, or gambling. He had no bad debts outside of the \$300 already allowed him. Neither his store nor his personal expenses were large, and all that he paid out on this account as well as on business debts or for borrowed money has been credited. The amount of goods which he bought was altogether beyond the needs of his business, and having been received within three or at most four short months, immediately preceding his bankruptcy, had disappeared at the end of that time with almost nothing to show for it. He could not have sold them in the ordinary course of trade, his business not being large enough to take them. And if he disposed of them at forced sales it would have been known and attracted attention. It is this that constitutes the strength of the case against him and gives an adverse cast to his so-called failure. All things considered, the only fair conclusion with the figures so seriously against him as they are, is that he covertly made away with so much as he cannot account for, and should now in consequence be required to produce and turn it over."

Page 1148. *In re Lasky*, 20 A. B. R. 729, 163 Fed. 99 (D. C. Ala.): "From the above-cited cases it seems clear to my mind that the following principle of law is well settled, to wit: That the property of a bankrupt estate, traced to the recent control or possession of the bankrupt, is presumed to remain there until he satisfactorily accounts to the court for its disposition or disappearance. Now let us see what may be properly deduced from the evidence as showing the property to be in the bankrupt's possession during the five months next before his adjudication:

A stock of goods on hand worth at least.....	\$2,500 00
Goods purchased within the five months for which not a dollar was paid	6,500 00
	<hr/>
	\$9,000 00

How and for how much of this does he account? First: He says that all goods were sold and converted into cash. The evidence indicates that they brought about cost, but let us allow \$2,000 for his selling cheap and the little remnant left in the store, so we have:

Item 1.	Discount to get quick sales.....	\$2,000 00
Item 2.	(He gives in detail his cost of doing business, and under that evidence \$100 a month is a liberal allowance, so) expenses of running store were.....	500 00
Item 3.	(His checks show exactly what he paid on old accounts, freight, and drayage in these five months.) Paid for goods, freight, and drayage about.....	1,300 00
Item 4.	Goldberg's living expenses, \$200 per month.....	1,000 00
Item 5.	Lasky's living expenses, \$200 per month.....	1,000 00
Item 6.	Accident to sister.....	500 00
Item 7.	Mother's and sister's trips.....	300 00
Item 8.	Money which Mr. and Mrs. Goldberg took away for living expenses, about	300 00
Total		<u>\$6,900 00</u>

This resolves every doubt in the bankrupt's favor and is more liberal to him than are the reported cases. It shows \$2,100 coming into his possession and wholly unaccounted for, and the estimate made by the court is certainly not overdrawn and, if anything, is rather below what may be sustained by the evidence. It is not attempted to state the exact amount of the bankrupt's frauds and concealments. The law does not require this, for, as is said in *In re Schlesinger* (D. C.), 3 Am. B. R. 342, 97 Fed. 930: 'A debtor is not, however, to go scot-free because the exact amount of his frauds and concealments are not ascertainable, nor should the Bankrupt Act be suffered to be paralyzed as respects the creditors by such means.' A merchant should not be permitted to shut his eyes to the disappearance of his goods, and when called upon by the court to account therefor escape the penalty of the law by simply saying: 'I have not the goods. I have no money.'

Page 1149. *In re Fidler & Son*, 21 A. B. R. 101, 163 Fed. 973 (D. C. Pa.): "The bankrupts have absolutely no explanation to offer for this large discrepancy. Their attention being called to it, that was the express answer which they gave. They admittedly experienced no loss by theft nor by fire, and, doing a cash and not a credit business, as they claim, they had no bad debts, if any could have accumulated in the short time in question. Indeed they even go so far as to say that they did not know that they were insolvent, and only went into bankruptcy because suits were being brought against them. But \$8,000 worth of goods, obtained inside of three short months, if their bills are to be relied on, are not to be disposed of upon any such convenient lack of knowledge. They certainly could not have disappeared through the ordinary and legitimate channels without leaving some trace behind them."

In re Cramer, 23 A. B. R. 637, 175 Fed. 879 (D. C. Mass.): "The bankrupt may have been, as the referee thinks, a person of an extremely low order of intelligence; but there is no question that he had intelligence enough to carry on business as a wholesale and retail dealer in picture frames for five years in Worcester, not to mention," etc. "The purchases of goods on credit and their subsequent disappearance, or the disappearance of money

received from them, if sold, within so short a time before the bankruptcy and while the bankrupt knew he was insolvent, together with the entire failure of the bankrupt to meet by reasonable and honest explanation the presumption against him which these facts create, would to my mind go very far, without more, to prove him guilty of concealment. If, under the pressure of an inquiry into these doings of his, he has also made admissions of the kind testified to by the trustee, I am unable to believe that justice will be done if the case be treated as one wherein the power of the court to compel restitution of what is being dishonestly withheld from creditors cannot be exercised for want of sufficient evidence. The order denying the trustee's petition is disapproved, and is to be vacated. On the case as now presented, the referee, in my judgment, should make such an order as has been requested by the trustee."

Page 1149. And the same rules prevail where it is traced into the hands of an agent of the bankrupt.

Page 1149, note 98. Instance, *In re Friedman*, 18 A. B. R. 712, 153 Fed. 939 (D. C. N. Y., affirmed in 20 A. B. R. 37, 161 Fed. 260, C. C. A.), quoted at § 1863.

Page 1149. Also, *In re Lesaius*, 21 A. B. R. 23, 163 Fed. 614 (D. C. Pa.): "It is also to be kept in mind that the object is to recover tangible property, and not to punish as on indictment for a fraudulent concealment or abstraction."

In re Rogowski, 21 A. B. R. 553, 166 Fed. 165 (D. C. Ga.): "If the rule be adopted, announced in some cases, that where a bankrupt shortly before his failure has on hand a large stock of merchandise, and when proceedings in bankruptcy are instituted he is found to have but a small amount of goods, the stock being depleted to such an extent that it could not have occurred in the ordinary course of business, and there are circumstances to indicate that the goods have been purposely and fraudulently removed so as to prevent their going into the hands of the trustee in bankruptcy, that then the court may require the bankrupt to produce the goods or give some reasonable explanation of their disappearance, and on his failure so to do may hold him for contempt, then a case is made out by the record here. See concurring opinion of Sanborn, Circuit Judge, in *Boyd v. Glucklich*, 8 Am. B. R. 393, 116 Fed. 131-142, 53 C. C. A. 451, and cases cited. On the other hand, if the rule be that, notwithstanding such condition of things as indicated above, the receiver, trustee, or creditor proceeding against the bankrupt is unable to point out any particular property or cash so removed, and its location, definitely and specifically, contempt proceedings are not justified, then no case is made here. I think the latter rule has been adopted by the Circuit Court of Appeals for this circuit in *Samel v. Dodd*, 16 Am. B. R. 163, 142 Fed. 68, 73 C. C. A. 254."

And where reasonable accounting is made, no order will be granted.

In re Reese, 22 A. B. R. 521, 170 Fed. 986 (D. C. Pa.): "This shows a difference of \$150.00 against the bankrupt, but must be regarded as practically balancing. Depending as it does on mere estimates, on one side and the other, it cannot be expected to come out even. And it is only in any case of this kind, where there are great discrepancies which cannot be explained except on the basis that the bankrupt has made away with his prop-

erty, that the matter can be laid hold of by a summary order. Being satisfied therefore that the bankrupt has cleared himself in the present instance of the charge made by the trustee of withholding and appropriating what belongs to his creditors. The exceptions are sustained, and the petition of the trustee is dismissed."

§ 1851. Rejecting Improbable Explanations.

Page 1149, note 100. Instance where no explanation offered, *In re Fidler & Son*, 21 A. B. R. 101, 163 Fed. 973 (D. C. Pa.); *Seigel v. Cartel*, 21 A. B. R. 140, 164 Fed. 691 (C. C. A. Iowa), quoted at § 2649; *In re Friedman*, 21 A. B. R. 213, 164 Fed. 131 (D. C. Wis.), quoted at § 852; *In re Holland*, 23 A. B. R. 835, 176 Fed. 624 (D. C. N. Y.); *In re Cramer*, 23 A. B. R. 637, 175 Fed. 879 (D. C. Mass.).

Page 1150. *In re Lasky*, 20 A. B. R. 729, 163 Fed. 99 (D. C. Ala.): "In a proceeding of this character, it is not within the province of the court to inflict punishment for dishonest conduct; but, in a careful effort to avoid such result, a court, when called upon to pass upon the weight of testimony and the credibility of witnesses, is not to be deprived of those faculties of judgment and discrimination as to what is true and probable, on the one hand, and untrue and improbable or absurd, upon the other, which are permitted to be exercised by juries in similar cases."

Instance, *In re Friedman*, 18 A. B. R. 712, 153 Fed. 939 (D. C. N. Y.), affirmed in 20 A. B. R. 37, 161 Fed. 260 (C. C. A.): "The story of Celia Friedman is inherently preposterous, as well as demonstrably false."

Page 1151, note 101. Instance, *Ohio Valley B'k v. Mack*, 20 A. B. R. 919, 163 Fed. 155 (D. C. Ohio), quoted at § 554. See ante, § 1568; post, § 2331.

Page 1151, note 102. See, in addition, *In re Mayer*, 19 A. B. R. 480, 156 Fed. 432, 157 Fed. 836 (D. C. Pa.), quoted at § 554½.

§ 1853. Order to Describe Property—Orders to Pay Value of Goods, Alternative Orders, etc.

The order for surrender must describe definitely the property to be surrendered.

Compare, *In re Lesaius*, 21 A. B. R. 23, 163 Fed. 614 (D. C. Pa.); *In re Rogowski*, 21 A. B. R. 553, 166 Fed. 165 (D. C. Ga.), quoted at § 1850.

Page 1152. *In re Lesaius v. Goodman*, 21 A. B. R. 446, 165 Fed. 889 (C. C. A. Pa.): "The other issue presented the question as to whether the bankrupt had fraudulently retained \$10,000, or any part of that sum. The court's order, however, does not deal with that issue. It directs the bankrupt, not to pay over \$4,000 which he has fraudulently retained, but to deliver 'gentlemen's furnishings and clothing to the extent and of the value of \$4,000.' We think the order is not supported by the pleadings, and that it must be reversed."

Page 1153. *In re Lesaius*, 21 A. B. R. 23, 163 Fed. 614 (D. C. Pa.): "The order it may be should be to turn over the goods, and not in the alternative to pay the value, the proceedings, as just stated, being supposed to be directed to the recovery of specific property. * * * But that does not prevent

its being measured by its value; that being the only way to indicate the extent of it. Neither is it necessary to do more than describe the property generally, as consisting for instance in the present case of gentlemen's furnishings and clothing, such as the bankrupt was carrying. To require greater particularity would make such proceedings practically nugatory. * * * This would not be necessary even to convict upon indictment."

The rule has even been laid down, though too strictly, that there must be a finding not only of the precise property but also of its location.

In *re Rogowski*, 21 A. B. R. 553, 166 Fed. 165 (D. C. Ga.): "On the other hand, if the rule be that, notwithstanding such condition of things as indicated above (unexplained and abnormal shrinkage of assets on the eve of bankruptcy) the receiver, trustee or creditor proceeding against the bankrupt is unable to point out any particular property or cash so removed, and its location, definitely and specifically contempt proceedings are not justified, then no case is made here. I think the latter rule has been adopted by the Circuit Court of Appeals for this circuit."

However on review, if the record does not contain the evidence, yet the Circuit Court of Appeals will presume from the fact that the order was granted to pay over money, that the property was money and that it was shown to be still in the bankrupt's control.

See, in addition, In *re Baum*, 22 A. B. R. 295, 169 Fed. 410 (C. C. A. Ark.).

§ 1854. Review of Summary Orders—Set Aside Only for Manifest Error.

Page 1153, note 105. The subsequent contempt proceedings to punish for failure to comply with the order of surrender may not be converted into a review of the order itself. In *re Marks*, 23 A. B. R. 911, 176 Fed. 1018 (D. C. Pa.), quoted, on other points at § 1857.

Page 1153. And where the record, upon a petition to revise an order that a bankrupt pay into court a certain amount in cash, does not contain the evidence taken before the referee, it will be presumed that the facts were sufficient to sustain his finding and order, and only matters of law, apparent upon the face of the record, may be considered.

In *re Baum*, 22 A. B. R. 295, 169 Fed. 410 (C. C. A. Ark.).

Likewise where by an order requiring a bankrupt to pay over money, it is found that he concealed assets, it will be presumed that such assets consisted of money in his possession, and under his control at the time the order was made, and that he was able to comply with the order.

In *re Baum*, 22 A. B. R. 295, 169 Fed. 410 (C. C. A. Ark.), quoted at § 1845.

§ 1855. Whether "Review" or "Appeal."

Summary orders upon bankrupts and others to surrender assets are reviewable by the Circuit Court of Appeals only under § 24 (b); and at

any rate as to others than bankrupts, only by writ of error or petition to revise, not by appeal.

Page 1154, note 107. Compare, *In re Cole*, 20 A. B. R. 761, 163 Fed. 180 (C. C. A. Me.).

§ 1856. Contempt for Disobedience of Summary Orders.

Page 1154, note 108. See, in addition, *In re Grassler & Reichwald*, 18 A. B. R. 694, 154 Fed. 478 (C. C. A. Calif.); *In re Lasky*, 20 A. B. R. 729, 163 Fed. 99 (D. C. Ala.); obiter (present possession not sufficiently proved), *In re Cole*, 20 A. B. R. 761, 163 Fed. 180 (C. C. A. Me.); *In re Holland*, 23 A. B. R. 835, 176 Fed. 624 (D. C. N. Y.), quoted, on other points, § 1840; *In re Marks*, 23 A. B. R. 911, 176 Fed. 1018 (D. C. Pa.), quoted at §§ 1843, 1857; obiter, *In re Peacock*, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.).

General order to surrender all assets, books, etc., contained in order of appointment of receiver, whether sufficient to predicate contempt, *Skubinsky v. Bodek*, 22 A. B. R. 699, 172 Fed. 340 (C. C. A. Pa.); also, see ante, § 392, note.

Page 1155. *In re Grassler & Reichwald*, 18 A. B. R. 694, 154 Fed. 478 (C. C. A. Calif.): "And if the referee could lawfully make the order, it follows that the court below could deal with the petitioner (on review) as for contempt, and commit him to imprisonment for refusal to obey the order."

The court may proceed either under the general power of all courts to punish contempt or under the specific provisions of the Bankruptcy Act, § 2 (13) (16).

In re Cole, 20 A. B. R. 761, 163 Fed. 180 (C. C. A. Me.): "If Mrs. Cole, who had been adjudged a bankrupt by the District Court, has wilfully disregarded its order in reference to the payment of money to the trustee, she might be proceeded against under the general powers vested in superior courts of judicature with reference to contempt, or, also, under the second section of the act, * * * which authorizes the district courts in bankruptcy to enforce obedience by bankrupts, officers and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment."

And punishment for contempt for failure to surrender property when ordered to do so is not the exercise of any new function in a court of equity.

See ante, § 1883 [1833].

Thus, an officer of a State court may be punished for such contempt.

See post, § 2330, et seq.; also, *In re Geiser*, 12 A. B. R. 208 (D. C. Mont.); *In re Cole*, 20 A. B. R. 761, 163 Fed. 180 (C. C. A. Me.).

As to practice and citation for contempt for failure to surrender, see post, § 2341.

But that he was acting under advice of counsel may excuse him.

See, in addition, *Orr v. Tribble*, 19 A. B. R. 849, 158 Fed. 897 (D. C. Ga.); also see post, § 2333; and ante, § 1474, note.

But mistake of counsel will not excuse failure of a petitioning creditor to whom under claim of ownership a receiver in bankruptcy had surrendered certain property, to return the property where, later, it had been judicially determined that the petitioner, under mistaken advice of counsel, had waived his claim as mortgagee (counsel considering it void for lack of proper record), and had assumed the sole position of a creditor.

See, in addition, *In re Strobel*, 20 A. B. R. 754, 163 Fed. 380 (D. C. N. Y.).

§ 1857. Whether Evidence on Which Order for Surrender Based May Be Re-Examined.

On principle it would seem that since the order to surrender assets may be granted only on convincing evidence or evidence beyond a reasonable doubt, the court, on contempt proceedings for failure to obey such order, ought not to go behind the order itself, if the order was not appealed from, and ought to take into consideration only facts arising subsequently thereto, leaving the propriety of the order itself remediable by appeal or petition for review, since otherwise the contempt proceedings would be diverted into an appeal from the order of surrender itself.

In re Lans, 19 A. B. R. 458, 158 Fed. 610 (C. C. A. N. Y.): "Having failed to secure a review of the order of December 14th, 1906, which found that the bankrupt was concealing property and directed him to turn it over to the trustee, he is in no position to question its propriety upon this petition which brings up only the order adjudging him to be in contempt for failure to comply with the provisions of said order of December 14th."

In re Home Discount Co., 17 A. B. R. 175, 147 Fed. 538 (D. C. Ala.): "He cannot ignore the order until the referee under § 14 certifies his disobedience to the judge, and then bring forward again, in his defense, matter contested before the referee prior to the making of the order, provided the order itself be not void. The method of correcting error is by appeal, and not by disobedience."

However some decisions that touch upon the point, although not directly deciding the proposition, seem to indicate that on contempt proceedings the evidence on which the original order was based may be re-examined.

In re Davidson, 16 A. B. R. 339 (D. C. R. I.); *In re Anderson*, 4 A. B. R. 641, 103 Fed. 854 (D. C. S. C., reversed, on other grounds, sub nom. *McGahan v. Anderson*; compare, *In re Cole*, 20 A. B. R. 761, 163 Fed. 180 (C. C. A. Me.); *In re Rosser*, 4 A. B. R. 153, 101 Fed. 562 (C. C. A. Mo.); *Samel v. Dodd*, 16 A. B. R. 166, 142 Fed. 68 (C. C. A. Ga., distinguished in *In re Stavrahn*, 23 A. B. R. 168, 174 Fed. 330, C. C. A. N. Y.). Compare, *In re Eddleman*, 19 A. B. R. 45, 154 Fed. 160 (D. C. Ky.); instance, *In re Laszky*, 20 A. B. R. 729, 163 Fed. 99 (D. C. Ala.); *In re Rogowski*, 21 A. B. R. 553, 166 Fed. 165 (D. C. Ga.), quoted at § 1845.

Review of Summary Order Treated as if on Contempt for Disobedience.—Since the evidence to support the order should be of equal weight with

that for contempt one court considered a review as if it were a contempt proceedings. In *re* (Wolfe) *Adler*, 21 A. B. R. 371, 170 Fed. 634 (D. C. Okla.).

Page 1156. At any rate, the order for surrender makes a *prima facie* case of possession, such that the trustee's petition for punishment for contempt need not allege ability to comply with the original order for surrender.

In *re* *Stavrahn*, 23 A. B. R. 168, 174 Fed. 330 (C. C. A. N. Y.): "We do not find in the statute, the General Orders or in any decision which has been called to our attention any authority for the proposition that the petition should contain an affirmative allegation of the bankrupt's present ability to comply with the order requiring him to turn over property. That is more properly a matter of defense. When the moving papers indicate that it has been determined after a full hearing that the bankrupt has concealed some specific piece of property; that he has been ordered to turn it over to the trustee; that he has been duly served with such order, and that he has failed to comply with such order; sufficient is charged to put him upon his defense. Of course he should have notice of the motion to punish him for such disobedience and have his 'day in court' when he may present what he may have to urge against such motion and an opportunity to be heard. All these the petitioner had in this case. * * * When the matter was before the District Court in February, 1909, on the final application to punish the bankrupt for a wilful and contumacious disobedience of the order of August 5, 1908, directing him to pay over, it appeared that before the last-named order was made there had been two adjudications, after full hearings, whereat the bankrupt testified and had the right to produce witnesses, both finding that the bankrupt had fraudulently concealed at least \$5,000, the profits of a certain real estate transaction which he should have turned over with the rest of his estate. It further appeared that the bankrupt had not taken any steps to review either of these adjudications. Certainly this was sufficient, *prima facie*, to establish the proposition that at some time subsequent to the bankruptcy, and prior to August 5, 1908, he was in the actual possession of that particular sum of money. In the face of such a finding it was incumbent on the bankrupt to give some reasonable explanation as to why it was that he did not turn it over in compliance with the order requiring him so to do; it was for him to explain how and why it was that this particular sum, in his possession a few months before, had disappeared; so that he no longer 'had the ability to turn it over in compliance with the order.' This he wholly failed to do."

Also, compare, In *re* *Marks*, 23 A. B. R. 911, 176 Fed. 1018 (D. C. Pa.): "In this proceeding the court will not re-examine the question whether the order should ever have been made—either at all, or in the particular amount fixed by the referee. The trustee has therefore an unimpeachable right to the money specified in the order, and presumptively the bankrupt is able to pay it; but the admission must nevertheless be made, that the presumption may not correspond with the fact, and that in reality the bankrupt cannot comply with the order. Unless he has the physical ability to comply, he should not be committed for contempt; in practical effect, although perhaps not in legal contemplation, this would revive the abolished penalty of imprisonment for debt. If he cannot pay, and if his inability is the result of his own criminal act, he may of course be punished by the criminal law, al-

though no civil remedy may be available in the situation. Even if he has misappropriated the money, the court has not the power to imprison him in a proceeding for contempt; for this would deprive him of his constitutional right to submit the charge of misappropriation to a jury in the proper criminal court, would deprive him also of the inseparable right to be exempt from imprisonment for such an offense until he shall have been lawfully convicted. And it is also true that he cannot be imprisoned in a proceeding for contempt, if for any other reason he cannot produce the money; for the court cannot imprison as a punishment, it can only imprison to compel obedience to its order. But with an order to pay in force against him, and with the need to overcome the presumption of his ability to comply, it will no doubt happen at times that a bankrupt may fail to meet the burden of proof, and may be obliged to go to jail until he satisfies the court that he was telling the truth when he pleaded poverty." Also quoted at § 1843.

§ 1858. Opportunity Must Be Given to Defend on Contempt.

Page 1156, note 111. See, in addition, *In re Cole*, 20 A. B. R. 761, 163 Fed. 180 (C. C. A. Me.); *obiter*, *In re Stavrahn*, 23 A. B. R. 168, 174 Fed. 330 (C. C. A. N. Y.), quoted *ante*, § 1857.

Page 1157. Petition should be filed.

In re Cole, 20 A. B. R. 761, 163 Fed. 180 (C. C. A. Me.).

And it should allege that the non compliance with the order was wilful.

In re Cole, 20 A. B. R. 761, 163 Fed. 180 (C. C. A. Me.). But compare, distinction made, *In re Stavrahn*, 23 A. B. R. 168, 174 Fed. 330 (C. C. A. N. Y.).

Page 1157, note 112. *Obiter*, *In re Stavrahn*, 23 A. B. R. 168, 174 Fed. 330 (C. C. A. N. Y.), quoted *ante*, § 1857.

A referee should not make a certificate of contempt, without such hearing and notice.

See post, § 2337½. See, also, *Magen & Magen*, 24 A. B. R. 63, 179 Fed. 572 (D. C. Pa.).

Except where it consists in an affront in open court and the referee initiates the proceedings.

See post, § 2337. Also, see, *Magen & Magen*, 24 A. B. R. 63, 179 Fed. 572 (D. C. Pa.).

§ 1859. Evidence on Contempt to Be Beyond Reasonable Doubt.

Page 1157, note 113. See, in addition, *In re Mize*, 22 A. B. R. 577, 172 Fed. 945 (D. C. Ala.). Compare, *In re Cole*, 20 A. B. R. 761, 163 Fed. 180 (C. C. A. Me.); also, compare, *In re (Wolfe) Adler*, 21 A. B. R. 371, 170 Fed. 634 (D. C. Okla.). See post, § 2340.

Page 1157. *In re Cole*, 20 A. B. R. 761, 163 Fed. 180 (C. C. A. Me.): " * * * and while also it seems to be conceded on all sides that, before committing for contempt, the court should be satisfied beyond a reasonable doubt

of a wilful refusal or a wilful act on the part of the person proceeded against yet neither the sixth amendment to the Constitution, nor any principle shadowed out by it, has strict application to proceedings of the character before us."

Page 1158. And ability to comply with the order and wilful disobedience of it are essential.

In *re Purvine*, 2 A. B. R. 787, 96 Fed. 192 (C. C. A. Tex.). Also, compare, analogously, *ante*, § 1845, et seq.

But the contempt proceedings are not a criminal proceedings, and it is not forbidden to introduce the bankrupt's schedules nor his general examination against him, as would be the case were the proceedings criminal.

Compare, suggestively, In *re Cole*, 20 A. B. R. 761, 163 Fed. 180 (C. C. A. Me.).

§ 1859½. Whether "Petition for Revision" or "Writ of Error" to Review Contempt Proceedings.

The court, as above remarked (§ 1856), may proceed either under the general power of all courts to punish contempts or under the specific provisions of Bankruptcy Act, § 2 (16) (13); and the method of review will depend somewhat upon which power the court has proceeded under; if under the general power, then a writ of error would be the proper method, whilst if under the specific provision of the Bankruptcy Act, a "petition for revision" would lie.

In *re Cole*, 20 A. B. R. 761, 163 Fed. 180 (C. C. A. Me.): "If the proceeding in the District Court was taken by virtue of the specific provision of the statute, it would be the natural presumption that the proper method of reaching us would be that which was in fact availed of, namely, a petition for revision under the same act. If, on the other hand, the proceeding in the District Court had relation to the general powers vested in superior courts of judicature with reference to contempts, the question would at once arise whether the present petitioner, Mrs. Cole, should not have come to us by writ of error. The parties themselves have made no issue as to either of these topics; but, as this application is without precedent in this court, and without authoritative exposition in all respects in the Supreme Court or in other Circuit Courts of Appeals, and as the extent to which the conclusions in the District Court may be reviewed may depend on the nature of the proceeding there, as also on the method taken to obtain a review thereof by this court, it is advisable that we should explain the position further. When a case comes up on writ of error with reference to a jury-waived trial of a civil case, or to a proceeding for contempt according to the ordinary course of the common law, the then method of raising questions which do not appear on the face of the pleadings would, if applied to this record, very much limit the scope of our examination with regard to the merits. If, on the other hand, the proceeding in this case was that especially authorized by the second section of the Act of July 1, 1898, so that a petition to revise would presumably be the ordinary way of reaching us, and if, on any petition to

revise like that before us, we are not restricted as we would be on a writ of error, our outlook is much broadened, and we are authorized to search the opinions filed in the District Court, although not a part of the record in the strict sense of the word, for the purpose of ascertaining at large what were in fact the issues."

§ 1860. Procedure on Obtaining Surrender from Court Officers.

Page 1158, note 114. See ante, "Comity Requires Resort First to State Tribunal," § 1637.

§ 1863. Jurisdiction to Determine Facts Requisite to Summary Jurisdiction.

Page 1159, note 115. See, in addition, *Knapp & Spencer v. Drew*, 20 A. B. R. 355, 160 Fed. 413 (C. C. A. Neb.), quoted at § 1800; *In re Hayden*, 22 A. B. R. 764, 172 Fed. 623 (D. C. Mass.); *In re Horgan*, 21 A. B. R. 31, 164 Fed. 415 (C. C. A. Mass.), quoted at § 1864; *In re Friedman*, 20 A. B. R. 37, 161 Fed. 260 (C. C. A. N. Y.); *In re Peacock*, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.).

Page 1159. Compare, *In re Friedman*, 18 A. B. R. 712, 153 Fed. 939 (D. C.), affirmed in 20 A. B. R. 37, 161 Fed. 260 (C. C. A.): "But if property which had once been in the possession of the bankrupt is found in the possession of any person, and such person is, in the opinion of the court, very clearly but a cover or receptacle for that property which as between the bankrupt and such other person is still the property of the bankrupt, or if (to vary the simile) the person who holds property which was formerly in the possession of the bankrupt is but the alter ego of the bankrupt, then a summary order is proper, and no pretended instruments of transfer, no apparatus of conveyances, should prevail. The question is: Whose is the property? And if, according to the evidence, it be the property of the bankrupt, the bankruptcy court should order its restoration to the representative of the creditors and enforce that order by the most drastic means. If this be not done, creditors in most cases are utterly without remedy, for a plenary suit against persons who are in truth but receivers of stolen goods (or money) is but an expensive illusion. In this case an unusually complicated scheme was pursued to hide the proceeds of the sale of the bankrupt stock. The complication of the method only renders more necessary the application of the rule which, I believe, exists."

In re Ellis Bros. Printing Co., 19 A. B. R. 472, 156 Fed. 430 (D. C. N. Y.): "* * * the bankruptcy court has power to inquire into the facts for the purpose of determining whether any basis exists for the adverse claim of title to the property asserted by the respondent. The mere assertion of an adverse claim of title, even with an intention to protect it by the usual process of law, will not preclude the bankruptcy court from exercising its power to proceed summarily. *In re Andre*, 13 Am. B. R. 132, 135 Fed. 736, 68 C. C. A. 374. It is only when the evidence indicates that the asserted claim is not false or fraudulent that the bankruptcy court is deprived of jurisdiction. If it should appear from the proofs that the respondent, Strong, refuses to surrender the money collected by him to the trustee simply on the ground that the title to the same is conclusively evidenced by his possession of it, or if the claim is unreal or colorable, then it is the duty of this court to direct its payment to the trustee. This principle of law is so clearly and definitely stated by

the Supreme Court in *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224, * * * that no other citations are thought necessary. In the prior cases decided by this court, in passing upon the right to exercise summary jurisdiction, it was not intended to be understood as holding that, irrespective of whether the elicited facts were sufficient in law, the mere assertion of an adverse claim of title or ownership deprived the court of summary power. If the proofs show that in fact there is no legal basis for the asserted adverse claim, the summary power of the court is not defeated."

And summary jurisdiction has been enforced against the bankrupt's attorney to compel him to surrender money collected by him for the bankrupt before bankruptcy, though he claimed the right to apply it on unpaid attorney's fees.

In *re Ellis Bros. Printing Co.*, 19 A. B. R. 472, 156 Fed. 430 (D. C. N. Y.), quoted at §§ 1828, 2099.

Page 1159, note 116. See, in addition, *Knapp & Spencer v. Drew*, 20 A. B. R. 355, 160 Fed. 413 (C. C. A. Neb.); In *re Hayden*, 22 A. B. R. 764, 172 Fed. 623 (D. C. Mass.), quoted at § 1864; In *re Peacock*, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.).

Page 1159. In *re Holbrook Shoe & Leather Co.*, 21 A. B. R. 511, 165 Fed. 973 (D. C. Mont.): "A very careful study of the record certified in this matter leads me to conclude that it was the duty of the referee to hear the testimony, in order to pass upon the question whether the claim of the Packard Shoe Company to the property in its possession had an actual basis—that is, was it a real or merely colorable claim? Power and duty to make such inquiry must exist under the Bankruptcy Act, else we cannot escape from the illogical conclusion that the mere assertion of what may be designated an adverse claim can oust the summary jurisdiction of the bankruptcy court, and, as a result, the trustee cannot expeditiously collect the estate for the creditors. But we are not without judicial authority in the premises, as the Supreme Court has expressly declared there is no such ouster, and that jurisdiction exists. *Muller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224. But how much farther may the bankruptcy court go? * * * Manifestly, the statute requires a broader construction, one that not alone authorizes the inquiry by the hearing of testimony, but which also required a decision upon the merits by the referee. This decision may be that the claim is in good faith, but of doubtful validity, or of questionable faith, yet is probably real; and, hence, that there ought to be an independent suit brought to try the questions; but if the decision is that the claim is without any actual merit or legal foundation, the referee should regard the property as subject to the jurisdiction of the bankruptcy court, as property of the bankrupt, and should, therefore, proceed to make an order requiring the actual wrongful holder to surrender to the court or trustee."

§ 1864. But Will Only Examine Far Enough to Ascertain if Facts Alleged in Good Faith and if True Would Constitute "Adverse" Party.

Page 1159, note 117. Instance, In *re Eurich's Fort Hamilton Brew*, 19 A. B. R. 798, 158 Fed. 644 (D. C. N. Y.); apparently, In *re Peacock*, 24 A. B. R. 159, 178 Fed. 851 (D. C. N. Car.).

Page 1161. Instance, *In re Eddleman*, 19 A. B. R. 45, 154 Fed. 160 (D. C. Ky.): "The evidence, however, further shows that \$1,605 of the money was paid out by the wife to Mrs. Fredericka Nickel, to whom she owed a note for borrowed money. This payment seems to have been made before the petition in bankruptcy was filed. There may not be any presumption that it was so, yet it is possible that this transaction may have been a fraudulent one—a mere friendly contrivance. Nevertheless, it is fair to assume that Mrs. Nickel thereby acquired what is called by the Supreme Court, in *Mueller v. Nugent*, 184 U. S. at page 15, 7 Am. B. R. 224, a basis for an adverse claim to that much of the \$2,057.29, and, if so, we can hardly see how we can punish the bankrupt for contempt for not paying over the money which the testimony shows was, presumably at least, adversely claimed by another person."

In re Hayden, 22 A. B. R. 764, 172 Fed. 623 (D. C. Mass.): "It was the referee's duty to inquire whether any basis for such a claim to the property as that asserted by the three respondents above named actually existed at the time of the filing of the petition. He was bound to enter upon that inquiry, and in doing so undoubtedly acted within his jurisdiction. It was for him to ascertain whether the respondents' claim to hold the property against the trustee was really adverse, as would appear from their answers, or was merely colorable. * * * For this purpose and to this extent he had jurisdiction to investigate the merits of the questions raised. If, however, as the result of his investigation he found the claim to be really adverse, it followed from that conclusion that he was without jurisdiction to proceed further."

In re Horgan, 21 A. B. R. 31, 164 Fed. 415 (C. C. A. Mass.): "But one question is here presented: Was the petitioners' claim to the sum here in controversy, * * * a claim really adverse to * * * the trustees in bankruptcy or merely colorably so? The District Court had jurisdiction to pass upon this question; but, if the claim was really adverse, the court was without jurisdiction to proceed further under § 23 of the Bankruptcy Act. * * * Whether the lien claimed by the petitioners be deemed to arise by implication of law out of the deposit with them of security for their liability on the bail bond, or from the express contract set up in their affidavits, we are of opinion that their claim to the lien was not so clearly without foundation as to be merely colorable within the decisions of the Supreme Court. * * * We are not called upon to hold the petitioners' claim to be valid, and we do not so hold. We merely hold it to be really adverse to the claim of the trustees in bankruptcy."

And the court is bound to enter on the inquiry to ascertain whether an adverse claim, not merely colorable, but real, even though fraudulent and voidable, exists in fact.

In re Friedman, 20 A. B. R. 37, 161 Fed. 260 (C. C. A. N. Y.).

§ 1865. Not Concluded by Pleadings.

Page 1162. But, it would seem to be the better rule that, unless the bad faith were sufficient to warrant a court in striking the pleadings from the files, the pleadings, especially if positively verified, should bind the court as to whether summary jurisdiction exists; so that, in general,

existence of summary jurisdiction would be rather a question of allegation than of proof.

Cooney v. Collins, 23 A. B. R. 840, 176 Fed. 189 (C. C. A. Montana): "All of the above-mentioned allegations of the defendant John W. Cooney were verified by him of his own knowledge. His objections to the determination, in such summary proceedings, of the right to the properties in question, were overruled by the referee in bankruptcy, which officer found, in effect, upon the conflicting evidence introduced before him, that all of the property in question really belonged to the bankrupt, Frank Henry Cooney, was paid for with his money, and put in the name of John W. Cooney for the purpose of defrauding the creditors of Frank Henry Cooney. The matter being brought before the court upon petition for revision of the action of the referee, like objections were there made by John W. Cooney to the jurisdiction of the referee, and of the power of the bankruptcy court to thus determine the property rights in question, resulting in the affirmance by the court of the referee's order. Hence the present petition for review. In so ruling we are of the opinion that the learned judge of the court below was in error. That court, as well as the counsel for the respondent here, largely rely in support of their position upon the case of *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224, which case was subsequently reviewed in the case of *Jaquith v. Rowley*, 188 U. S. 620, 624, 9 A. B. R. 525, where the Supreme Court thus concluded its review of it: 'in other words, *Nugent's* case simply holds that where the agent held money belonging to the bankrupt to which he had no claim, but simply refused to give up the property, which he acknowledged belonged to the bankrupt, the bankruptcy court had power, by summary proceedings, to order him to deliver such property to the trustee in bankruptcy, which was not only a 'wholly different' case from that of *Jaquith v. Rowley*, but also from that now before us. Like the surety in the case of *Jaquith v. Rowley*, the petitioner here, John W. Cooney, by his verified answer not only claims the absolute right to hold all of the property in question as against everybody, but specifically alleges the reasons for his claim of ownership of it. Of course, his allegations in that behalf may not be true; still they make a case of adverse claim to the property on his part, to overcome which it was essential for the trustee to protect in accordance with the provisions of § 23 of the Bankruptcy Act and not by summary proceeding in bankruptcy. We think the case of *Jaquith v. Rowley*, 188 U. S. 620, 9 Am. B. R. 525, is directly in point, on the authority of which the judgment of the District Court should be reversed, with directions to order the dismissal of the trustee's petition."

§ 1867. Ancillary Jurisdiction in Bankruptcy Court of Another District to Make Summary Order.

Ancillary jurisdiction exists in the bankruptcy court of one district to make a summary order to surrender assets in aid of a bankruptcy proceedings in another.

Page 1162, note 121. See "Ancillary Proceedings," ante, § 1705, et seq.; Bankr. Act as amended in 1910, § 2 (20); *Babbitt v. Dutcher*, 216 U. S. 102, 23 A. B. R. 519; *In re Madson Steele Co.*, 216 U. S. 115, 23 A. B. R. 614.

§ 1869. Procedure—Petition to Redeem and Notice.

Page 1162. Redemption may be ordered upon petition and notice.

Ten days' notice, it appears from the Supreme Court's Official Form No. 43, is to be sent to all creditors.

In re Grainger, 20 A. B. R. 166, 173, 160 Fed. 69 (C. C. A. Calif.).

Although § 58 does not specifically mention such applications among those matters notices of which must be sent to all creditors.

§ 1872. Summary Jurisdiction to Order Trustee to Surrender Property to Rightful Owner.

Page 1163, note 124. **Summary Jurisdiction over Trustee as to Exceptions to His Accounts.**—The bankruptcy court in general has summary jurisdiction over the trustee or receiver in respect to their accounts. Impliedly, In re Moore & Bridgeman, 21 A. B. R. 651, 166 Fed. 689 (C. C. A. Tex.).

And the bankruptcy court has summary jurisdiction over the trustee, to this end.

Instance, In re MacDougall, 23 A. B. R. 762, 175 Fed. 400 (D. C. N. Y.).

And the proper procedure is for an order to show cause to be issued upon the trustee, upon the claimant's petition, as in other cases.

Instance, In re MacDougall, 23 A. B. R. 762, 175 Fed. 400 (D. C. N. Y.).

§ 1874. Referee Has Jurisdiction.

Page 1164, note 127. See, in addition, In re Coffey, 19 A. B. R. 148, (Ref. N. Y.).

§ 1875. Replevin Suits Not Maintainable against Trustee or Receiver.

Page 1164, note 128. See cases cited under §§ 1796 and 1798½ et seq. See, in addition, Murphy v. John Hoffman Co., 21 A. B. R. 487, 211 U. S. 562; White v. Schloerb, 4 A. B. R. 178, 178 U. S. 542; Berman v. Smith, 22 A. B. R. 662, 171 Fed. 735 (D. C. Ga.).

§ 1876. Petitions for Reclamation, Surrender or Redelivery.

Page 1164. Surrender of property in the custody of the bankruptcy court but belonging to a stranger, is accomplished by filing before the referee a petition, variously styled a petition for redelivery, for surrender, for restitution or for reclamation.

The trustee may himself file a motion for authority to surrender the property, without any action on the claimant's part. Instance, McDonald v. Clearwater Ry. Co., 21 A. B. R. 182, 164 Fed. 1007 (U. S. C. C. Idaho). And in one instance the court dispensed with formal reclamation proceedings and ordered the return of goods without a petition being filed, In re Kingston Realty Co., 19 A. B. R. 703, 157 Fed. 303 (D. C. N. Y.), which is, however, a practice not to be commended.

Payments to Trustees under Mistake of Law.—If money is paid or property turned over to a trustee in bankruptcy under mistake of law it should be

surrendered to the rightful owner, the rule being different with court officers from what it is with individuals, obiter, *Carpenter v. Southworth*, 21 A. B. R. 390, 165 Fed. 428 (C. C. A. N. Y.); but it should not be surrendered even though at law not recoverable, if justly it should be retained. *Carpenter v. Southworth*, 21 A. B. R. 390, 165 Fed. 428 (C. C. A. N. Y.).

Page 1164. A "proof of debt" is not a proper method.

In *re Dorr*, 21 A. B. R. 752 (Ref. Calif.).

Page 1164. But it has been held that in reclamation proceedings, it is not necessary that the petition should describe the property claimed with that degree of definiteness and particularity required in a complaint and writ in an action of replevin.

In *re Pierce*, 19 A. B. R. 664, 157 Fed. 757 (C. C. A. N. Dak.): "It is conceded that the petition to the bankruptcy court is fatally defective because the property claimed was not specifically described. It is not necessary in cases of this sort that the property claimed be described with that degree of definiteness and particularity that is required in a complaint and writ in an action in replevin. It not infrequently happens that the claimant is unable to give in the first instance more than a general description of his property, and is compelled to rely upon the proofs at the hearing for its separation from other property of similar kind. A court of bankruptcy exercising equity powers may be depended upon to see that justice is done, and that no more is secured by the claimant than he is entitled to. Moreover, in the present case there were attached to the petition of the company invoices in which the property delivered under the contract was described minutely and in detail, and reference was made to them in the body of the petition. The order of the referee directing surrender to the claimant contained a like reference. This was sufficient in a case of this character."

Answer should be filed by him, and due hearing be had.

Compare practice on objections to claims, ante, § 841.

The hearing should not be had upon affidavits.

Analogously, In *re Bailey*, 19 A. B. R. 470, 156 Fed. 691 (D. C. N. Y.).

For the proceedings corresponds to an action of replevin; for which reason it is that the pleading is styled a petition, rather than a motion.

Page 164, note 129. **Costs on Dismissal of Reclamation Petition.**—Expense of preserving the property pending the hearing upon an unsuccessful petition for reclamation may be taxed against the claimant. In *re Schocket* (*Ex parte Blankenstein*), 24 A. B. R. 47, 177 Fed. 583 (D. C. R. I.).

When receiver's and trustee's commissions chargeable on granting petition for reclamation, see post, § 2111.

A deposition for proof of debt, though given probative effect, as prima facie evidence of a "claim," is not to be held evidence in a petition for reclamation, as apparently was the obiter holding in one case.

See ante, § 844; obiter, In *re McIntyre & Co.*, 24 A. B. R. 1, 176 Fed. 552 (C. C. A. N. Y.).

See ante, § 844; impliedly holding evidence of conversion, *In re McIntyre & Co.*, 24 A. B. R. 1, 176 Fed. 552 (C. C. A. N. Y.).

Indeed, such deposition, being that provided for proof of debts, would, rather, be an implied ratification of the conversion and admission that a mere debt exists—a waiver of the tort and a claiming upon contract.

After the case has been closed it should not be reopened for the admission of further testimony except upon good cause shown in accordance with the ordinary rule.

In re Booss, 18 A. B. R. 658, 154 Fed. 494 (D. C. Pa.), quoted at § 553½.

Of course, at the time of bankruptcy there are likely to be many articles in the bankrupt's possession that really do not belong to him and therefore do not belong to his creditors.

Infant Repudiating an Otherwise Preferential Bill of Sale, No Right to Priority on Theory of Return of Money Loaned by Him.—Where, after an infant's claim as a preferred creditor under a bill of sale given within the four months period, has been disallowed, because possession of the property covered thereby had not been given prior to the bankruptcy, the claimant, upon electing to disaffirm the bill of sale will be treated as a general creditor upon seeking to prove a claim for the loans made by him to the bankrupt. *In re Huntenberg*, 18 A. B. R. 697, 153 Fed. 768 (D. C. N. Y.).

Res Judicata and Collateral Attack.—As to questions of res judicata and collateral attack arising in such proceedings, compare, § 1771, et seq.; also, compare, *Ross v. Stroh*, 21 A. B. R. 644, 165 Fed. 628 (C. C. A. Pa.).

No estoppel, after creditors refuse offer of composition because of adverse claimant's standing by silently without claiming ownership before refusal, *In re Loll*, 20 A. B. R. 548, 162 Fed. 79 (D. C. Conn.).

§ 1877. Reclamation of Property Left for Repairs, Storage or Other Bailment.

Page 1165, note 130. Instance, reclamation refused, bill of sale found fraudulent, *In re Schlessel*, 18 A. B. R. 429 (Ref. N. Y.); instance, reclamation granted where verbal assignment of book accounts made and trustee collected same, *In re Macauley*, 18 A. B. R. 459, 158 Fed. 322 (D. C. Mich.); reclamation where patented articles left to be sold under terms of license, *In re Spitzel & Co.*, 21 A. B. R. 729, 168 Fed. 156 (D. C. N. Y.).

Page 1165. Likewise where goods are shipped to the bankrupt to be treated by him and then to be reshipped to the customer.

In re Susquehanna Roofing Co., 23 A. B. R. 5, 173 Fed. 150 (D. C. Ark.).

§ 1877¼. Of Property Sold on Approval, etc.

Thus, property sold to the bankrupt on approval and not accepted or where title has not passed for other reasons, may be reclaimed.

In re Planett Mfg. Co. (*Schultz v. Scott*), 19 A. B. R. 729, 157 Fed. 916 (C. C. A. Ind.); *Fridmore v. Puffer Mfg. Co.*, 20 A. B. R. 851, 163 Fed. 496 (C. C. A. S. Car.).

As goods sold on "sale and return."

In re Schindler, 19 A. B. R. 800, 158 Fed. 458 (D. C. N. Y.).

Goods sold with bill of lading attached to draft.

In re Reboulin Fils & Co., 21 A. B. R. 296, 165 Fed. 245 (D. C. N. J.).

Also a steam shovel, leased, with option to purchase not exercised within the time limited, but payment of rent continued.

McEwen v. Totten, 21 A. B. R. 336, 164 Fed. 837 (C. C. A. Ga.).

§ 1877½. Of Consigned Property.

Property left on consignment may be reclaimed.

Mathieu v. Goldberg, 19 A. B. R. 191, 156 Fed. 541 (D. C. N. Y.): "But the general rule I understand to be that a principal in the absence of an agreement, express or implied, to the contrary, has a right at any time to retake possession of unsold goods consigned to a factor, on payment of all advances and liens (19 Cyc., p. 117, and cases cited); and I do not think that the fact that Goldberg, under the arrangement, was to be paid for his services by a part of the profits instead of by the usual percentage makes the rule inapplicable."

Likewise, where by contract the proceeds of property left on consignment were to be held as a trust fund for the benefit of the seller such proceeds, if kept separate, at any rate, are reclaimable.

In re McGehee, 21 A. B. R. 656, 166 Fed. 928 (D. C. Ga.), quoted at § 1883.

§ 1878. Of Property Bought on Conditional Sale.

Property sold to the bankrupt on conditional sale is reclaimable—where it would be reclaimable under State law.

Instance, looms sold on conditional sale. Davis v. Crompton, 20 A. B. R. 53, 158 Fed. 735 (C. C. A. Pa.); instance, implements, In re Pierce, 19 A. B. R. 664, 157 Fed. 757 (C. C. A. N. D.); instance, steel rails, Nat'l Bank v. Williams, 20 A. B. R. 79, 159 Fed. 615 (C. C. A. Tex.); instance, In re Gray, 21 A. B. R. 375, 170 Fed. 638 (D. C. Okla.); instance, Reardon v. Rock Island Plow Co., 22 A. B. R. 26, 168 Fed. 654 (C. C. A. Ills.); Franklin v. Stoughton Wagon Co., 22 A. B. R. 63, 168 Fed. 857 (C. C. A. Okla.); instance, reclamation refused, In re Agnew, 23 A. B. R. 360 (D. C. Miss.).

York Mfg. Co. v. Brewster, 23 A. B. R. 474, 174 Fed. 566 (C. C. A. Tex.): "The appellant is entitled to have its property restored (In re Great Western Mfg. Co.); or, in lieu of the property, to payment of the debt to it according to the terms of the contract and notes exhibited with the intervening petition."

John Deere Plow Co. v. Anderson, 23 A. B. R. 480 (C. C. A. Ga.), 174 Fed. 815: "The trustee has no greater right in property sold under a conditional sale contract than the bankrupt had. * * * In this case the sale was undoubtedly valid as between the parties, and the plow company was therefore entitled to the property as against the trustee."

Or the proceeds of such property if the same are traceable into the trustee's hands.

In re Fabian, 18 A. B. R. 488, 151 Fed. 949 (D. C. Pa.); compare, § 1882; instance, looms sold on conditional sale, *Davis v. Crompton*, 20 A. B. R. 53, 158 Fed. 735 (C. C. A. Pa.); instance, steel rails, *Nat. Bank v. Williams*, 20 A. B. R. 79, 159 Fed. 615 (C. C. A. Tex.); instance, obiter, "corn popper," In re Grainger, 20 A. B. R. 166, 173, 160 Fed. 69 (C. C. A. Calif.).

Especially where such proceeds were to be held in trust for the seller.

In re McGehee, 21 A. B. R. 656, 166 Fed. 928 (D. C. Ga.).

And is not reclaimable where it would not be reclaimable under State law.

In re Burke, 22 A. B. R. 69, 168 Fed. 994 (D. C. Ga.).

As laid down by the highest tribunal of the State.

In re Burke, 22 A. B. R. 69, 168 Fed. 994 (D. C. Ga.).

As, for instance, where it is in reality an absolute sale disguised as one on condition.

Compare instances, ante, § 1228; In re Rinker, 23 A. B. R. 62, 174 Fed. 490 (D. C. Pa.).

But the conditional seller need not assert his rights by way of reclaiming the property in kind, but, in most States, may have the property sold and the proceeds applied on the balance of the purchase price, on the theory of equitable lien.

In re Max Goldman, 23 A. B. R. 497, 174 Fed. 579 (C. C. A. Ohio): "In equity the reserved title of the vendor is regarded as in the nature of a security for the payment of the price, and in some States it is held that such a conditional sale is the equivalent of an out and out sale and a mortgage back to secure the payment of the purchase money. At law the transfer of the property gives to the vendee the right to the possession so long as he is performing his agreement to pay. But, when he fails to do this, his right to the possession ceases, and he then holds it for the vendor. But in equity these considerations are regarded as technical merely, and the court will look to see whether the vendor has such a hold or claim upon the property as entitles him to subject it to the payment of the purchase money. The maxim that equity follows the law is inapt where the legal remedy is inadequate to the enforcement of equitable rights. 16 Cyc. 137. There are many instances in the law of sales where even at the common law a lien is implied for the protection of the vendor in cases of ordinary sales. Although the agreement is perfected so as to pass the title for most purposes, still the vendor is allowed a lien for the price, while it remains in his own possession; or where he has delivered it to a common carrier according to agreement and the carrier is held to be the agent of the vendee for the purpose of accepting delivery, the vendor is allowed the privilege of recaption in transitu if the vendee becomes insolvent or becomes bankrupt, and in equity the vendor of real property is given a lien, a claim, a

hold upon it, notwithstanding it has gone into the possession of the vendee, and no agreement for a lien has been made."

Statute Requiring Refund on Taking Possession, Not Applicable When Property Sold Rather than Reclaimed.—In the event that the conditional seller does not petition for reclamation but asks the court either to pay him from the proceeds, a statute requiring refund on taking possession will not be applicable. In *re Max Goldman*, 23 A. B. R. 497, 174 Fed. 579 (C. C. A. Ohio): "It does not provide a remedy which is precisely according to the principles of equity, for it is provided that the refunding by the vendor shall not be required unless the amount he has received exceeds 25 per cent. of the contract price. If the vendor, instead of taking back the property, should foreclose the vendee's right by a proceeding in equity, there would be no such limitation. On the other hand, as the law then stood, the vendor, treating the title of the property reserved by the contract as a security for the payment of the price, might file his bill in equity to obtain a judicial sale of the property and an appropriation of the proceeds to the payment of the debt. By the latter course the equity of the vendee was protected by the conscience of the court and its power of control over the sale. He suffered no wrong of which he could complain. That the vendor has the right to proceed in this manner, we think, cannot be doubted. It is a favorite jurisdiction of equity to relieve against forfeitures, and the practice of this remedy will subserve the purposes of justice in such cases."

§ 1879. Of Goods Bought under Misrepresentations or While Grossly Insolvent.

Page 1165, note 132. Compare, where rescission and seizure on replevin occurred before bankruptcy court took possession, under the doctrine enunciated at § 1585, ante, *William Openhym & Sons v. Blake*, 19 A. B. R. 639, 157 Fed. 536 (C. C. A. Mo.), quoted at § 1585.

Page 1166, note 133. See, in addition, *In re American Knit Goods Mfg. Co.*, 19 A. B. R. 212, 155 Fed. 906 (D. C. N. Y.).

Page 1166. Thus where a buyer mortgaged or assigned all its assets between the time of giving its order and the time of the delivery of the goods, rescission and reclamation have been allowed, the facts indicating design.

Haywood Co. v. Pittsburgh Industrial Iron Works, 19 A. B. R. 780, 163 Fed. 799 (D. C. Pa.).

Likewise, it has been refused where the seller knew the buyer was in failing circumstances, and was unreliable in his statements as to financial condition.

In re Sweeney, 21 A. B. R. 866, 168 Fed. 612 (C. C. A. Tenn.).

Page 1167. The right of reclamation is lost if the seller proves his claim as a creditor.

Lynch v. Bronson, 20 A. B. R. 409, 160 Fed. 139 (D. C. Conn.), quoted at § 639.

§ 1879¼. Election to Rescind.

If the transferee elects to rescind he must proceed promptly, and after having made his election, he will be bound.

Compare, analogously, to same effect, *Thomas v. Sugerman*, 19 A. B. R. 509, 157 Fed. 669 (C. C. A. N. Y.).

Proof of Claim as Unsecured Debt, Not Waiver of "Vendor's Privilege" to Reclaim in Louisiana.—*Sessler v. Paducah Distilleries Co.*, 21 A. B. R. 723, 168 Fed. 44 (C. C. A. La.).

In *re Kenyon*, 19 A. B. R. 194, 156 Fed. 863 (D. C. Ohio): "Having made proof of his claim and secured its allowance, he is, in the absence of inadvertence, fraud or mistake, none of which are alleged, bound thereby, because when a creditor makes proof of his claim against a bankrupt's estate, he stands in the position of a plaintiff at law and becomes a party to the suit."

Varnish Works v. Haydock, 16 A. B. R. 286, 143 Fed. 318 (C. C. A.): "As the referee properly said in his opinion, it was open to the petitioner, the purchase having been procured by fraud, to elect whether to confirm the sale notwithstanding, and maintain the position of a creditor for the price, or to repudiate the sale and recover the goods. But the vendor must make his election promptly on discovery of the fraud. This is the settled law. Upon this principle Judge Ray held in *In re Hildebrandt*, 10 Am. B. R. 184, 120 Fed. 992, that a vendor could not affirm the contract of sale as to part of the goods, and claim the price and disaffirm as to another part, and recover the goods in specie. And see *Seavey v. Potter*, 121 Mass. 297. And having made his election in such circumstances, the vendor makes it once for all. *Kennedy v. Thorp*, 51 N. Y. 174; *Moller v. Tuska*, 87 N. Y. 166; *Heller v. Elliott*, 44 N. J. L. 467; *Carter v. Smith*, 23 Wis. 497. The petition did not state when the petitioner became aware of the falsity of the bankrupt's representations of its solvency and of its fraudulent purpose, or whether it was before or after the petitioner proved its claim and participated in the proceedings as a creditor. And if, as it has in some cases been held, the burden of proof that the election was made with knowledge of the facts is upon the party who urges the estoppel, it would be difficult to resist the conviction that the circumstances attending the assignment and the adjudication of bankruptcy were sufficient to have shown the petitioner that the bankrupt in procuring the goods had made false representations in regard to its solvency. Not only did the petition make no claim that the petitioner was ignorant, at the time of proving its claim, of the facts in regard to the representations of the bankrupt and of its intention in making the purchase, but the facts stated by the referee are sufficient, *prima facie*, to support the conclusion that the petitioner had knowledge of the essential facts when it voted for the trustee. In these circumstances, the election of the petitioner to prove its claim as a general creditor was final. There is good ground for saying that it was too late for the exercise of an election after the petitioner had joined the general creditors in shaping and carrying forward the bankruptcy proceedings and influencing their associates in their action. The suggestion that the proceedings probably would have been the same without the petitioner's co-operation cannot avail. The assumption of the position of a general creditor toward the assets would naturally be a strong inducement to the other creditors in pursuing the bankruptcy

proceedings, for this would imply a sharing of the assets, and this result would be defeated if their associates were permitted to turn about and reclaim the assets in specie."

§ 1879½. Delay in Rescission.

In bankruptcy the usual rules prevail as to the necessity for diligence in rescission and of putting the parties in statu quo.

Compare [William] Openhym & Sons v. Blake, 19 A. B. R. 639, 157 Fed. 536 (C. C. A. Mo.): "We do not think appellants should be denied relief because they delayed intervening in the bankruptcy court until after a partial dividend was declared. The fraud was practiced on appellants and the goods obtained July 13th, the sale was rescinded August 21st, and the intervening petition was filed in the bankruptcy court December 21st. At all times after the rescission of the sale the purpose of appellants to rely thereon was manifest. They were fairly diligent in the assertion of their rights, and no one seems to have been prejudiced by the short delay that occurred. That the filing of the intervening petition was delayed until after the dividend injured no one. The trustee and the court were aware that appellants had rescinded the sale, and the dividend took but a part of the funds on hand. There remained more than enough to pay the appellants, and had the intervening petition been presented and allowed much earlier the same dividend would probably have been declared. At least no reason appears why it should not have been."

§ 1879¾. Subrogation to Right of Reclamation.

Where a surety has paid the claim afterwards, or it has been assigned, the surety or assignee may be subrogated to the right of reclamation.

Sessler v. Paducah Distilleries Co., 21 A. B. R. 723, 168 Fed. 44 (C. C. A. La.): " * * * it is also contended that, as Menard Bros. took no express subrogation at the time of payment, they acquired no rights of the original creditor to rescind the sale. There may be some doubt as to whether any subrogation took place by contract; but as Menard Bros. were sureties * * * and paid the debt, we think they are legally subrogated under the Louisiana Code. * * * We have no doubt about the right of a surety to prosecute his claim in bankruptcy in the name of the principal creditor, when subrogation takes place after proof of debt."

§ 1880. Reclaiming Part Still in Trustee's Hands, Proving Claim for Balance.

Page 1168. Although, on reason, it would seem that such course would amount to affirming and denying contractual relations at the same time.

Compare discussion, ante, § 638.

However, the distinction seems to be that so long as the original contract of sale is not affirmed, but that what is affirmed is only the implied contract to pay for goods converted, as if bought, there is no inconsistency.

§ 1882. **Converted Property or Its Traced Proceeds, Reclaimable.**

Property converted by the bankrupt may be recovered; so may its proceeds if they can be identified and traced.

Compare, *In re Grainger*, 20 A. B. R. 166, 160 Fed. 69 (C. C. A. Calif.); compare, analogously, where order is on third person, *In re Rose Shoe Mfg. Co.*, 21 A. B. R. 725, 168 Fed. 39 (C. C. A. N. Y.).

Page 1168, note 148. See also, § 1883; *In re Dorr*, 21 A. B. R. 752 (Ref. Calif.); *In re Brunsing, Tolle & Postel*, 22 A. B. R. 129, 169 Fed. 668 (D. C. Calif.), quoted at § 1883.

Waiving Tort and Affirming Contractual Relations.—See ante, § 638. See also, *Thomas v. Taggart*, 19 A. B. R. 710, 209 U. S. 385, wherein the Supreme Court held that where the customer's proof of claim contained a reservation of whatever rights he had against the bankrupts or either of them, for or on account of their failure to return the stock covered by the receipt, he was not precluded after discovery that his shares of stock had been returned to the trustee in bankruptcy, from reclaiming them as his own property, though he had actively participated at the meetings held for the election of trustee. See also, *In re Berry*, 23 A. B. R. 27, 174 Fed. 409 (C. C. A.), growing out of the same bankruptcy.

Page 1169. *Thomas v. Taggart*, 19 A. B. R. 710, 209 U. S. 385: "The rule is generally recognized that if the title to property claimed is good as against the bankrupt and his creditors at the time the trustee's title accrued, the title does not pass and the property should be restored to its true owner; or, if the property has been sold, the proceeds of the sale takes the place of the property."

Page 1169. Thus, converted shares of stock or the proceeds of converted shares of stock in a stockbroker's hands where the relation between the stockbroker and his customer is held to be that of pledgee and pledgor or bailee and bailor rather than that of debtor and creditor, may be traced, and recovered.

Instance, transfer by bankrupt stockbroker under forged powers of attorney, *Unity Banking & Sav. Co. v. Boyden*, 20 A. B. R. 264, 159 Fed. 916 (C. C. A. Ohio).

Page 1169, note 149. See ante, § 1313. See, in addition, *Thomas v. Taggart*, 19 A. B. R. 710, 209 U. S. 385 (affirming *In re Berry & Co.*, 17 A. B. R. 467, 147 Fed. 208); analogously, *Richardson v. Shaw*, 19 A. B. R. 717, 209 U. S. 365; *In re (Fred) Dorr*, 21 A. B. R. 752 (Ref. Calif.); *In re Brown & Co.*, 22 A. B. R. 659, 171 Fed. 281 (D. C. N. Y.); compare, *In re Meadows, Williams & Co.*, 23 A. B. R. 124, 173 Fed. 694 (D. C. N. Y.), where were involved the rights of the parties where stock, paid for by a customer, was bought through a correspondent in another city, who retained the stock as security for the purchase price which the bankrupt never transmitted, the correspondent meanwhile also having a lien on the bankrupt's seat in a stock exchange to secure any unpaid balance between the two; also, see *Denison v. Emery*, 153 Fed. 427 (C. C., affirmed sub nom. *Harmon v. Sprague*, 163 Fed. 486), involving the rights of parties in much the same relation as in *Meadows, Williams & Co.*, supra.

Instance, where conversion held not proved. *In re McIntyre & Co.*, 24 A. B. R. 1, 176 Fed. 552 (C. C. A. N. Y.): "The basis of the claimant's demand is the conversion of his stock. The only evidence tending to establish a conversion is the entries in the stock record book showing that upon one particular day there was a difference of only five shares between the receipts and deliveries of distillers stock. From this testimony the claimant seeks to draw the inference that on that day the brokers must have disposed of, and consequently, have converted his stock. But the testimony does not warrant the drawing of this inference. There is nothing to show that if the claimant had demanded his stock on the day in question he would not have received it. The entries do not show necessarily that the brokers did not have under their control sufficient shares to make delivery. They may, in regular course of business, have parted with the possession of as many shares as they received and yet have retained subject to their absolute control in the possession of another sufficient stock to meet the claimant's demand. If they did this there was no conversion."

Remedies Where Bankrupt Broker Has Converted Customer's Stock.—Where a bankrupt broker has converted his customer's stock several remedies are open to the customer: (1) An action of tort for the conversion; (2) waiver of tort and suit for proceeds; (3) following of proceeds as trust fund; (4) breach of contract; (5) assumpsit on implied contract to refund the money paid, [partially, combining (2) and (3), as to which see ante, § 638], see *In re A. O. Brown*, 23 A. B. R. 423, 175 Fed. 769 (C. C. A. N. Y.).

Thus, the proceeds of goods sold to the bankrupt on conditional sale may be ordered surrendered, where the sale was valid as against the trustee and the proceeds are successfully traced.

In re Fabian, 18 A. B. R. 488, 151 Fed. 949 (D. C. Pa.).

The right of reclamation is lost if the owner, or fraudulently induced seller, files his claim as a creditor.

Lynch v. Bronson, 20 A. B. R. 409, 160 Fed. 139 (D. C. Conn.), quoted at § 639: but compare, analogously, *Sessler v. Paducah Distilleries Co.*, 21 A. B. R. 723, 168 Fed. 44 (C. C. A. La.).

In re Berry, 23 A. B. R. 27, 174 Fed. 409 (C. C. A.): "This is a petition to revise an order of the District Court affirming the report of a special master to the effect that the petitioner had elected to prove against the estate for the value of stock wrongfully hypothecated by the bankrupts, and therefore could not subsequently claim the stock or its profits specifically. It is to be inferred from the opinion of the Supreme Court in *Thomas v. Taggart*, 209 U. S. 385, 19 Am. B. R. 710, that a creditor who does this without making any reservation has finally elected his remedy."

Unless the filing of the claim was made without knowledge of all the facts, or in ignorance of legal rights.

Obiter, *In re Berry*, 23 A. B. R. 27, 174 Fed. 409 (C. C. A.): "If the record in this matter showed that the petitioner made his claim without knowledge of all the facts, or even in ignorance of his legal rights to

follow the certificates or their proceeds, the situation might be different, but it does not. On the contrary, the special master and the district judge both found that he acted with full knowledge of all the facts. The situation he is now in is not due to his laches or to any estoppel arising out of anything done to the prejudice of others, but to the fact that he has deliberately elected a remedy inconsistent with the claim he now makes."

A fortiori, certificates of stock, bought and paid for by a customer before the bankruptcy of a stock broker, and issued in the customer's name, obviously must be surrendered to the claimant.

In re Meadows; Williams & Co., 24 A. B. R. 251, 177 Fed. 1004 (C. C. A. N. Y.), affirming 23 A. B. R. 124, 173 Fed. 694).

§ 1883. "Tracing Trust Funds."

Page 1169, note 150. Impliedly, In re Brown, 22 A. B. R. 659, 171 Fed. 281 (D. C. N. Y.).

Page 1170. In re McGehee, 21 A. B. R. 656, 166 Fed. 928 (D. C. Ga.): "The Troup Company and McGehee had the right to make any contract as between themselves they saw proper, so far as the matters in controversy here are concerned. There is nothing illegal or wrong about the agreement between them, and as to them it would seem that the Troup Company had the right to claim all notes, accounts, and proceeds of sale of fertilizers in the hands of McGehee as its property until the notes due the company for fertilizers were paid. Treated either as a reservation of title or as an equitable lien arising from a written agreement between the parties, it is certainly valid as between them. Of course, this claim of the Troup Company would be subject to any intervening liens or conveyances without notice, inasmuch as the agreement was never recorded. It would also be subject to the rights of parties who gave credit to McGehee on the strength of his supposed ownership of this property without notice of any kind. Where money had been received from the fertilizers, and had gone into the general funds of McGehee, of course, there would be no rights on the part of the Troup Company. How far the creditors may have obtained rights to which the Troup Company's claims of priority should be subordinated is not shown by this record."

Obiter, Block, trustee v. Rice, trustee, 21 A. B. R. 691, 167 Fed. 693 (D. C. Pa.): "It may be conceded that if Rice collected \$750.00 of trust funds belonging to the Fine bankruptcy estate and held it intact in a separate fund, or if it be shown that he received the money and deposited it in his own bank account and that at all times after the receipt of the trust fund and its deposit that the net balance of his bank account exceeded the amount of the trust fund, that upon application, the Fine bankruptcy estate, by an order of court, could have secured possession of the fund so held by Rice, and under these conditions it may be that as against Rice's creditors a voluntary payment of this trust fund by Rice to the Fine bankruptcy estate within four months of the time of filing a petition in bankruptcy against him would be a lawful payment, although Rice knew at the time he was insolvent, and that such a payment would not be held to be preferential under the act." Quoted further at § 1884.

In re Acheson Co., 22 A. B. R. 338, 170 Fed. 427 (C. C. A. Ore.): "The doctrine of equity as sustained by the Supreme Court in National Bank v.

Insurance Co., 104 U. S. 65, 26 L. Ed. 693, approving the rule in Hallett's Estate, 13 Ch. Div. 696, 36 Moak's Eng. Rep. 779, is that if property is intrusted to another to sell and pay over the proceeds, and sale is made, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify them. If the proceeds cannot be identified because the trust money is mingled with the money of the trustee, then the cestui que trust is entitled to a charge upon the new investment to the extent of the trust money traceable into it. Justice Matthews writes of the rule as going far enough to cover not alone express trustees and agents, but bailees, rent collectors, or 'anybody else in a fiduciary position,' and as making 'no difference between investments in the purchase of lands or chattels or bonds or loans or moneys deposited in a bank account,' and he shows very clearly that the foundation of the doctrine rests upon the 'very idea of trusts,' which can only be preserved by a strict enforcement of the principle that one who holds a relationship of trust is not allowed to make private use of trust property."

Page 1170, note 151. In re Smith, Thorndyke & Brown Co., 20 A. B. R. 312, 159 Fed. 268 (D. C. Wis., affirmed in 22 A. B. R. 350, 170 Fed. 900), quoted at § 1884; impliedly, as to part, In re McGehee, 21 A. B. R. 656, 166 Fed. 928 (D. C. Ga.), quoted supra; Block, trustee, v. Rice, trustee, 21 A. B. R. 691, 167 Fed. 693 (D. C. Pa.), quoted at § 1883 and at § 1884; In re (Fred) Dorr, 21 A. B. R. 752 (Ref. Calif.); In re Acheson Co., 22 A. B. R. 338, 170 Fed. 427 (C. C. A. Ore.), quoted post, § 1884; In re Smith, Thorndyke & Brown, 22 A. B. R. 350, 170 Fed. 900 (C. C. A. Wis., affirming 20 A. B. R. 312, 159 Fed. 268); In re A. O. Brown, 23 A. B. R. 423, 175 Fed. 769 (C. C. A. N. Y.).

Page 1171. In re Kearney, 21 A. B. R. 721, 167 Fed. 995 (D. C. Pa.): "Since, therefore, the money was not traced into a particular fund or deposit or earmarked in any other way, the inevitable inference is that the check of May 25th was drawn against the general funds of the bankrupt, and was intended to prefer the payee, * * * After the trustee had established a prima facie case of preference, it then became the duty of the claimant to prove that the loan was impressed with a trust, and that the money could be followed, either with precision, or at least into a mass from which it might be extracted with reasonable certainty."

In re Brunsing, Tolle & Postel, 22 A. B. R. 129, 169 Fed. 668 (D. C. Calif.): "The deposit, constituting the trust fund, is not, by the findings of the referee, sufficiently traced as part of the assets of the bankrupt estate. The rule applicable in cases like this is thus stated by Gilbert, J., in Spokane County v. National Bank, 68 Fed. 979, 16 C. C. A. 81: 'Both the settled principles of equity and the weight of authority sustain the view that the plaintiff's right to establish his trust and recover his fund must depend upon his ability to prove that his property is in its original or a substituted form in the hand of the defendant.' In other words, the depositor is not entitled to an equitable lien upon the entire mass of the estate of the bankrupt, but only upon that portion of it into which his deposit can be traced. In the well-considered case of Cavin v. Gleason, 105 N. Y. 257, 11 N. E. 506, the court said: 'It is clear, we think, that upon an accounting in bankruptcy or insolvency a trust creditor is not entitled to a preference over general creditors of the insolvent merely on the ground of the nature of his claim; that is, that he is a trust creditor, as distinguished from a general creditor. We know of no authority for such

a contention. The equitable doctrine that as between creditors equality is equity admits, so far as we know, of no exception founded on the greater supposed sacredness of one debt, or that it arose out of a violation of duty, or that its loss involves greater apparent hardship in one case than another, unless it appears in addition that there is some specific recognized equity founded on some agreement, or the relation of the debt to the assigned property, which entitled the claimant, according to equitable principles, to the preferential payment." Quoted further at § 1884.

In re Acheson Co., 22 A. B. R. 338, 170 Fed. 427 (C. C. A. Ore.): "We do not mean 'to be understood as holding that equity will grant to a cestui que trust relief against any assets in the hands of a trustee, for it will not go farther than to give a lien when the facts are that there remain in the estate specific funds or property which have increased the assets of the estate, and which represent the proceeds of the specific property intrusted to the bankrupt. * * * Moreover, if there has been expenditure, and the funds are gone, and no specific property or money is found instead of the funds, it is inequitable that some other property found should be applied to pay one creditor in preference to another. So, funds that have been dissipated or that have been used to pay other creditors, or that have been spent to pay current business expenses, are not recoverable, because they are gone, and there is nothing remaining to be the subject of the trust."

Page 1171, note 153. Compare, § 1884; Block, trustee, v. Rice, trustee, 21 A. B. R. 691, 167 Fed. 693 (D. C. Pa.), quoted supra; In re Kearney, 21 A. B. R. 721, 167 Fed. 995 (D. C. Pa.), quoted supra; In re Acheson Co., 22 A. B. R. 338, 170 Fed. 427 (C. C. A. Ore.), quoted post, § 1884.

But compare, obiter, wherein the court seems to fail to note that the deposition is, at best, merely prima facie proof of "debt," not proof of "conversion," In re McIntyre & Co., 24 A. B. R. 1, 176 Fed. 552 (C. C. A. N. Y.): "He contends, however, that the allegations of his proof of claim constituted prima facie evidence of conversion and that the burden was upon those objecting to his claim to show that the bankrupts at all times had their shares or their equivalent in their possession or under their control. Concededly this was not affirmatively shown, and, consequently, he urges that his claim must stand as established. It is undoubtedly true that a sworn proof of claim has probative force. It is prima facie evidence of its allegations even when objected to. There would, therefore, be much force in the claimant's contention if he had taken the same position before the referee. He might properly have stood upon his proof of claim and have insisted that the objections should go forward. But he did not do so. He offered to establish the allegations of his proof of claim by the entries in the stock record book and contended that the inference to be drawn therefrom supported the charge of conversion. Having thus attempted to establish the allegations in his proof of claim, he cannot be permitted to use those very allegations to supply the deficiencies in his testimony. A proof of claim may have some probative force but it certainly should not be regarded as selfproving unless relied upon."

Page 1171, note 154. See, in addition, In re Dorr, 21 A. B. R. 752 (Ref. Calif.).

Page 1172, note 154. (e) Also similar stock bought, after conversion of customer's stock, presumed bought to replace converted shares, In re Brown & Co., 22 A. B. R. 659, 171 Fed. 281 (D. C. N. Y.).

(m) Bank remitting to bankrupts the proceeds of a collection, in ignorance of the bankrupt's retention of the proceeds of a counter collection; no trust, *In re Northrup*, 20 A. B. R. 86, 159 Fed. 686 (C. C. A. N. Y.).

(n) Infant repudiating contract of employment may not have priority not allowed by § 64 (b) on the theory that he is asking for the proceeds of labor, title to which, by the repudiation, did not pass to the trustee, *In re Huntenberg*, 18 A. B. R. 697, 153 Fed. 768 (D. C. N. Y.).

(o) Proceeds of note and stock held by bankrupts as trustees under a will but "loaned" to themselves, *Hatch v. Curtin*, 19 A. B. R. 82, 154 Fed. 791 (C. C. A. Mass.).

(p) Notes, accounts and other proceeds of sale of goods, where the contract provided that the goods should remain the property of the seller until sold and that the proceeds of sale including notes, accounts, etc., should be kept separate as a trust fund to be turned over to the seller as collateral security, *In re McGehee*, 21 A. B. R. 656, 166 Fed. 928 (D. C. Ga.).

(q) Trustee in bankruptcy himself becoming bankrupt—funds of estate not successfully traced, *Block, trustee, v. Rice, trustee*, 21 A. B. R. 691, 167 Fed. 693 (D. C. Pa.), quoted at §§ 1883, 1884.

(r) Money loaned to pay for license not traced, *In re Kearney*, 21 A. B. R. 721, 167 Fed. 995 (D. C. Pa.).

(s) Funds of a grocers' association deposited by its treasurer in the funds of a trading corporation of which he was also president and which became bankrupt, *In re Smith, Thorndyke & Brown*, 22 A. B. R. 350, 170 Fed. 900 (C. C. A. Wis.).

(t) Stock paid for by customer but still in hands of correspondent of stock broker in another city, who is retaining it as security for unpaid balance between correspondent and bankrupt, bankrupt having failed to remit price, such correspondent also having lien on bankrupt's stock exchange seat, *In re Meadows, Williams & Co.*, 23 A. B. R. 124, 173 Fed. 694 (D. C. N. Y.).

Page 1173. But a trust must exist, else tracing will not avail.

In re Northrup, 20 A. B. R. 86, 159 Fed. 686 (C. C. A. N. Y.): "The conversation was wholly inadequate to vest in the Syracuse Bank any title—equitable or other—in the collections which it remitted for, or to operate as a substitution of funds. It did not constitute a declaration of trust."

And in the absence of an express trust there must be some breach of good faith, or some fraud or unconscientious conduct to give rise to the equity.

In re Smith, Thorndyke & Brown, 20 A. B. R. 312, 159 Fed. 268 (D. C. Wis.): "It is sometimes profitable to lay aside elaborate briefs, burdened with a multitude of citations, and refer to an elementary principle, which is, after all, the pivot upon which the case must turn. Much has been said in the argument about trusts and trustees, trust moneys, etc. As applied to this case the word 'trust' is little more than a figure of speech. It is called by the law writers a constructive trust. Mr. Pomeroy, in his work on *Equitable Jurisprudence* (section 1044), uses the term 'trust in invitum,' and the learned author well describes how and why the court of equity has resorted to this fiction to facilitate its peculiar jurisdiction and to work out justice in peculiar cases. It is elementary that, in every instance where the court

creates this quasi trust relation, it must find either actual fraud or some unconscientious conduct. In such case the court will fasten upon the property in the hands of the offending party and will convert him into a trustee of the legal title. It may be nothing more than a breach of good faith, as a mingling by an agent of the funds of his principle with his own moneys, or the receipt of a deposit by the officers of a bank when they know the bank to be hopelessly insolvent. There are innumerable variations of tortious conduct which will warrant this interposition of a court of equity; but in every such case there must be at the bottom some unfair dealing or wrongdoing. In the instant case the evidence shows without contradiction that Smith, as treasurer of the Grocers' Association, was at liberty to deposit its funds with the Smith, Thorndyke & Brown Company, that such company were to use such funds, and that disbursements therefrom were to be made by checks upon such company; in other words, nothing has been done either by Smith, or the Smith, Thorndyke & Brown Company, which was not contemplated by the parties, and therefore there would appear to be no just occasion for the application of the trust doctrine."

And a mere general deposit, giving rise to the relation of debtor and creditor rather than to that of bailee and bailor, or trustee and cestui qui trust, will not constitute a "trust fund."

In re Smith, Thorndyke & Brown, 20 A. B. R. 312, 159 Fed. 268 (D. C. Wis.): "The Grocers' Association had practically consented to employ Smith, Thorndyke & Brown as a bank. * * * There is in the present case no semblance of bailment, because the deposit was general, not special. All that was required of Smith, Thorndyke & Brown Company was to return on demand an equivalent sum. Can there be any doubt, therefore, that as between these original parties there subsisted the relation of debtor and creditor? And, if so, Mrs. Smith by virtue of her assignment became a creditor, and must share *pari passu* with other creditors under the terms of the Bankruptcy Act."

In re Nichols, 22 A. B. R. 216, 166 Fed. 603 (D. C. N. Y.): "Wheeler drew his checks against this from time to time, and it appears from the book that at times he made an overdraft, and that at other times there was a large amount to his credit. There was no agreement that Nichols should hold and keep these moneys separate and distinct from his other funds, or that he should not use them in the usual course of his banking business. The relation of the parties was that of debtor and creditor. Nichols, of course, knew that he was receiving the funds of the town, as he knew that Wheeler was the supervisor thereof, and that the funds deposited by Wheeler as supervisor were held by him in that capacity, and for the town and the school districts, etc. This, however, gave Wheeler no lien of claim upon the funds or moneys of Nichols. So far as capable of identification Wheeler could have held the funds as against the other creditors of the bankrupt, but no further."

§ 1884. Commingling of Trust Funds or Trust Property.

Page 1173, note 155. In re McGehee, 21 A. B. R. 656, 166 Fed. 928 (D. C. Ga.), quoted at § 1883, is not contra, for there, doubtless, the "general fund" mentioned did not refer to an existent actual fund or deposit, but

probably referred to the fact that the proceeds had already been spent for general purposes. See, *obiter*, *In re A. O. Brown*, 23 A. B. R. 423, 175 Fed. 769 (C. C. A. N. Y.).

Page 1175. *Block, trustee, v. Rice, trustee*, 21 A. B. R. 691, 167 Fed. 693 (D. C. Pa.): "But the difficulty the defendant encounters in setting up that defense here is that his right to follow this trust fund in the possession of Rice depends upon it having been kept separate, or upon its having been received by him, deposited in bank, and the net balance of his bank account at all times exceeding the \$750.00, and this must be made to appear by him to the satisfaction of the jury. The burden of showing this rests upon him. I recall no evidence whatever in the case to this effect." Quoted further *ante*, § 1883.

In re Brunsing, Tolle & Postel, 22 A. B. R. 129, 169 Fed. 668 (D. C. Calif.): "Of course, under this rule, it was not incumbent on the depositor, in the present case, to show that the identical merchandise purchased with his money passed into the hands of the trustee. If such merchandise was commingled with the bankrupt's general stock, and this general stock or the proceeds arising from the sale thereof, whether money, credits, or other property, can be shown to form a part of the assets of the bankrupt estate, the depositor would be entitled to an equitable preference in the distribution of such estate. In the case of *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504, above cited, the court, after stating that it is the general rule, as well in a court of equity as in a court of law, that in order to follow trust funds and subject them to the operation of the trust they must be identified, proceeded to say: 'A court of equity, in pursuing the inquiry and in administering relief, is less hampered by technical difficulties than a court of law, and it may be sufficient, to entitle a party to equitable preference in the distribution of a fund in insolvency, that it appears that the fund or property of the insolvent remaining for distribution includes the proceeds of the trust estate, although it may be impossible to point out the precise thing in which the trust fund has been invested, or the precise time when the conversion took place. The authorities require at least this degree of distinctness in the proof before preference can be awarded.'" Quoted further at § 1883.

Page 1176. At any rate, such will be the case where at no time an adverse balance occurs.

In re A. O. Brown, 23 A. B. R. 423, 175 Fed. 769 (C. C. A. N. Y.).

Page 1176. But an adverse balance or an entire drawing out of all funds occurring at any time will destroy the tracing of the fund.

In re Smith, Thorndyke & Brown, 22 A. B. R. 350, 170 Fed. 900 (C. C. A. Wis.).

Page 1176. *In re Smith, Thorndyke & Brown*, 20 A. B. R. 312, 159 Fed. 268 (D. C. Wis., affirmed in *In re Smith, Thorndyke & Brown Co.*, 22 A. B. R. 350, 170 Fed. 900 C. C. A.): "There is another principle which would be equally fatal to the contention of the claimant. It appears that in February, 1907, the Smith, Thorndyke & Brown Company, being temporarily embarrassed, but supposed on all hands to be solvent, called in an attorney to look over its books, who found this account with Smith as treasurer appearing only

upon the cash book, and showing a debit balance against the Smith, Thorndyke & Brown Company of about \$4,000, which had not been paid because the company had not funds available to pay the same. The attorney advised that this account should be transferred to the general ledger of the company, and that Smith should at once open an account with the bank as treasurer of the Grocers' Association, and thereafter deposit all funds of the association with the bank, which course was pursued. Between that time and June 10, 1907, the date of the filing of the petition in bankruptcy, this balance of \$4,000 was reduced to \$2,156. Not a dollar of the association money came to the Smith, Thorndyke & Brown Company after February, 1907. The general bank balance of Smith, Thorndyke & Brown Company was appropriated by the bank under a banker's lien, which proceeding was sanctioned by the court, and no part of such money came to the hands of the trustee. Thus it appears that no part of the sum claimed ever found its way into the assets of the estate. It had been spent and dissipated four months before the bankruptcy proceedings. Under such circumstances no equitable doctrine could be invoked to appropriate general assets of the estate belonging to general creditors to make good this antecedent deficit; no portion of the fund having been traced into the estate."

Thus, where the deposit was not special, but general.

But where the trust funds are commingled, not only with private funds, but with other trust funds; and, after checking out, there remains at any time less than the trust fund in controversy, the claimants had failed pro tanto in tracing out their fund.

It has been held that where shares of stock belonging to a customer have been converted by a broker, other similar shares, subsequently purchased, will be presumed to have been bought to replace them, unless there were other customers of similar stock, in which event all would be entitled thereto as tenants in common.

In re Brown, 22 A. B. R. 659, 171 Fed. 281 (D. C. N. Y.): "The question is whether we should not assume that the broker, in taking from other funds enough to buy an equal number of shares of stock, did not intend pro tanto to attribute that much of his own funds to making good his default. By way of analogy, suppose that an agent depletes a bank deposit made in his name as agent. Subsequent deposits in that fund would go to make good the former conversion, and the general creditors could not complain. * * * He may make good his default out of his own property, and all that is necessary is some unequivocal appropriation of the property to that effect. Of course, in that case the appropriation was unambiguous, and here we must adopt a presumption; but the question is whether such a presumption is not usually borne out in fact. I think it is. I believe that brokers do usually mean their stocks on hand in the first instance to belong to their customers until they have enough to answer their obligations. If the bankrupts in this case in fact had no such intention, the receiver must show it. A manifest intention being enough, however, I shall adopt the presumption that the purchase of similar stock to that converted is the manifestation of such an intention. A more difficult question of fact arises in case the stock on hand turns out not to be enough to meet all the obligations to customers. Still in that case I think I must likewise assume in

the absence of contradictory evidence, that the broker's intention was to contribute so much of the assets as he invested in this stock in general toward the fulfillment of such obligations. Each share being of equal value and unidentified, he cannot be said to have favored one customer rather than another; nor can I say that, because all the obligations are not fulfilled by the stock which is left, therefore I must assume that he had no intention whatever of fulfilling any part of them. Of course, he did not complete his intention; but so far as he went I think I must assume that he intended to replace the stock which he should have, but did not have, on hand. To adopt the analogy suggested by Mr. Justice Holmes in his opinion in *Richardson v. Shaw*, *supra*, suppose an elevator man has depleted the elevator below the amount due to all depositors; when he subsequently puts back into the elevator enough, or part of enough, wheat to answer his obligations to all, the claimants become co-owners of it. Could the elevator man's general creditors claim that they were entitled to the subsequent accretions? Or suppose it could be shown that he had entirely emptied the grain elevator; is there any doubt that his subsequent filling of it, or partial filling of it, must be assumed to be an appropriation by him of so much of his property to make good his conversion? The analogy in law seems to me to be complete in spite of the diversity of the subject-matter."

Page 1176, note 157. Compare, *Smith v. Township*, 17 A. B. R. 545, 150 Fed. 257 (C. C. A. Mich.).

Grain in Elevator and Outstanding Warehouse Certificates.—Where grain is commingled in an elevator and there are outstanding warehouse certificates, nevertheless the grain passes to the trustee in bankruptcy. In *re Millbourne Mills Co.*, 20 A. B. R. 746, 162 Fed. 988 (D. C. Pa.). Also, see *ante*, § 964.

Page 1176. In *re Acheson Co.*, 22 A. B. R. 338, 170 Fed. 427 (C. C. A. Ore.): "In carrying out the rule when it comes to proof, the owner must assume the burden of ascertaining and tracing the trust funds, showing that the assets which have come into the hands of the trustee have been directly added to or benefited by an amount of money realized from the sales of the specific goods held in trust; and recovery is limited to the extent of this increase or benefit. * * * If, however, he succeeds in making requisite proof, it then devolves upon the bankrupt, or the trustee who takes the property of the bankrupt, in the same relation that it was held by the bankrupt, to distinguish between what is his and that of the cestui que trust. We do not mean to be understood as holding that equity will grant to a cestui que trust relief against any assets in the hands of a trustee, for it will not go farther than to give a lien when the facts are that there remain in the estate specific funds or property which have increased the assets of the estate, and which represent the proceeds of the specific property intrusted to the bankrupt. *Lowe v. Jones*, Adm'r, 192 Mass. 94, 78 N. E. 402, 6 L. R. A. (N. S.) 487, 116 Am. St. Rep. 225. Moreover, if there has been expenditure, and the funds are gone, and no specific property or money is found instead of the funds, it is inequitable that some other property found should be applied to pay one creditor in preference to another. So, funds that have been dissipated or that have been used to pay other creditors, or that have been spent to pay current business expenses, are not recoverable, because they are gone, and there is nothing remaining to be the subject of

the trust. This qualification of the general rule is to be applied to the facts pleaded in the present case, inasmuch as it is alleged that some of the trust moneys were used by the bankrupt in paying its employees, and in the expenses of running its business, and in paying other creditors. For them there can be no recovery."

§ 1884¼. Evidence.

Possession is itself evidence raising the presumption of ownership.

See, in addition, *In re Mayer*, 19 A. B. R. 480, 156 Fed. 432, 157 Fed. 836 (D. C. Pa.), quoted at § 554½; *In re Diamond*, 19 A. B. R. 811, 158 Fed. 370 (D. C. Ala.).

Uncontradicted testimony may yet be rejected if improbable.

See ante, § 554 et seq., also post, § 2650 et seq., or if accessible witnesses are not produced in corroboration. See ante, 554½, and post, § 2646; *In re Mayer*, 19 A. B. R. 480, 156 Fed. 432, 157 Fed. 836 (D. C. Pa.), quoted at § 554½.

§ 1884½. Goods in Warehouse or Elevator, and Outstanding Receipts.

Where goods are in a warehouse or grain in an elevator on the bankrupt's premises, and receipts or certificates have been issued therefor, the rights of the parties in the absence of fraud are to be determined by State law. If by State law title has passed, and there be no fraud, then in bankruptcy the title will not be in the trustee.

See ante, § 1146. But compare, § 964.

However, if there be fraud, then, since the Bankruptcy Act, in § 70 (a), passes to the trustee title to all property fraudulently transferred, the trustee will get title.

See ante, § 1146; also, (*Security*) *Warehousing Co. v. Hand*, 19 A. B. R. 291, 206 U. S. 415.

Where parts of the goods or grain have been converted, the rules of § 1884 prevail; thus, where subsequent additions to the common stock have been made.

In re Brown & Co., 22 A. B. R. 659, 171 Fed. 281 (D. C. N. Y.).

§ 1885. Jurisdiction to Marshal Liens.

Page 1178, note 158. See, in addition, *In re Farmers Supply Co.*, 22 A. B. R. 460, 170 Fed. 502 (D. C. Ohio); *In re Clark Coal & Coke Co.*, 23 A. B. R. 273, 173 Fed. 658, 176 Fed. 955 (D. C. Pa.).

Page 1179. *In re Dana*, 21 A. B. R. 683, 167 Fed. 529 (C. C. A.): "The principal question arising on this petition to revise is whether a District Court of the United States, in which bankruptcy proceedings are pending, and which is in the actual possession of certain real estate conceded to belong to the bankrupt, has jurisdiction to determine the amount and the

order of priority of liens thereon, and to liquidate such liens, to the end that the property may be sold free of incumbrances and in aid thereof to enjoin the lienholders from prosecuting the foreclosure of their liens in a suit brought in a State court before the commencement of the bankruptcy proceedings but within four months thereof; and this, though the lienholders object to such jurisdiction, and it is not contended that their liens are preferential or fraudulent or invalid for any other reason. Bearing in mind the property was the property of the bankrupt, the title to which had passed to the trustee in bankruptcy, and that it was in the actual possession of the District Court of the United States, we think an affirmative answer should be given, upon the authority of *In re Schermerhorn*, *In re Epstein* (quoted § 1797) and the cases therein cited. * * * Indeed, it appears that before the injunction in question was awarded, the State court, which by its receiver had actual possession of the property, voluntarily surrendered it to the receiver appointed in the bankruptcy proceedings upon request being made."

Page 1180, note 158. (23½). Novation—None exists where bankrupt deeds to his father real estate encumbered with a mortgage made to secure the note of the bankrupt where father devises real estate back to bankrupt and bankrupt's sister, *In re Straub*, 19 A. B. R. 808, 158 Fed. 375 (D. C. W. Va.).

(30) Transfer of stock under forged powers of attorney, *Unity Banking & Sav. Co. v. Boyden*, 20 A. B. R. 264, 159 Fed. 916 (C. C. A. Ohio).

Misuse of life insurance policies surrendered by children to father for specific purpose, liens marshaled; subrogation to real estate mortgage lien consequent thereon, *In re MacDougall*, 23 A. B. R. 762, 175 Fed. 400 (D. C. N. Y.).

(31) Bankrupt assumes mortgage, on purchase of property; another collateral mortgage given by same debtor for same debt, foreclosed; mortgagee to resort first to bankrupt's property, *In re Beaver Knitting Mills*, 18 A. B. R. 528, 154 Fed. 320 (C. C. A. N. Y.).

(32) Fraudulently transferred real estate, where bankrupt still in occupancy, though claiming another owns it, *In re Coffey*, 19 A. B. R. 148 (Ref. N. Y.).

(33) Goods in warehouse on bankrupt's premises for which warehouse receipts issued, (*Security*) *Warehousing Co. v. Hand*, 19 A. B. R. 291, 206 U. S. 415. See §§ 964, 1146, 1884½.

(34) Grain in storage on bankrupt's premises for which certificate issued, *In re Millbourne Mills Co.*, 20 A. B. R. 746, 162 Fed. 988 (D. C. Pa.), quoted at §§ 964, 1146, 1884½; *Fourth St. Nat. Bank v. Millbourne Mills Co.*, 22 A. B. R. 442, 172 Fed. 177 (C. C. A. Pa.).

(35) Maritime liens on cargo and receiver's certificates for care and preservation, *In re Alaska Fishing, etc., Co.*, 21 A. B. R. 685, 167 Fed. 875 (D. C. Wash.).

(36) Deeds of trust that had been inadvertently or fraudulently released decreed to be reinstated and the rights of the holders of notes secured thereby protected by declaring their right to a lien on said real estate, *Dulany v. Waggaman*, 22 A. B. R. 36 (Supt. Ct. D. C.).

(37) Misdescription of mortgage debt, *In re Farmers Supply Co.*, 22 A. B. R. 460, 170 Fed. 502 (D. C. Ohio).

(38) Corporate seal lacking, *In re Farmers Supply Co.*, 22 A. B. R. 460, 170 Fed. 502 (D. C. Ohio).

(39) Alteration of mortgage bond to cover new indebtedness subsequently created between same parties, *In re Burns*, 22 A. B. R. 640, 171 Fed. 1008 (D. C. Ga.).

Conditional vendor praying for marshaling of liens and payment of the balance of his purchase price as an equitable lien, rather than asking for surrender of the property itself. *In re Max Goldman*, 23 A. B. R. 497, 174 Fed. 579 (C. C. A. Ohio), quoted at § 1878.

Reformation of second mortgage to be a first lien on another piece of property. *Hardy v. Chandler*, 23 A. B. R. 717, 175 Fed. 138 (D. C. Ga.).

Exempt Property.—It has been held that a creditor holding lien on both exempt and non-exempt property, need not exhaust security on exempt property first. *In re Bailey*, 24 A. B. R. 201, 176 Fed. 990 (D. C. Utah).

Page 1181. Thus, the bankruptcy court may determine whether a transfer or conveyance by the bankrupt of property still remaining in the possession of the bankruptcy court, is fraudulent or preferential.

In re Coffey, 19 A. B. R. 148 (Ref. N. Y.); also cases cited ante, this same paragraph.

§ 1886. Consent of Lienholder Not Necessary.

Page 1181, note 161. See, in addition, *In re Kohl-Hepp Brick Co.*, 23 A. B. R. 822, 176 Fed. 340 (C. C. A. N. Y.), quoted at §§ 1970, 1980; *In re Dana*, 21 A. B. R. 683, 167 Fed. 529 (C. C. A.), quoted at § 1885.

Whether conditional sale contract to be considered "lien," from which property may be sold clear and free, see *In re Grainger*, 20 A. B. R. 166, 160 Fed. 69 (C. C. A. Calif.).

§ 1887. Incidental Power to Compel Execution of Papers by Third Parties.

Page 1181, note 162. Compare, *In re Harris*, 23 A. B. R. 237, 173 Fed. 735 (D. C. N. Y.), as to lack of power where person outside of district; also, see ante, § 29.

Page 1181. Where a wife has given her consent to the sale of real estate free from her dower interest and to accept the money value in lieu thereof, she may be compelled to execute a formal release of her dower right.

In re Acretelli, 21 A. B. R. 537, 173 Fed. 121 (D. C. N. Y.): "The right to make the sale presupposes the power to compel it, the consent once given."

§ 1887¼. Incidental Power to Reform Instruments.

Also as incident to the power, the bankruptcy court undoubtedly has jurisdiction to reform instruments, where a proper case for reformation exists.

Fowler v. Hart, 13 How. 373. But compare, *Sexton v. Kessler*, 21 A. B. R. 807, 172 Fed. 535 (C. C. A. N. Y.): "Doubtless a court of equity would not intervene to enforce or perfect an imperfect mortgage as against the other creditors of the mortgagor."

§ 1887½. **And to Relieve against Forfeiture.**

Also the bankruptcy court undoubtedly has the incidental power to relieve against forfeiture, which it will exercise under the usual equity rules.

Impliedly, *Mound Mines Co. v. Hawthorne*, 23 A. B. R. 242, 173 Fed. 882 (C. C. A. Colo.).

§ 1888. **Referee Has Jurisdiction.**

Page 1181, note 165. Instance, *In re Kohl-Hepp Brick Co.*, 23 A. B. R. 822, 176 Fed. 340 (C. C. A. N. Y.), quoted, on other points, at §§ 1970, 1979, 1980.

Even where the transfer complained of occurred more than four months preceding the bankruptcy.

In re Elletson Co., 23 A. B. R. 530, 174 Fed. 859 (D. C. W. Va.): "This deed having been executed more than four months prior to the institution of bankruptcy proceedings, under older decisions some doubt might have arisen as to the right of the referee to pass upon and adjudicate the matter in this summary proceeding instead of requiring the institution of a plenary suit for the purpose. The bank, however, having voluntarily submitted to the jurisdiction by presenting its claim for adjudication, and the estate of the bankrupt being wholly in the possession of the court, there can no longer be doubt of the jurisdiction as thus taken by the referee under the rulings. Indeed the question of 'four months' or not has nothing to do with the jurisdiction of the referee, that jurisdiction being dependent rather on possession of the res."

Page 1182. *In re Miner's Brewing Co.*, 20 A. B. R. 717, 162 Fed. 327 (D. C. Pa.): "Under the facts reported by him, the referee had authority to order a sale of the bankrupt's real estate discharged of liens. Upon these facts, he had authority also to hear claims upon the fund produced by the sale, and to determine their validity, extent and relative priority."

Mound Mines Co. v. Hawthorne, 23 A. B. R. 242, 173 Fed. 882 (C. C. A. Colo.): "Where, however, property which is in the possession of a bankrupt at the time of the bankruptcy proceedings, and passes as part of his estate into the possession of the trustee in bankruptcy, and a third party claims an interest therein, the referee may, by a summary proceeding, require such third party to appear in the bankruptcy court, present his claim, and the referee adjudicate the rights of the parties in respect thereof."

§ 1889. **Reasonable Notice to Lienors or Other Parties in Interest Requisite.**

Notice must be given to lienholders.

In re Foundry & Machine Co., 17 A. B. R. 293, 147 Fed. 828 (D. C. Wis.); *In re Kohl-Hepp Brick Co.*, 23 A. B. R. 822 (C. C. A. N. Y.), quoted at § 1980; *In re Sanborn*, 3 A. B. R. 54, 96 Fed. 551 (D. C. Vt.); *In re Saxton Furnace Co.*, 14 A. B. R. 483, 136 Fed. 697 (D. C. Pa.); *Mound Mines Co. v. Hawthorne*, 23 A. B. R. 242, 173 Fed. 882 (C. C. A. Colo.), quoted at § 1888; *obiter*, *In re Gerdes*, 4 A. B. R. 447, 102 Fed. 318 (D. C. Ala.). See post, § 1980.

And a sale does not divest the lien of a creditor unless he has been given such notice and unless the sale has been made free therefrom.

See post, § 1980; *In re Kohl-Hepp Brick Co.*, 23 A. B. R. 822, 176 Fed. 340 (C. C. A. N. Y.), quoted at § 1980; *Bassett v. Thackera*, 16 A. B. R. 787, 72 N. J. L. 81, 60 Atl. 39; *In re Foundry Machine Co.*, 17 A. B. R. 293, 147 Fed. 828 (D. C. Wis.).

Reasonable notice to the various lienholders and claimants of interest, to come in and set up their rights, is all that is requisite.

Page 1182, note 166. See, in addition, *In re Foundry & Machine Co.*, 17 A. B. R. 293, 147 Fed. 828 (D. C. Wis.); *obiter*, *In re Gerdes*, 4 A. B. R. 347, 102 Fed. 318 (D. C. Ala.); *In re Sanborn*, 3 A. B. R. 54, 96 Fed. 551 (D. C. Vt.); *In re Saxton Furnace Co.*, 14 A. B. R. 483, 136 Fed. 697 (D. C. Pa.); *Mound Mines Co. v. Hawthorne*, 23 A. B. R. 242, 173 Fed. 882 (C. C. A. Colo.), quoted at § 1888; *In re Foundry & Machine Co.*, 17 A. B. R. 293, 147 Fed. 828 (D. C. Wis.). See post, § 1980.

United Sheet & Tin Plate Co. v. Hess, 20 A. B. R. 254, 159 Fed. 889 (C. C. A. Ohio): "There is no better established principle than that all parties interested, whose rights will be directly affected by the decree, must be made parties to the suit. * * * The relief which the petitioners sought was directly hostile to the mortgage of September 1, 1893."

Page 1183. Even though the claim be considered frivolous, the alleged lienor should be given notice.

In re Kohl-Hepp Brick Co., 23 A. B. R. 822, 176 Fed. 340 (C. C. A. N. Y.).

However, the failure to give him notice would not make the sale invalid, but would simply make it subject to whatever rights the alleged lienor might be able to prove.

Likewise notice must be given to adverse claimants, where any disposition of the property in which they claim to be interested is concerned.

Thus, the court held a trustee in bankruptcy personally liable to an adverse claimant where the trustee turned the property back to the bankrupt upon confirmation of a composition, after having actual notice of the adverse claimant's rights.

In re Cadenas & Coe, 24 A. B. R. 135, 178 Fed. 158 (D. C. N. Y.).

§ 1890. "Ten Days Notice by Mail" Insufficient; "Order to Show Cause," Proper Method.

Page 1183, note 168. See, in addition, *Kurtz v. Young*, 12 A. B. R. 509, 131 Fed. 719 (C. C. A. Minn.). And see ante, § 1838.

Page 1183. There is no need of giving notice, however, of the application for an order to show cause—the show-cause order is itself a notice to appear and it concludes no one.

In re Philip Brady, 21 A. B. R. 364, 169 Fed. 152 (D. C. Ky.): "While a notice might not have been improper, it was not at all necessary, because

the show-cause order itself gives notice and affords an opportunity on a certain named future day to show cause why the special relief sought should not be granted. The order, per se, gives him his day in court."

Similarly "order to show cause" may be issued upon the trustee upon a claimant's petition or cross petition, where notice upon the trustee is proper.

Instance, *In re MacDougall*, 23 A. B. R. 762, 175 Fed. 400 (D. C. N. Y.).

§ 1894. Pleadings and Practice in Marshaling Liens and Interests.

Page 1184, note 172. See post, § 1985.

Page 1184, note 173. See, in addition, *Carriage Co. v. Solanas*, 6 A. B. R. 225 (D. C. La.); impliedly, *In re Bellevue Pipe & F'dy Co.*, 22 A. B. R. 97, 16 Ohio Dec. 247 (Ref. Ohio); *In re Stevens*, 23 A. B. R. 239, 173 Fed. 842 (D. C. Ore.), quoted at § 758½.

As to rules regarding the reopening of the case for further testimony, see § 553½; compare rules regarding objections to claims, etc., § 830, et seq.

Page 1184. The hearing should be upon affidavits, for the proceedings are not in the nature of a mere motion but rather of a petition.

Analogously, *In re Bailey*, 19 A. B. R. 470, 156 Fed. 691 (D. C. N. Y.).

§ 1894½. Statutory Regulations of Right to Institute or Maintain Suit Not Applicable.

State regulations of the right of a party to institute or maintain suit are not applicable to proceedings in the bankruptcy court.

In re Farmers Supply Co., 22 A. B. R. 460, 170 Fed. 502 (D. C. Ohio): "The jurisdiction and remedies conferred by the Constitution and statutes of the United States on the national courts are uniform throughout the different states of the Union, and cannot be impaired, restricted, or destroyed by state legislation, which prescribes a condition only by compliance with which a partnership having a fictitious name may commence and maintain litigation in its own courts."

§ 1896. What Law Governs Validity.

Page 1185, note 175. See ante, §§ 1140, 780.

Instance, *In re Bailey*, 24 A. B. R. 201, 176 Fed. 990 (D. C. Utah); creditor holding lien on exempt and non-exempt property, not obliged to exhaust lien on exempt property first, the fact of its being exempt being held to vary the rule.

Page 1186. *In re Elletson Co.*, 23 A. B. R. 530, 174 Fed. 859 (D. C. W. Va.): "The Supreme Court has determined that the question whether such a deed of trust is valid or not is a local one and must be governed by the State court decisions, which the Federal courts will follow."

§ 1897. Where Rights under State Statute Dependent on Resort to Special Remedies.

Page 1186. Likewise, where the statute requires conditional vendors to refund part of the purchase price on taking possession, such refund will not be required where the conditional vendor does not petition for surrender of the property, but merely for a marshaling of the liens and payment of the balance of his purchase price as an equitable lien.

See ante, § 1878; also, see *In re Max Goldman*, 23 A. B. R. 497, 174 Fed. 579 (C. C. A. Ohio), quoted at § 1878.

§ 1900. Summary Jurisdiction to Prevent Trustee Interfering with Others' Rightful Custody.

Page 1187, note 183. "Order to show cause" upon trustee. Instance, *In re MacDougall*, 23 A. B. R. 762, 175 Fed. 400 (D. C. N. Y.).

§ 1901. Jurisdiction to Issue Injunctions in Aid of Bankruptcy Proceedings.

Page 1188, note 184. Compare, as to jurisdiction to stay suits to permit the bankrupt to interpose discharge, post, § 2696, et seq.; *In re Dana*, 21 A. B. R. 683, 167 Fed. 529 (C. C. A.), quoted at § 1796. *Berman v. Smith*, 22 A. B. R. 662, 171 Fed. 735 (D. C. Ga.); *In re Bluestone Bros.*, 23 A. B. R. 264, 174 Fed. 53 (D. C. W. Va.), quoted at § 1908.

Instance (restraining landlord), *In re Schwartzman*, 21 A. B. R. 885, 167 Fed. 399 (D. C. S. C.), quoted at § 984.

Page 1189. *New River Coal Land Co. v. Ruffner*, 20 A. B. R. 100, 165 Fed. 881 (C. C. A. W. Va.): "We have given careful consideration to the arguments submitted and are of opinion that the order granting a stay of proceedings in the State court was clearly authorized by the Bankruptcy Act. In the administration of the affairs of insolvent persons and corporations the jurisdiction of the federal courts in bankruptcy is essentially exclusive. 'The intent of the bankruptcy law,' says the Supreme Court *In re Watts and Sachs*, 190 U. S. 27, 10 Am. B. R. 113, 'is to place the administration of affairs of insolvents exclusively under the jurisdiction of the bankruptcy courts.'"

§ 1902. Restraining Sale or Distribution under Levy Made within Four Months.

Thus, the sale or distribution of property or its proceeds under levy or seizure made within four months of bankruptcy, while still in the hands of the officer of the court making the levy or seizure, may be restrained before the adjudication, and pending the determination as to the bankruptcy of the debtor.

And, of course, also after adjudication.

New River Coal Land Co. v. Ruffner Bros., 21 A. B. R. 474, 165 Fed. 881 (C. C. A. W. Va.): "In the act forbidding courts of the United States to stay proceedings in a State court the courts of bankruptcy are specifically

excepted and the bankruptcy law of 1898 expressly confers upon these courts the power to issue injunctions to stay proceedings within this exception. * * * The prime purpose of the Bankruptcy Act is to secure an equal distribution of an insolvent's estate among the creditors, and it is not only a power conferred upon the court in a bankruptcy proceeding to take jurisdiction of the unencumbered property of a bankrupt, but also of property to which liens attach, provided the judge of the court in bankruptcy shall determine that such property should be administered by that court. It has not unfrequently been the case that the bankrupt courts have issued injunctions to stay proceedings in a State court, to foreclose mortgages, to enforce other liens, and even to forbid State officers from proceeding with executions upon judgments, where in the opinion of the judge of the bankruptcy court, it was to the interest of the general estate to do so."

§ 1903. But No Injunction Where Levy Not Made within Four Months.

Page 1190, note 186. Compare, to same effect, analogously, *Sample v. Beasley*, 20 A. B. R. 164, 158 Fed. 606 (C. C. A. La.). Also compare, *In re Sterlingworth Ry. v. Supply Co.*, 21 A. B. R. 341, 164 Fed. 591, 165 Fed. 267 (D. C. Pa.).

§ 1904½. And Where State Officers to Be Restrained, Court Cautious.

And where it is sought to restrain a State officer, the court will proceed with great caution, and hearing will not be had on mere affidavits.

In re Bailey, 19 A. B. R. 470, 156 Fed. 691 (D. C. N. Y.); *obiter*, *In re Dana*, 21 A. B. R. 683, 167 Fed. 529 (C. C. A.).

§ 1905. Adverse Claimants Restrained until Appropriate Action Can Be Taken.

Page 1190, note 188. *In re Berkowitz*, 22 A. B. R. 233, 173 Fed. 1012 (D. C. N. J.): Restraining a corporation from selling out, where corporation simply a fiction to enable bankrupt to defraud creditors.

In re Blake, 22 A. B. R. 612, 171 Fed. 298 (D. C. N. Y.): Restraining order on a mortgagee in possession refused, but security required from him as to disposal of rents until appropriate action could be taken.

See similar proposition *before* adjudication, ante, § 365.

§ 1906. Adverse Claimants Restrained from Interfering with Assets in Custody of Bankruptcy Court.

Page 1190, note 189. Instance (restraining landlord), *In re Schwartzman*, 21 A. B. R. 885, 167 Fed. 399 (D. C. S. C.); instance (restraining bankrupt's wife from replevin suit against trustee), *Berman v. Smith*, 22 A. B. R. 662, 171 Fed. 735 (D. C. Ga.).

§ 1908. Court Proceedings Enjoined Where Property in Custody of Bankruptcy Court Sought to Be Seized or Levied on.

Page 1191, note 193. See, in addition, *Berman v. Smith*, 22 A. B. R. 662, 171 Fed. 735 (D. C. Ga.).

Page 1191. And this is so even where the property is exempt.

In re Bluestone Bros., 23 A. B. R. 264, 174 Fed. 53 (D. C. W. Va.): "It is no longer an open question in this circuit that the jurisdiction of the Federal courts in bankruptcy is essentially exclusive, and that a District Court, as a court of bankruptcy, has power to stay proceedings of a State court, seeking to take away from its trustee either the property itself or to impose a lien upon it."

§ 1909. Injunction Refused Where Legal Proceedings Not Nullified by Bankruptcy, and State Court Prior in Custody.

Page 1191. Thus foreclosure suits instituted within the four months period will not be restrained; nor, a fortiori, those instituted before the four months period.

Sample v. Beasley, 20 A. B. R. 164, 158 Fed. 606 (C. C. A. La.); In re Pennell, 18 A. B. R. 909, 159 Fed. 500 (D. C. N. J.); for facts, see Kneeland v. Pennell, 18 A. B. R. 538, 54 Misc. 43, 104 N. Y. Supp. 498, but compare, New River Coal Land Co. v. Ruffner Bros., 21 A. B. R. 474, 165 Fed. 881 (C. C. A. W. Va.); and compare, also, apparently contra, In re Dana, 21 A. B. R. 683, 167 Fed. 529 (C. C. A.).

Page 1191, note 196. And injunction has been refused where it has been sought to restrain a suit in equity to wind up a corporation's affairs and to reorganize it. In re Ellsworth, 23 A. B. R. 284, 173 Fed. 699 (D. C. N. Y.), quoted at §§ 153, 158, 159, 305.

§ 1909½. Foreclosure Enjoined Where Actual Possession Afterwards Acquired by Bankruptcy Court.

However, if actual possession of the property has not been taken in the foreclosure proceedings or if actual possession has been surrendered by the State court to the bankruptcy court, then the bankruptcy court acquires complete jurisdiction and may enjoin the further prosecution of the foreclosure suit, and itself determine the right of lienholders and other parties and sell free of liens.

In re Dana, 21 A. B. R. 683, 167 Fed. 529 (C. C. A.), quoted at § 1796.

§ 1910. Whether May Restrain Levy on Exempt Property for Other Purposes than to Interpose Discharge.

Page 1191, note 197. Contra, impliedly, First Nat. Bank of Sayre v. Bartlett, 21 A. B. R. 88, 35 Pa. Super. Ct. 593.

§ 1910½. Attempts to Control Trustee's Administration by Proceedings in Other Courts.

The trustee's administration of the estate and the exercise of his dis-

cretion are not to be interfered with by proceedings brought in other courts.

In re Kranich, 23 A. B. R. 550, 174 Fed. 908 (D. C. Pa.). Also, see ante, § 1788½.

Thus, the bankrupt will not be permitted to maintain an injunction suit in the State Court to prevent the trustee from carrying out a compromise of a controversy with the bankrupt's wife.

In re Kranich, 23 A. B. R. 550, 174 Fed. 908 (D. C. Pa.). Also, see ante, § 1788½.

Thus, also, the plaintiff in a suit for infringement of a patent may not have injunction against the receiver or trustee in bankruptcy of the defendant (who has been adjudged bankrupt in the meantime) to prevent the paying out of the funds in the course of the administration of the bankrupt's assets, such application being properly addressed, rather, to the bankruptcy court in charge of the administration.

In re Leeds & Catlin Co., 23 A. B. R. 679, 175 Fed. 309 (D. C. N. Y.).

American Graphophone Co. v. Leeds & Catlin Co., 23 A. B. R. 337, 174 Fed. 158 (C. C. N. Y.): "It is not for this court to say what moneys the receiver shall or shall not pay out. All questions as to priority of claims and as to payment of moneys in the custody of the District Court should be submitted to that court for determination. If the claim be one not provable in bankruptcy, presumably that court will make no provision for its payment. If it be a provable claim, it is equally presumable that whatever funds there may be in the hands of receiver, over and above the expenses of administering the estate, will be retained, until all provable claims are liquidated and all questions of priority (if any arise) are determined. The whole matter is exclusively in the jurisdiction of the bankruptcy court."

In such an event the bankruptcy court will direct the bankruptcy receiver or trustee not to pay out any dividends without notice to the defendant in the pending patent case.

In re Leeds & Catlin Co., 23 A. B. R. 679, 175 Fed. 309 (D. C. N. Y.).

§ 1911. Suits in Personam against Receiver, Trustee or Marshal for Wrongful Seizure Not Restrained.

Page 1192, note 198. See, in addition, Berman v. Smith, 22 A. B. R. 662, 171 Fed. 735 (D. C. Ga.).

Page 1192. But a landlord has been restrained from prosecuting an independent suit in personam for trespass, where he was endeavoring in this indirect way to recover rent for use and occupation, having delayed any presentation of a bill therefor as part of the expenses of administration until almost all the funds of the estate had been distributed.

In re Empire Cons.^g Co., 19 A. B. R. 704, 157 Fed. 495 (D. C. N. Y.).

However, it would seem to have been in that case equal laches on the trustee's part, not to have taken care of his expenses.

§ 1911½. **Staying Trustee's Administration of Estate.**

No stay of the administration of the estate will be granted against the trustee at the suit of an unsuccessful litigant who has failed to give bond for appeal in the State court.

In re Nat'l Lock & Metal Co., 19 A. B. R. 106, 155 Fed. 690 (D. C. N. Y.).

§ 1912. **Ancillary Injunction in Aid of Bankruptcy Proceedings in Another District.**

Ancillary injunction can be obtained in one district in aid of bankruptcy proceedings in another district.

Bankruptcy Act, as amended 1910, § 2: "That the courts of bankruptcy, as hereinbefore defined, * * * are hereby invested * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * to (20) exercise ancillary jurisdiction over persons or property than their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy." Babbitt, trustee, *v. Dutcher*, 23 A. B. R. 519, 216 U. S. 102, quoted at § 1705; inferentially, In re Peiser, 7 A. B. R. 690, 115 Fed. 199 (D. C. Pa.). Compare, *Horskin v. Sanderson*, 13 A. B. R. 101, 132 Fed. 415 (D. C. Vt.). Contra, In re Williams, 9 A. B. R. 741, 120 Fed. 38 (D. C. Ark.). Also, compare, § 1705.

§ 1913. **No Enjoining of Pledgee's Sale, unless Fraud or Oppression Exist.**

Page 1192, note 200. See ante, § 760, et seq.; In re Mayer, Leslie & Baylis, 19 A. B. R. 356, 157 Fed. 836 (C. C. A. N. Y.).

§ 1914. **Injunction Where Legal Action Requisite to Fix Liability of Sureties.**

Page 1193, note 202. See, in addition, In re Ennis & Stoppani, 22 A. B. R. 679, 171 Fed. 755 (D. C. N. Y.), quoted at § 1524.

Page 1193. Thus it has been refused to the trustee where judgment is necessary to fix the liability of a surety on an attachment bond.

In re Ennis & Stoppani, 22 A. B. R. 679, 171 Fed. 755 (D. C. N. Y.), quoted ante, § 1524.

In re Mercedes Import Co., 21 A. B. R. 590, 166 Fed. 427 (C. C. A. N. Y., reversing s. c., 20 A. B. R. 648, 166 Fed. 427: "The district judge was not obliged to grant the stay under § 11 of the Bankruptcy Act, but did so because he thought that the creditor had no better equity against the surety than he had against the bankrupt. As the trustee in bankruptcy has no interest whatever in the claim against the surety, we think the creditor's rights and equities are questions to be disposed of by the State court. * * * We think the court in which the action is pending should be left free to take whatever steps it thinks equitable in the premises in accordance with its own practice, and the order granting the stay is therefore reversed."

§ 1917½. **Injunction after Sale by Trustee.**

It has not been authoritatively decided whether injunction may issue after a trustee's or receiver's sale, to protect the purchaser in his rights.

Query, *In re Bluestone Bros.*, 23 A. B. R. 264, 174 Fed. 53 (D. C. W. Va.).

§ 1919. **Petition Requisite and to Be Filed in Bankruptcy Proceedings Themselves.**

The injunction is only to be granted upon proper petition.

See instances under the various headings of this division.

§ 1924. **All Property of Estate to Be Appraised.**

Page 1203. A sale made without appraisalment is not, however, a nullity; it is a mere irregularity to be corrected by review.

In re Maloney, 21 A. B. R. 502 (Sup. Ct. D. of C.).

If there be no review, the sale passes good title.

§ 1926. **Appraisers to Be Disinterested.**

Thus, prospective purchasers would be disqualified.

Compare, conversely, setting aside of sale made to an appraiser, post, §§ 1955, 1955½.

§ 1930½. **Reappraisal.**

Page 1206, note 9. **Appraisers' Fees.**—See post, § 2121.

§ 1931. **Sale to Be on Petition and Order.**

Page 1207, note 1. See ante, § 386½; also, *In re Fulton*, 18 A. B. R. 591, 153 Fed. 664 (D. C. N. Y.), quoted at § 386½.

Stipulation between receiver and adverse claimant as to sale of property in adverse claimant's possession. See *Ommen, trustee, v. Talcott*, 23 A. B. R. 572, 175 Fed. 261 (D. C. N. Y.).

Page 1208. But compare, *In re Fulton*, 18 A. B. R. 591, 153 Fed. 664 (D. C. N. Y.): " * * * But nevertheless it is apparently certain that a sale of a chattel real by a receiver without the express direction of the court conveys no title. The defect in the sale cannot be cured by a motion to confirm the sale and to quiet adverse claims to the property sold."

§ 1932. **Equity Rules Followed Where Act, Forms and Orders Silent.**

Page 1208. And may not be changed by stipulation.

Vitzthum v. Large, 20 A. B. R. 666, 162 Fed. 485 (D. C. Iowa), quoted at § 1759½.

§ 1940. **Private Sales, Real Estate or Personal Property, Advertised and Conducted as Court Directs.**

Page 1211. Although there is no law requiring the fixing of an upset price, the better practice is, before granting an order to sell at private sale, to require the showing of an offer, actually tendered, sufficient to warrant the court in granting an order of private sale, and then to set in the order of sale a corresponding minimum price which should, of course, not be less than such offer.

Compare, however, post, §§ 1949, 1956.

§ 1941. **Who May File Petition to Sell: Trustee, Receiver, Marshal, Bankrupt.**

Page 1211, note 9. Instance, sale by receiver, *In re Vogt*, 20 A. B. R. 457, 159 Fed. 317, 163 Fed. 551 (D. C. N. Y.).

Page 1211, note 10. **Sale Where Trustee's Election Set Aside and New Election Ordered.**—Probably it would not affect the validity of an intervening sale that the election of the trustee is set aside and a new election ordered. Compare, *In re Evening Standard Pub. Co.*, 21 A. B. R. 156, 164 Fed. 517 (D. C. N. Y.).

Page 1211. It has apparently been assumed, in some cases, that it is not even necessary that the trustee take any part in the sale.

Instance, *In re Vogt*, 20 A. B. R. 243, 457, 159 Fed. 317, 163 Fed. 551 (D. C. N. Y.).

§ 1943. **Sales before Adjudication.**

* Page 1212, note 12. Instance of sale, *In re Garner & Co.*, 18 A. B. R. 733, 153 Fed. 914 (D. C. Ala.).

Page 1212. The reason is obvious; before adjudication it cannot be certainly known that the property belongs to the creditors. Moreover, until the appointment and qualification of a trustee there is no officer having title to the property in behalf of creditors.

But compare, *In re Maloney*, 21 A. B. R. 502 (Sup. Ct. D. of C.), quoted at § 1950; also, compare, ante, § 386½.

Page 1212, note 13. See ante, § 386½; also compare, *In re Fulton*, 18 A. B. R. 591, 153 Fed. 664 (D. C. N. Y.), quoted at § 386½.

§ 1944. **Meaning of "Perishability."**

"Perishability," under the Act of 1898, would seem to refer to physical deterioration, more than to financial depreciation, through the goods becoming unseasonable, although the decisions are not uniform in this regard.

Compare, ante, §§ 386, 564.

Page 1214. Compare, *In re Harris*, 19 A. B. R. 635, 156 Fed. 875 (D. C. Ala.): "But I further stated in that case that this was confined only to

such cases in which it was clear to the court that the property was, in fact, perishable in part or in its entirety, or would greatly deteriorate if held without a sale, and only that portion which was of such nature could be ordered sold."

Contra, *In re Milne Mfg. Co.*, 21 A. B. R. 468 (Ref. N. Y.): "Real estate may be considered perishable within the meaning and intent of General Order 18, when it consists of buildings, rapidly deteriorating and in a dilapidating condition and requiring immediate expenditure of a large sum of money by the trustee to prevent absolute loss. An order to sell perishable property, even real estate, rests in the sound discretion of the court, and where it is not affirmatively shown that gross injustice has been done to the creditors, a sale of such property at private sale, by the trustee, will not be disturbed for lack of notice to a creditor of the application for an order to sell or for confirmation of the sale. Where a building, used as a manufacturing plant by an involuntary bankrupt, was rapidly deteriorating in value and was unsalable, and an offer was made therefor of a sum representing its fair value, which offer was conditioned upon conveyance being made within a shorter period of time than would allow notice to be given in accordance with the usual practice in sales of bankrupt properties, and where great loss would be occasioned by failure to make the sale, the court is justified in making an order, allowing the trustee to consummate the sale without notice, and a sale so made will not be set aside."

§ 1949. Sale Subject to Approval and to Be for Seventy-Five Per Cent.

But an upset price need not be fixed in the order of sale, since the statute itself expressly provides that the property shall not be sold, unless subject to the approval of the court, for less than 75 per cent.

Schuler v. Hassinger, 24 A. B. R. 184, 177 Fed. 119 (C. C. A. Ala.).

However, in practice, before granting an order to sell at private sale, it should be shown to the court that an actual offer at a certain price has been made, sufficient to warrant the court in granting an order of private sale; in which event, the order granted should, in proper practice, set a minimum price.

§ 1950. Trustee's Sale, a Judicial Sale.

Page 1215. *In re Maloney*, 21 A. B. R. 502 (Sup. Ct. D. of C.): "Another objection is, that the sale was made by the receivers, when the title was in the trustee, relating back to the date of the adjudication in bankruptcy; and that therefore the receiver could convey no title. This argument is fallacious in this, that the sale is not made by the receivers, but is a sale made by the court; and whether the sale is brought about by the efforts of the receivers and their petition to the court, or by the direction of a trustee, or other officer, the title is under the control of the court; and if it should be necessary in order to perfect the title, the court could at any time require the trustee to join in the sale, or in a conveyance to the purchaser."

§ 1952. "Gross Inadequacy" Sufficient to Refuse Confirmation.

Obiter, In re Shapiro, 19 A. B. R. 125, 154 Fed. 673 (D. C. Pa.): "That a sale of this kind may be set aside upon the sole ground of inadequacy is sustained by *Ballentyne v. Smith*, 205 U. S. 285; but in order that this should be so the difference between what the property has brought and its real value must be such as to be unconscionable."

Page 1216, note 25. Instance held not gross inadequacy of price, *Schuler v. Hassinger*, 24 A. B. R. 184, 177 Fed. 119 (C. C. A. Ala.).

§ 1953. But Mere Inadequacy, or Merely a Better Offer, Insufficient.

Page 1217. In re Shapiro, 19 A. B. R. 125, 154 Fed. 673 (D. C. Pa.): "The stock of the bankrupt was appraised at \$5,000, and was sold at a public sale by the trustee for \$2,800. It is now asked that a resale be ordered, the creditors who make the request having agreed to bid at least \$3,200. That a sale of this kind may be set aside upon the sole ground of inadequacy is sustained by *Ballentyne v. Smith*, 205 U. S. 285; but in order that this should be so the difference between what the property has brought and its real value must be such as to be unconscionable. * * * The advance which is offered, however, is inconsiderable—only \$400—and is not enough to warrant the court in overturning what has been done after this interval. There is also a condition attached that the stock shall be the same as when it was inspected by the representative of creditors, which further detracts from it. It is suggested that notice of the sale was not received by some of the creditors and that the party who had been sent to attend it missed his train. But however this might help to induce the court to order a resale if properly substantiated, the controlling thing as the case stands is that the amount guaranteed is too small to bother with. This may favor the bankrupt, who is said to be the real purchaser—his brother having the name of it—at the expense of his creditors, who also, as it seems, have other and older grievances against him, two previous failures and a fire standing to his credit. But however this may be, they will have to get satisfaction some other way, the matter here not warranting further controversy."

§ 1954. Stifling of Competition; Misconduct of Trustee or Unfairness to Bidders.

Page 1217, note 29. **Reimbursement and Attorney's Fees to Creditor Succeeding in Getting Sale Set Aside for Collusion.**—A creditor who has succeeded in getting a collusive sale by the trustee set aside and thereby eventually a greater fund has been brought into the court may be allowed reimbursement of expenses including attorney's fees incurred, such allowance not being by virtue of § 64 (b) (2) but under the general equity powers of the court. In re Groves, 2 N. B. N. & R. 466 (Ref. Ohio); also, compare (merely suggestively and analogously, however), obiter, In re Roadarmour, 24 A. B. R. 49, 177 Fed. 379 (C. C. A. Ohio).

Page 1218. But that the attorney of the ultimate purchaser at an auction sale of a bankrupt's property by the trustee had a private arrangement with the auctioneer that the bid of any other person should be

raised \$50 each time until a sign was given by the attorney to stop, does not render the sale invalid or prevent its confirmation.

In re Ketterer Mfg. Co., 19 A. B. R. 638, 156 Fed. 719 (D. C. Pa.): "The complaint, with regard to this, is that it was a discouragement to other bidders to have their bids immediately overtopped by this amount by the auctioneer, without there being any apparent bid by anyone present, conveying the impression that the auctioneer was simply puffing the sale. But I see no occasion for setting the sale aside upon that ground. There was nothing underhanded or unfair in the arrangement referred to, nor was it indeed out of the ordinary, according to the way in which auction sales are conducted. A bid may be, and often is, conveyed by a mere nod, which no one but the auctioneer sees or understands, this course being taken for the very purpose of keeping it from being known who the bidder is, who, without this, might have the property run up upon him by puffers, beyond what he otherwise would be compelled to give. It is not required, as argued, that there should be an open and obvious bidder, whom other competitors can see and know, at the time. It is sufficient, if all parties desiring to bid have a fair chance, the announcement by the auctioneer, from time to time, of the amount bid disclosing to each just how the sale is going, and bids in good faith, from responsible parties, alone being entertained."

But, that the purchaser is allowed to apply upon the purchase price securities held upon the bankrupt's property, is not an unfairness invalidating the sale.

Schuler v. Hassinger, 24 A. B. R. 184, 177 Fed. 119 (C. C. A. Ala.): "The fourth proposition, that the terms of sale were unequal and unfair, and competition was thereby stifled, is based upon the fact that the purchaser was permitted by the terms of the order of sale to turn in, in payment of the price, admitted securities; the argument being that the holders of securities could buy without paying cash while an outsider would be compelled to pay cash. * * * The contention in this case seems to disregard the general rule which prevails in all foreclosure and execution sales wherein it is not deemed proper and necessary to require purchasers to put up cash with one hand to take it down with the other."

§ 1955. Bankrupt May Be Bidder.

Page 1218. Nor may an agent of the receiver or trustee, nor any person obtaining confidential information from the receiver or trustee, be a purchaser.

In re Frazen & Oppenheimer, 24 A. B. R. 598, 174 Fed. 713 (C. C. A. N. Y.).

Nor may an appraiser be a purchaser.

In re Frazen & Oppenheimer, 24 A. B. R. 598, 174 Fed. 713 (C. C. A. N. Y.).

§ 1955½. Reorganization Committees, etc., as Purchasers.

Page 1219. The mere fact that the purchaser is a reorganization committee or a reorganized corporation, is not, in and of itself, proof of an

improper sale; in fact, such method may become the only adequate method of taking care of a large plant with diversified interests.

Compare criticism in *In re E. T. Kenney Co.*, 14 A. B. R. 611, 136 Fed. 451 (D. C. Ind.).

Schuler v. Hassinger, 24 A. B. R. 184, 177 Fed. 119 (C. C. A. Ala.): "The second proposition, that the sale was collusive, is based upon the fact that prior to the sale there was a reorganization committee for the purpose of purchasing the property in bulk; that the trustees favored such reorganization; and that the order of sale permitted the trustees to receive, as part of the purchase price, admitted securities constituting liens upon the property. That there should be a reorganization agreement for the purpose of buying in the property of the bankrupt corporation cannot be objected to. In fact, it furnishes the only way that a large diversified property and plant like that of the Southern Steel Company can be sold and purchased without disastrous results to creditors and stockholders, and the creditors have every right to organize themselves for the purpose of protecting their interests. These are propositions that need neither argument nor authority to support. That the trustees should in good faith encourage and approve a plan which looked to the successful settlement and winding up of the bankruptcy estate, and which met the approval of creditors and had the consent of all classes interested, was perfectly proper. See *Cook on Corporations*, Vol. 3, p. 3189; *Platt v. Philadelphia R. R.* (C. C.), 65 Fed. 872. The reorganization agreement set forth in the record as approved by the trustees provided for the mortgage and lien holders and the unsecured creditors and all stockholders, both common and preferred; and it was assented to by all of the first mortgage bondholders, 99¾ per cent. of the collateral trust note holders, 86 per cent. of the proved claims, 87 per cent. of the preferred stockholders, and 90 per cent. of the common stockholders. Such a reorganization agreement seems so fair on its face that the court itself could well have approved it if brought before it in proper way; in fact, it seems to have all the elements of a composition which is favorably provided for in the bankruptcy law."

§ 1956. May Accept Bid of Less Than Seventy-Five Per Cent.

It is not necessary that the order fix an upset price, since the statute provides that the assets shall not be sold otherwise than subject to the approval of the court, for less than 75 per centum of the appraised value.

Schuler v. Hassinger, 24 A. B. R. 184, 177 Fed. 119 (C. C. A. Ala.). Compare, however, better *practice*, ante, §§ 1940, 1949.

§ 1959. "Caveat Emptor."

Page 1220, note 40. Purchaser of leasehold takes rights as he finds them, as to arrearage of rent, etc., *In re Ketterer Mfg. Co.*, 20 A. B. R. 694, 163 Fed. 583 (D. C. Pa.).

Page 1220, note 41. See, in addition, impliedly, *In re Drumgoole*, 15 A. B. R. 261, 140 Fed. 208 (D. C. Pa.).

Page 1221. A third party's rights may be asserted against the purchaser notwithstanding the trustee, in words, or by description has at-

tempted to sell such third party's goods, unless, of course, such third party has estopped himself by his conduct from asserting his rights.

In *re* Bluestone Bros., 23 A. B. R. 264, 174 Fed. 53 (D. C. W. Va.): "But some doubt arises as to whether such jurisdiction could extend to the protection of the property after it has been sold and delivered to the purchaser. This question it becomes wholly unnecessary to decide in this case. It is only necessary to say that, in any event, the defendant, Devault, could only be stayed in his right to assert claim in a State court to the property under two conditions of things: First, in case there was conflicting claim to the property between himself and the bankrupt, which claim he had asserted in the bankruptcy court, and it had been there determined, or, being made a party to the proceeding, he had refused or failed there to assert his right, being called upon so to do; second, had by his fraudulent conduct at the time of sale, either by direct representation or by silent acquiescence, secured or allowed plaintiff to buy his goods, mingled with those of the bankrupts, as goods of the bankrupt properly to be sold."

§ 1961. Resale.

Page 1221, note 45. Instance, *In re* Fisher & Co., 17 A. B. R. 404, 148 Fed. 907 (D. C. N. J., affirmed sub nom. *In re* Wylie, 18 A. B. R. 503, 173 Fed. 281, C. C. A.).

§ 1962. Summary Power to Compel Purchaser to Complete Sale.

The bankruptcy court has summary power to compel a purchaser to complete his contract of sale.

See post, § 1804.

Forfeiture of purchaser's deposit where public authorities refuse to transfer liquor license because of purchaser's personal unfitness, *In re* Comer & Co., 22 A. B. R. 558, 171 Fed. 261 (D. C. Pa.). But purchaser entitled to return of deposit, when, *In re* Miller, 22 A. B. R. 560, 171 Fed. 263 (D. C. Pa.).

§ 1965. May Be Sold Free from Liens and Liens Transferred to Proceeds.

Page 1223, note 4. See, in addition, *In re* Waterloo Organ Co., 18 A. B. R. 752, 154 Fed. 657 (C. C. A. N. Y.); *In re* Littlefield, 19 A. B. R. 18, 155 Fed. 838 (C. C. A. N. Y.), quoted at § 1967; *In re* Miner's Brewing Co., 20 A. B. R. 717, 162 Fed. 327 (D. C. Pa.); *In re* Dana, 21 A. B. R. 683, 167 Fed. 529 (C. C. A.), quoted at § 1885; obiter, *In re* Allert, 23 A. B. R. 101, 173 Fed. 691 (D. C. N. Y.); instance, sale by receiver, *In re* Vogt, 20 A. B. R. 457, 159 Fed. 317, 163 Fed. 551 (D. C. N. Y.).

§ 1966. Lienholder's Consent Not Necessary.

Page 1225, note 6. *In re* Dana, 21 A. B. R. 683, 167 Fed. 529 (C. C. A.), quoted at § 1885; obiter, *In re* Allert, 23 A. B. R. 101, 173 Fed. 691 (D. C. N. Y.).

§ 1967. Sale Clear and Free Ordered before Validity or Priority of Liens Determined.

Page 1225, note 9. See, in addition, *Mason v. Wolkowich*, 17 A. B. R. 709, 150 Fed. 693 (C. C. A. N. Y.); *In re Tucker* (*Tucker v. Curtin*), 18 A. B. R. 378, 153 Fed. 91 (C. C. A. N. Y.), although in this case the decision does not show on its face that the point was decided—only by reference to *Mason v. Wolkowich*.

Page 1225. *In re Littlefield*, 19 A. B. R. 18, 155 Fed. 838 (C. C. A. N. Y.): "A court of bankruptcy has jurisdiction to order a sale of a bankrupt's property upon which a lien is asserted without first determining either the validity or amount of the lien."

§ 1970. Order Should Provide for Transfer of Rights to Proceeds.

In re Kohl-Hepp Brick Co., 23 A. B. R. 822, 176 Fed. 340 (C. C. A. N. Y.): "This order was made after appellants had given notice of their alleged lien, but it makes no provision for the imposition of such lien on the proceeds of sale. Under the authorities such provisions are essential."

§ 1972. Parties Relegated to State Court Where Foreclosure Necessary to Bar Rights Not within Jurisdiction of Bankruptcy Court.

Page 1227, note 18. Compare, analogously, ante, §§ 1584, 1584½, 1806; but also compare, § 1813.

Page 1227. Or, at any rate, will permit the parties to resort to the State courts.

In re Victor Color & Varnish Co., 23 A. B. R. 177, 175 Fed. 1023 (C. C. A. N. Y.): "We are clearly of the opinion that the holder of the chattel mortgage was entitled to have his day in court, in a suit to foreclose it, and that so much of the order as refused him leave to begin such a suit, on the ground that the property was in the hands of a receiver in bankruptcy, must be reversed. It was entirely proper, however, for the bankruptcy court to refuse to give petitioner immediate possession of the property; it should remain in the custody of the receiver till the suit is determined, although, of course, if all parties agree, it may be sold and the proceeds held by the receiver. Order modified."

The bankruptcy court has power to sell free from liens, but not to "foreclose."

Compare, inferentially, *Goodnough Mercantile & Stock Co. v. Galloway*, 19 A. B. R. 244, 156 Fed. 504 (D. C. Ore.).

Thus, it is possible for the bankruptcy court to sell assets free from liens, transferring the liens to the proceeds of sale, and at the same time have the lienholder to maintain a suit to foreclose his lien in the State court.

Instance, on the facts, *In re Clover Creamery Ass'n*, 23 A. B. R. 884, 176 Fed. 907 (C. C. A. Wis.).

§ 1974. But, if Wife Consents, Sale May Be Made Free from Dower.

But, if the wife consents, a sale may be ordered in the bankruptcy court free from her inchoate dower rights, and she may be compensated therefor out of the proceeds.

In re Acretelli, 21 A. B. R. 537, 173 Fed. 121 (D. C. N. Y.).

And this practice is approved.

Page 1228. Where the wife gives consent to such sale, she may, on sale being made, be compelled to execute a formal release of the dower.

In re Acretelli, 21 A. B. R. 537, 173 Fed. 121 (D. C. N. Y.): "The right to make the sale presupposes the power to compel it (the consent once given)."

§ 1975. Referee May Order Sale Free from Liens.

Page 1228, note 21. See, in addition, In re Miner's Brewing Co., 20 A. B. R. 717, 162 Fed. 327 (D. C. Pa.). See ante, § 1883.

§ 1979. And Consent of Parties Not Necessary.

Page 1228, note 26. Compare, to same effect, ante, § 1886.

§ 1980. Notice to Lienholders Requisite.

Page 1229, note 28. See, in addition, United Sheet & Tin Plate Co. v. Hess, 20 A. B. R. 254, 159 Fed. 889 (C. C. A. Ohio), quoted at § 1889; In re Kohl-Hepp Brick Co., 23 A. B. R. 822, 176 Fed. 340 (C. C. A. N. Y.), quoted also, at § 1970. See ante, § 1889.

Page 1229, note 29. See ante, § 1889.

Page 1229. In re Kohl-Hepp Brick Co., 23 A. B. R. 822, 176 Fed. 340 (C. C. A. N. Y.): "This order was made after appellants had given notice of their alleged lien, but it makes no provision for the imposition of such lien on the proceeds of sale. Under the authorities such provisions are essential. * * * It is unfortunate to have to reverse the order at this late stage of the proceedings, but the power to displace liens is a drastic one, and should be exercised only with scrupulous attention to secure the lienor specific notice and full opportunity to protect his interests." Quoted further at § 1979.

Even though the claim of lien be considered "frivolous" the claimant should be given notice.

In re Kohl-Hepp Brick Co., 23 A. B. R. 822, 176 Fed. 340 (C. C. A. N. Y.).

Although, without notice, the sale doubtless would not be invalid but would simply be a sale subject to whatever rights the claimant might succeed in establishing.

§ 1982. "Order to Show Cause," Approved Form of Notice.

Page 1229, note 31. "Order to show cause" not appealable, nor reviewable. *Morehouse v. Hardware Co.*, 24 A. B. R. 178, 177 Fed. 337 (C. C. A. Nev.). See post, §§ 2841, 2878, 2922.

§ 1985. How Lienholder to Set Up Lien.

See, in addition, *In re Stevens*, 23 A. B. R. 239, 173 Fed. 842 (D. C. Ore.), quoted ante, § 758½. To same effect, see ante, § 1894.

Page 1230, note 35. See ante, § 1894.

Page 1230: The right of amendment, of course, exists under the usual rules. Interest is computable to the date of payment of the lien, not to the date of the filing of the bankruptcy petition, although when the lienholder comes to prove his claim for the deficit for participation in dividends, his interest will be restricted to accruals at the date of the filing of the petition.

Coder v. Arts, 18 A. B. R. 513, 152 Fed. 943 (C. C. A. Iowa), quoted at § 1147.

In cases of amendment, the better practice undoubtedly is to present the proposed amendment at the time of the application for leave to amend.

Analogously, *Knapp & Spencer v. Drew*, 20 A. B. R. 355, 160 Fed. 413 (C. C. A. Neb.).

§ 1985½. Statutory Regulations of Party's Right to Maintain Suit, Not Binding.

Statutory regulations of a party's right to maintain suit, as, for example, that partnerships doing business under fictitious names or names not showing who are the members, shall not maintain suit until compliance with certain regulations, are not binding upon the bankruptcy court, for the federal courts will prescribe their own regulations of the right of a party, otherwise competent, to institute or maintain proceedings.

See ante, § 1894½; *In re Farmers Supply Co.*, 22 A. B. R. 460, 170 Fed. 502 (D. C. Ohio), quoted at § 1894½; *In re Stevens*, 23 A. B. R. 239, 173 Fed. 842 (D. C. Ore.), quoted at § 758½.

§ 1987. Failure to Object to Sale without Separation Waives Rights.

Page 1231, note 37. For a case where conditional vendor did not so fail, but protested, see *In re Grainger*, 20 A. B. R. 166, 160 Fed. 69 (C. C. A. Calif.); compare, *In re Goldsmith*, 21 A. B. R. 845, 168 Fed. 779 (D. C. N. Y.).

Page 1231, note 38. See, in addition, *Vollmer v. McFadgen*, 20 A. B. R. 540, 161 Fed. 914 (C. C. A. Pa.); *In re McFadgen*, 19 A. B. R. 481, 156 Fed. 715 (D. C. Pa., affirmed sub nom. *Vollmer v. McFadgen*, 20 A. B. R. 540, 161 Fed. 914).

§ 1988. Taking Additional Evidence, after Sale, to Fix Proportions of Fund.

It would be proper for the referee, sua sponte, to take additional evidence as to the proportion of the funds respectively assignable to each lienholder, after the sale, if the sale were made as an entirety without arrangement for separation of the proceeds.

In re Goldsmith, 21 A. B. R. 845, 168 Fed. 779 (D. C. N. Y.).

§ 1989. Expenses of Preservation and Sale Paid Out of Particular Fund Involved.

Page 1233, note 42. Impliedly, In re Baughman, 20 A. B. R. 811, 163 Fed. 669 (D. C. S. Car.). But compare, apparently but not really, contra, Mills v. Virginia-Carolina Lumber Co., 20 A. B. R. 750, 164 Fed. 168 (C. C. A. N. Car.), quoted at § 1993; inferentially, In re Evans Lumber Co., 23 A. B. R. 881, 176 Fed. 643 (D. C. Ga.).

Page 1233. And this is so notwithstanding there be not enough left to pay the liens in full.

In re Baughman, 20 A. B. R. 811, 163 Fed. 669 (D. C. S. Car.), although the qualification is added that the lienholder did not object.

In re Williams Estate (Anheuser-Busch Brew. Ass'n v. Harrison) 19 A. B. R. 389, 156 Fed. 934 (C. C. A. Wash.): "It thus appears that all of the property of the bankrupt was covered by the brewing association's liens, and that the total amount realized from the sale of the property upon which the petitioner had valid liens was less than the amount of those liens. The real question for decision, therefore, is to what extent, if at all, funds realized by the sale of property upon which a creditor of a bankrupt has valid liens, proof of which secured claims is filed in the bankruptcy court after the making of such sale, and when the proceeds of the sale are insufficient to pay the liens in full, may be used to pay the general costs of administration of the bankrupt's estate. It is true that the record in the case shows that the lienholder voluntarily came into the bankruptcy court and asked that the property covered by its liens be sold by that court. The Bankruptcy Act * * * in terms declares that none of its provisions shall affect a valid lien. But the estate of a bankrupt is interested in any excess that may exist over and above the amount of such liens. So it was held by this court in the case entitled In re Jersey Island Packing Co., 14 Am. B. R. 689, 138 Fed. 625, 627, 71 C. C. A. 75, 2 L. R. A. (N. S.) 560, that 'property on which there is a mortgage or other lien passes to the trustee in bankruptcy and is therefore in the custody of the court of bankruptcy,' and further, in the same case, that 'the provision of the Bankruptcy Act that such a lien shall not be affected by the bankruptcy proceedings has reference only to the validity of the lienholder's contract. It does not have reference to his remedy to enforce his rights. The remedy may be altered without impairing the obligation of his contract, so long as an equally efficient and adequate remedy is substituted.' By coming into the bankruptcy court, therefore, the holder of a valid lien upon the estate of a bankrupt comes into an appropriate place and into a court amply able to enforce and protect his rights. By doing so the lienholder waives none of his rights. The enforcement of his lien in

another court would entail upon the proceeds of the property upon which the lien exists the payment of the appropriate court costs; and so, in the enforcement of such lien in a court of bankruptcy, the proceeds of the property of the bankrupt upon which such lien exists is properly chargeable with the costs of such court appropriate to such enforcement, but with no other or further costs."

§ 1990. Each Fund to Bear Its Own Expenses and Costs.

And each fund is to bear its own expenses and costs.

Impliedly, *In re Morris*, 19 A. B. R. 781, 156 Fed. 597 (D. C. Pa.); *In re Bourlier Cornice Co.*, 13 A. B. R. 585, 133 Fed. 958 (D. C. Ky.).

Of course, where the expenses of preservation cover several funds, they may be apportioned among the various funds.

Instance, *In re Evans Lumber Co.*, 23 A. B. R. 881, 176 Fed. 643 (D. C. Ga.).

§ 1991. Proportionate Part Not to Be Charged against Each Lien.

Page 1233, note 43. See, in addition, *Mills v. Virginia-Carolina Lumber Co.*, 20 A. B. R. 750, 164 Fed. 168 (C. C. A. N. Car.), quoted at § 1993.

Page 1233. But where the lien is only on part, the expenses assignable to that part, of course, may be arrived at proportionately.

In re Davis, 19 A. B. R. 98, 155 Fed. 671 (D. C. N. Y.).

But, of course, the expenses, where jointly incurred in the protection of several different funds, may be apportioned among various funds.

Instance, *In re Evans Lumber Co.*, 23 A. B. R. 881, 176 Fed. 643 (D. C. Ga.).

§ 1992. Costs and Expenses First Deducted and Liens Paid Out of Remainder.

Page 1233, note 44. Impliedly, *In re Baughman*, 20 A. B. R. 811, 163 Fed. 669 (D. C. S. Car.).

Impliedly, *In re Alaska Fishing, etc., Co.*, 21 A. B. R. 685, 167 Fed. 875 (D. C. Wash.).

Impliedly, *In re Allert* 23 A. B. R. 101, 173 Fed. 733 (D. C. W. Va.).

Page 1233, note 45. See, also, cases cited under § 1989.

Page 1233. Likewise costs and expenses of the sale have precedence over landlord's liens for rent.

In re Morris, 19 A. B. R. 781, 156 Fed. 597 (D. C. Pa.).

Receiver's certificates have thus been given priority in certain cases.

In re Alaska Fishing, etc., Co., 21 A. B. R. 685, 167 Fed. 875 (D. C. Wash.).

And priority creditors are not entitled to come before lienholders.

In re Allert, 23 A. B. R. 101, 173 Fed. 691 (D. C. N. Y.). See post, § 2186; also, see In re Proudfoot, 23 A. B. R. 106, 173 Fed. 733 (D. C. W. Va.).

And the prior lienholder is entitled to be paid in full, after deduction of the costs and expenses, if the fund is sufficient.

In re Allert, 23 A. B. R. 101, 173 Fed. 691 (D. C. N. Y.).

§ 1993. General Costs of Administration Not Chargeable.

Page 1234, note 46. See, in addition, In re Morris, 19 A. B. R. 781, 156 Fed. 597 (D. C. Pa.).

Page 1234. In re Williams (Anheuser Busch Brew. Asso. v. Harrison), 19 A. B. R. 389, 156 Fed. 934 (C. C. A. Wash.): "They are not chargeable with the general costs of the administration of the bankrupt's estate, such as the services of a receiver in carrying on the business of the bankrupt, the expenses and losses of such business, the fees of the attorney for such receiver, the general fees of the trustee or those of his attorney. If so, the valid lien upon the estate of the bankrupt, which the Bankruptcy Act expressly declares shall be unaffected by any of its provisions, might very readily be destroyed, as it would unquestionably be, should such costs equal or exceed the proceeds in cases like the present, where the aggregate amount of the valid liens exceeds the proceeds of the entire estate of the bankrupt." Quoted further at § 1989.

Mills v. Virginia-Carolina Lumber Co., 20 A. B. R. 750, 164 Fed. 168 (C. C. A. N. Car.): "Whilst we think, therefore, that the judgment of the District Court, allowing the proof of the \$750.00 debt, should be affirmed, we feel constrained to modify the judgment with respect to cost. In the order which was filed by the District Court from the report of the referee, we find the following: "It is further ordered and adjudged that as the creditor (meaning the Virginia-Carolina Lumber Company) voluntarily came into court and filed its claim for allowance, that said claim must bear its pro rata part of the costs of the administration under the proceedings in bankruptcy." Aside from the mere costs incident to the proof of the claim, we do not see how this creditor should be required to pay any part of the costs of the administration of this bankrupt's estate. The lumber company had its claim secured by deed in trust on the property of the bankrupt and it was entitled to have its claim paid in full, provided the property so conveyed would bring enough. The trustee in bankruptcy elected to sell this property and has the proceeds of the sale in hand. The lumber company, in our opinion, is entitled to have of the proceeds of the sale sufficient to pay its debt and interest, provided there is enough. If the property did not bring enough to pay the debt and interest in full, then the lumber company is entitled to have the whole of the proceeds. In other words, this creditor, which has simply come into a bankrupt court and established a debt that is a lien upon specific property of the bankrupt, should not be charged so as to reduce the security by making the fund arising from such specific property liable for the costs of the general administration of the bankrupt's estate."

In re Clark Coal & Coke Co., 23 A. B. R. 273, 173 Fed. 658, 176 Fed. 955 (D. C. Pa.): "But that with this slight power [Bankr. Act, § 2 (5)], and in the face of § 67d, that liens given or accepted in good

faith should not be affected by the act,' a court of bankruptcy, without notice, can take the money of a lien creditor to pay the expenses of the general estate, or provide a fund for distribution among the general creditors, does not appear to us to be sound." [Quoted further at § 1996. Also, see opinion of referee in 22 A. B. R. 843, 57 Pitts. L. J. 205.]

§ 1994. Trustee's Attorney's Fees and Expenses Benefiting Entire Fund Chargeable but Not for Services in Litigating Liens.

Page 1234, note 48. See, in addition, *In re Williams (Anheuser-Busch Brew. Asso. v. Harrison)*, 19 A. B. R. 389, 156 Fed. 934 (C. C. A. Wash.), quoted at §§ 1993, 1989.

§ 1995. Referee Has Authority to Tax Costs and Expenses.

Page 1234, note 49. To the same effect, *In re Rome*, 19 A. B. R. 820, 162 Fed. 971 (D. C. N. J.).

§ 1996. Costs and Expenses Taxable.

Page 1234, note 50. See, in addition, *In re Morris*, 19 A. B. R. 781, 156 Fed. 597 (D. C. Pa.).

Page 1234, note 52. See, in addition, *In re Morris*, 19 A. B. R. 781, 156 Fed. 597 (D. C. Pa.).

Appraiser's Fees.—See post, § 2121.

Page 1234, note 53. See, in addition, *In re Morris*, 19 A. B. R. 781, 156 Fed. 597 (D. C. Pa.). Watchman's pay and wages of clerk at sale.

Page 1235, note 54. Compare, *In re Williams (Anheuser-Busch Brew. Assn. v. Harrison)*, 19 A. B. R. 389, 156 Fed. 934 (C. C. A. Wash.), quoted at §§ 1989, 1993.

Page 1235. *In re Clark Coal & Coke Co.*, 23 A. B. R. 273, 173 Fed. 658, 176 Fed. 955 (D. C. Pa.): "Unless the lien creditor came into court, or was brought into court by regular process, and consented to the operation of the plant, or unless the facts would warrant the conclusion that it was under such circumstances as would estop the lien creditor that the business was continued, the lien creditor could not be displaced and the property covered by his lien swept away from him." [Quoted further at § 1993.]

Page 1235, note 55. See, in addition, *In re Morris*, 19 A. B. R. 781, 156 Fed. 597 (D. C. Pa.).

Page 1235. Except that, where the fund actually is insufficient even to pay the lienholders, it is perhaps proper to charge against the fund the services of the trustee's attorney in defeating improper claims for liens thereon.

Perhaps, *In re Waterloo Organ Co.*, 18 A. B. R. 752, 154 Fed. 657 (C. C. A. N. Y.): "The trustee in bankruptcy presents a bill for services and attorney's fees in the controversy (which was heretofore brought up to this court) as to the validity of the two bonds held by Bacon and the 21 bonds

held by the bank. That litigation was not a frivolous one, as our former opinions indicated, and since its object was to reduce the number of claimants upon the special fund belonging primarily to the secured (mortgage) creditors, that fund is the proper one to bear the expense."

Page 1235, note 59. In addition, compare *Chestertown Bank v. Walker*, 20 A. B. R. 840, 163 Fed. 510 (C. C. A. Md.). But compare, *In re Waterloo Organ Co.*, 17 A. B. R. 300, 147 Fed. 814 (D. C. N. Y.).

Also compare, *In re Claussen*, 21 A. B. R. 34, 164 Fed. 300 (D. C. S. Car.), wherein mortgagee's attorney refused compensation for services rendered exclusively for mortgagee's benefit, but apparently would have been allowed for services for general benefit. Compare, *In re Blanchard Shingle Co.*, 21 A. B. R. 142, 164 Fed. 311 (C. C. A. Wash.), where a mortgagee was refused his attorney's lien for instituting foreclosure before bankruptcy, though allowed as a general claim.

Compare, *In re Wendel*, 18 A. B. R. 665, 152 Fed. 672 (D. C. Pa.); *In re Allert*, 23 A. B. R. 101, 173 Fed. 691 (D. C. N. Y.), wherein attorney for second mortgagee was refused compensation.

Page 1236. But attorney's fees have been allowed to mortgagees in sales in bankruptcy where proper by State law as part of the lien contracted for.

In re Wendel, 18 A. B. R. 665, 152 Fed. 672 (D. C. Pa.), wherein the court reduced the amount from that stipulated for, in accordance with State law; also, see *In re Waterloo Organ Co.*, 17 A. B. R. 300, 147 Fed. 814 (D. C. N. Y.), and same case, modified by appellate court in 18 A. B. R. 752, 154 Fed. 657 (C. C. A. N. Y.), wherein a trustee for mortgage bondholders was allowed compensation and attorney's fees.

Thus, even for services in opposing the adjudication in bankruptcy of the debtor, in a case where there was a trustee in a mortgage given to secure bondholders, who contested the adjudication in the interest of the bondholders.

In re Waterloo Organ Co., 18 A. B. R. 752, 154 Fed. 657 (C. C. A. N. Y.).

Page 1236. And it has been held that in general the expenses and costs chargeable against a particular fund should not exceed what would have been chargeable had foreclosure in the State court been had.

In re Davis, 19 A. B. R. 98, 155 Fed. 671 (D. C. N. Y.).

But certainly there can be no hard and fast rule to such effect, though economy of administration should continually be borne in mind in this particular as in every other particular in bankruptcy.

Receiver's certificates for expenses in the preservation of the property involved are also chargeable.

In re Alaska Fish, etc., Co., 21 A. B. R. 685, 167 Fed. 875 (D. C. Wash.). Compare, also, ante, § 389.

Commissions of the referee, one per cent. on the amount realized over and above the expenses, are properly chargeable.

Compare, however, *In re Morris*, 19 A. B. R. 781, 156 Fed. 597 (D. C. Pa.); *In re Baughman*, 20 A. B. R. 811, 163 Fed. 669 (D. C. S. Car.).

Likewise, commissions of the trustee.

In re Morris, 19 A. B. R. 781, 156 Fed. 597 (D. C. Pa.); *In re Baughman*, 20 A. B. R. 811, 163 Fed. 669 (D. C. S. Car.).

Page 1236. Receiver's compensation for the care and preservation of the property sold is also entitled to priority as costs.

In re Alaska Fish, etc., Co., 21 A. B. R. 685, 167 Fed. 875 (D. C. Wash.).

By the Amendment of 1910, commissions of the receiver may also be charged.

Bankr. Act, 48d and e. Also, see post, § 2118, et seq.

§ 1997½. Interest.

Where the funds are ample interest on the lien is to be computed to date, and not merely to the time of the filing of the bankruptcy petition.

Coder v. Arts, 22 A. B. R. 1, 213 U. S. 223: "Nor do we think the circuit court of appeals erred in holding that, inasmuch as the estate was ample for that purpose, Arts was entitled to interest on his mortgage debt."

Page 1236. Nor merely to the time of the approval of the sale.

In re Allert, 23 A. B. R. 101, 173 Fed. 691 (D. C. N. Y.).

Page 1236. However, such rule only applies as to payments out of the fund covered by the lien. When the deficit is presented for allowance against the general estate for sharing in dividends, the amount of such deficit is to be arrived at by computing interest only to the date of the filing of the bankruptcy petition; otherwise, the mere existence of some security, however small, would produce inequality in the allowance of claims for sharing in dividends.

§ 1999. Remedies against Purchaser.

Page 1236. The purchaser is chargeable with interest from the date of the confirmation of the sale until he makes payment.

Instance, *In re Waterloo Organ Co.*, 18 A. B. R. 752, 154 Fed. 657 (C. C. A. N. Y.).

§ 2000½. Whether Injunction Available in Aid of Purchaser to Protect against Third Party.

It does not appear to be authoritatively decided whether injunction

is available after sale by the trustee in aid of the purchaser as against third parties.

Query, *In re Bluestone Bros.*, 23 A. B. R. 264, 174 Fed. 53 (D. C. W. Va.).

§ 2001. Jurisdiction to Tax Costs.

Page 1244, note 1. Compare, instance where taxed against unsuccessful claimant, *In re Shocket*, 24 A. B. R. 47, 177 Fed. 583 (D. C. R. I.), quoted at § 2111, note.

§ 2003. May Be Taxed against Successful Party, "for Cause."

Page 1244. Thus, against the bankrupt where the creditors have unsuccessfully prosecuted appeal from an order dismissing their specifications of objections to discharge.

In re McCrea, 20 A. B. R. 412, 161 Fed. 246 (C. C. A. N. Y.).

§ 2004. No Showing of "Cause" Requisite Where Taxed against Unsuccessful Party.

Page 1245. But there seems to be some question whether attorney's fees of the trustee may be taxed against an unsuccessful creditor.

Compare as to costs on disallowance of claim, *In re Rome*, 19 A. B. R. 820, 162 Fed. 971 (D. C. N. J.).

It would seem on principle, however, that an equitable portion of the trustee's attorney's fees might under some circumstances be taxed against the unsuccessful party; indeed, there are seldom any other "costs" that can be taxed except the expenses of the trustee, among which expenses may occur also attorney's fees.

Compare, instance of taxing expense and compensation of custodian, for preservation of property while petition pending, against unsuccessful claimant, on refusing petition for reclamation, *In re Schocket*, 24 A. B. R. 47, 177 Fed. 583 (D. C. R. I.), quoted at § 2111, note.

§ 2007. Compensation Not to Exceed Ten Cents per Folio for Taking and Transcribing.

Page 1246. It is said a different rule prevails where the examination occurs before adjudication and is before a special commissioner or master in chancery.

In re Stark, 18 A. B. R. 467, 155 Fed. 694 (D. C. N. Y.): "It does not seem to the court that the provisions of § 38, subdivision 5, apply to hearings before a special commissioner. The meaning of this section would seem to be that a referee in bankruptcy may make use of the services of a stenographer, when the trustee considers that the testimony should be taken, and that in such case the rate is fixed, but this rate has nothing to do with the employment of a stenographer on isolated and unusual occasions, where at the request of the creditors or of the receiver, a special hearing is had before

a special commissioner. The bankruptcy law gives the court power to appoint special masters or commissioners, to hold hearings in certain special cases enumerated in section 21a. If the hearing is not a statutory hearing before a referee in bankruptcy, the provisions of § 38, as to the employment of a stenographer by the referee in bankruptcy, would not apply."

§ 2011. Policy of Act, Strictest Economy.

Page 1247, note 13. Impliedly, *In re Kyte*, 19 A. B. R. 768, 158 Fed. 121 (D. C. Pa.); *In re Marks*, 22 A. B. R. 54 (Ref. Ga.); *Dunlap Hardware Co. v. Huddleston*, 21 A. B. R. 731, 167 Fed. 433 (C. C. A. Ga.); compare, as to extravagance in allowance of appraisers' fees, note, post, § 2128.

Bankruptcy Court Often Has to Protect Creditors against Their Own Neglect.—*Ross v. Saunders*, 5 A. B. R. 350, 105 Fed. 915 (C. C. A. Mass.).

Page 1248. *In re Ketterer Mfg. Co.*, 19 A. B. R. 646, 156 Fed. 719 (D. C. Pa.): "Economy in the administration of estates is the policy of the present law, and is to be strictly enforced."

In re Allert, 23 A. B. R. 101, 173 Fed. 691 (D. C. N. Y.): "It should remain uppermost in the minds of litigants and attorneys practicing in the bankruptcy courts, that it is the policy of the Bankruptcy Act to administer estates with the strictest economy, to the end that fees, costs and charges should be reduced to the lowest minimum;" although in this case itself "extra" compensation was allowed the referee.

An example of the tendency towards extravagance of administration is afforded in the practice that has grown up in a few districts of appointing special masters at an increased expense to estates to perform various parts of the duties that the referee is presumed to perform as part of the duties for which he receives his fixed compensation.

See ante, §§ 24, 522½.

Page 1248, note 17. Compare, *In re Allert*, 23 A. B. R. 101, 173 Fed. 691 (D. C. N. Y.), wherein the court allowed a referee "extra" compensation for such duty, saying it was performed outside of the referee's duties.

Page 1248. Thus, a "special commissioner" passing on priority of expense of administration where the assets were too small to pay them in full.

In re Gregnard Lith. Co., 19 A. B. R. 743, 155 Fed. 699 (D. C. N. Y.).

For determining reasonableness of prepayment of attorney's fee under § 60 (d) and § 64 (b) (3).

In re Shiebler & Co., 20 A. B. R. 777, 163 Fed. 545 (D. C. N. Y.).

For taking an accounting in order to determine proper amount for which a proof of claim should be allowed.

In re Fenn, 22 A. B. R. 833, 172 Fed. 620 (D. C. Vt.).

Page 1249, note 21. See § 2660; *In re Grossman*, 6 A. B. R. 510, 111 Fed. 507 (D. C. Mich.); *Bragassa v. St. Louis Cycle Co.*, 5 A. B. R. 700, 107 Fed.

77 (C. C. A. Tex.), quoted at § 2660. Contra, *In re Wilcox*, 19 A. B. R. 241, 156 Fed. 685 (D. C. Mich.).

Page 1249, note 23. See, in addition, *In re Allert*, 23 A. B. R. 101, 173 Fed. 691 (D. C. N. Y.).

§ 2012. Preliminary Deposits for Referee, Clerk and Trustee.

Page 1249, note 24. **Clerk's Per Diem for Making References in Judge's Absence.**—See ante, § 285, n.

§ 2013. First Priority.

Page 1250, note 24. *In re Heller*, 23 A. B. R. 792, 176 Fed. 656 (D. C. N. Y.).

§ 2014. What Included in Term.

Petitioning creditors doubtless may also be allowed expenses for the actual and necessary cost of preserving the estate.

In re Heller, 23 A. B. R. 792, 176 Fed. 656 (D. C. N. Y.).

§ 2015. Second "Priority."

Page 1253. Of course, the petitioning creditors may be allowed, also, for their actual and necessary expenses incurred in the preservation of the estate.

In re Heller, 23 A. B. R. 792, 176 Fed. 656 (D. C. N. Y.).

§ 2016. Reimbursement of Creditors Recovering Concealed Assets, etc.

Page 1253, note 37. Instance (reimbursement of attachment proceedings, where sheriff preserved assets), *In re Heller*, 23 A. B. R. 792, 176 Fed. 656 (D. C. N. Y.); obiter, *In re Roadarmour*, 24 A. B. R. 49, 177 Fed. 379 (C. C. A. Ohio). Compare, § 2060.

And, doubtless, in such cases the court of bankruptcy would probably have authority to make such reimbursement by virtue of its general equity powers, regardless of the express permission of the statute.

Obiter, *In re Roadarmour*, 24 A. B. R. 49, 177 Fed. 379 (C. C. A. Ohio); *In re Groves*, 2 N. B. N. & R. 466 (Ref. Ohio), wherein such reimbursement, including attorneys' fees, was allowed out of the estate for setting aside a collusive sale of the assets before the Amendment of 1903 to Bankr. Act, § 64 (b) (2).

§ 2018. Disallowance of Unjust Claims before Election of Trustee.

Page 1254, note 43. Compare (though occurring after the Amendment of 1903), *In re Helier*, 23 A. B. R. 792, 176 Fed. 656 (D. C. N. Y.).

Page 1256, note 46. Compare (though lien of attachment not preserved for benefit of estate), *In re Heller*, 23 A. B. R. 792, 176 Fed. 656 (D. C. N. Y.).

§ 2020. **Equity Rules to Govern Order of Precedence in Class Three.**

Page 1256, note 48. See post, § 2027.

§ 2027. **Probable Order of Priority.**

Undoubtedly, the expenses of the referee, receiver and trustee would in equity have precedence over all other costs of administration.

But compare, *In re Gregnard Lith. Co.*, 19 A. B. R. 743, 155 Fed. 699 (D. C. N. Y.), in which case occurs the remarkable item of "special commissioner's" fees for passing upon the priority of expenses of administration where the estate is not sufficient to pay them in full! See ante, §§ 24, 2011.

§ 2033. **Expenses of Receiver and Trustees.**

Of course the expenses of receivers and trustees are bound to be various.

Withholding Expenses on Removal of Trustee.—Under what circumstances the allowance of expenses has been withheld on removal of the trustee, see *In re Leverton*, 19 A. B. R. 434, 155 Fed. 925 (D. C. Pa.); also, see ante, § 947½.

They are as varied as are the natures of the different businesses that happen to get into bankruptcy. Thus, there is likely to be rent.

In re Hersey, 22 A. B. R. 860, 171 Fed. 998 (D. C. Iowa).

Insurance.

In re Kyte, 19 A. B. R. 768, 158 Fed. 121 (D. C. Pa.).

Appraisers' fees.

See ante, § 1930½, note.

Expense of litigation; attorneys' fees; etc.

§ 2034. **Rent for Use and Occupation.**

Page 1261, note 65. See ante, § 984.

Page 1261. But the landlord is entitled to pay for the use and occupation of the premises.

In re Grignard Lith. Co., 19 A. B. R. 101, 158 Fed. 557 (D. C. N. Y.); *In re Hersey*, 22 A. B. R. 860, 171 Fed. 998 (D. C. Iowa).

Restraining Action in Possession by Landlord against Trustee.—A landlord has been restrained from prosecuting an independent suit in personam for trespass against the trustee where he was endeavoring in this manner to recover rent for use and occupation, having delayed presenting his bill therefor as part of the expenses of administration until almost all the funds of the estate had been disbursed, *In re Empire Construction Co.*, 19 A. B. R. 704, 157 Fed. 495 (D. C. N. Y.). The query arises, however, whether it was not the trustee's duty to take care of this expense as of other expenses.

Such being by way of an expense of the administration and not by way of a "priority."

In re Hersey, 22 A. B. R. 860, 171 Fed. 998 (D. C. Iowa).

§ 2035. Whether Computed at Lease Rate.

Page 1262, note 66. See post, § 985.

Page 1262. In re Yodleman-Walsh Foundry Co., 21 A. B. R. 509, 166 Fed. 381 (D. C. N. Y.): "This court has held in a number of instances that if the receiver is actually in possession, for the purpose of preserving the estate, during a certain number of days, he should pay, as part of the expenses of maintaining the estate, the pro rata rent, at a reasonable value, for that time, and in the same way this court has held in a number of instances that the receiver is entitled to the benefit of being compelled to pay only a reasonable value for the property, if the rental value happens to be greater because of some contract liability which will result in a claim against the estate in the hands of the trustee, or against the bankrupt himself, if he should subsequently continue with the lease."

It is doubtful, also, whether the landlord's loss of a prospective tenant by reason of the occupancy can be taken into account in arriving at a quantum valebat.

In re Grignard Lith. Co., 19 A. B. R. 101, 158 Fed. 557 (D. C. N. Y.).

§ 2036. Expense of Conducting Business.

Page 1262, note 69. See ante, § 387, et seq. But it has been held that the **expenses of conducting the business may not be charged upon property to the loss of a prior valid lien** thereon without the lienor's consent. See to same effect where lienor not notified, In re Clark Coal & Coke Co., 23 A. B. R. 273, 173 Fed. 658 (D. C. Pa.).

Page 1262. And this is so even though there will not be enough left to pay more than a dividend to labor claimants.

In re Krause, 19 A. B. R. 93, 155 Fed. 702 (D. C. N. Y.).

In general, a receiver will not be surcharged for losses on sales while conducting the business.

In re Isaacson, 23 A. B. R. 98, 174 Fed. 406 (C. C. A. N. Y.). Also, compare, In re Consumers Coffee Co., 20 A. B. R. 835, 162 Fed. 786 (D. C. Pa.); also, compare, In re Bayley, 22 A. B. R. 249, 177 Fed. 522 (D. C. Pa.).

Page 1263, note 69. Likewise, receiver conducting business at a loss without keeping proper books, and leaving bankrupt's officers in charge, and commingling funds of estate with his own funds—part of loss surcharged upon his account, In re Consumer's Coffee Co., 20 A. B. R. 835, 162 Fed. 786 (D. C. Pa.).

Suing receivers or trustees for acts done while conducting business, see ante, §§ 1780, 1780½, 1783, 1784.

Running of hotel by trustee pending sale, whether trustee may be sur-

charged for permitting liens for supplies, to acquire precedence over landlord's lien, *In re Bayley*, 22 A. B. R. 249, 177 Fed. 522 (D. C. Pa.).

Compensation where case transferred from one District Court to another, *In re Isaacson*, 23 A. B. R. 98, 174 Fed. 406 (C. C. A. N. Y.).

No collateral attack on order to continue business, *In re Isaacson*, 23 A. B. R. 98, 174 Fed. 406 (C. C. A. N. Y.).

§ 2037½. **Expert Accountant.**

In special instances it may be proper for the trustee to employ an expert accountant, to investigate the bankrupt's books, etc.

Instance, where refused compensation out of estate, because employment not authorized and fees exorbitant, *In re Marks*, 22 A. B. R. 54 (Ref. Ga.).

§ 2041. **Attorney's Fees Incurred by Trustees and Receivers.**

As to whom to employ as attorney, see ante, § 377, note.

As to "compensation" of receiver and trustee, see post, § 2108, et seq.; § 2118, et seq.

§ 2044. **For Many Services Attorney to Seek Pay from Own Client, Not from Estate.**

Page 1266, note 77. Instance, *In re Coventry Evans Furn. Co.*, 22 A. B. R. 623, 166 Fed. 516, 171 Fed. 673 (D. C. N. Y.); mortgagee allowed to foreclose out of bankruptcy court. Instance, *In re Claussen*, 21 A. B. R. 34, 164 Fed. 300 (D. C. S. Car.).

Page 1266. And charge must not be made out of the estate for services really performed for particular creditors represented by the attorney.

In re Ketterer Mfg. Co., 19 A. B. R. 646, 156 Fed. 719 (D. C. Pa.).

§ 2045. **Fees Must Be "Reasonable."**

Page 1266, note 78. See, in addition, *In re Ketterer Mfg. Co.*, 19 A. B. R. 646, 156 Fed. 719 (D. C. Pa.). Receiver's attorney allowed \$1,500.

In re Kyte, 19 A. B. R. 768, 158 Fed. 121 (D. C. Pa.): Receiver's attorney's fee cut down from \$200 to \$150.

Ohio Valley Bank Co. v. Mack, 20 A. B. R. 919, 163 Fed. 155 (D. C. Ohio): No fee allowed receiver, he being a lawyer.

In re Irwin, 23 A. B. R. 487, 174 Fed. 642 (C. C. A. Pa.): Increasing bankrupt's attorney's fees from \$37.50 to \$100 in an estate of at least \$2,074.

Page 1267, note 78. *Ohio Valley Bank Co. v. Mack*, 20 A. B. R. 919, 163 Fed. 155 (D. C. Ohio): \$150 allowed petitioning creditors.

In re Southern Steel Co., 22 A. B. R. 476, 169 Fed. 702 (D. C. Ala.): \$5,000 allowed to petitioning creditors' attorneys.

In re Fidler & Son, 23 A. B. R. 16, 172 Fed. 635 (D. C. Pa.): Attorney allowed \$250 where his vigorous action resulted in bringing into the estate \$500.

In re Hoffman, 23 A. B. R. 19, 173 Fed. 234 (D. C. Wis.), where, in a proceeding against a bankrupt's wife, who was suspected of having appropriated and concealed some \$6,000 worth of assets, the attorneys for the trustees were allowed \$1,500 on account of services rendered in the litigation, a finding of the referee upon the attorneys' application for an additional allowance of \$1,000, that the original allowance was sufficient, the litigation having resulted in no benefit to the estate, will be affirmed, but his finding disallowing the attorney's claim for actual disbursements, certified to have been proper, was reversed.

Ohio Valley Bank Co. v. Mack, 20 A. B. R. 919, 163 Fed. 155 (D. C. Ohio): No allowance until itemization of services made, trustee himself being an attorney.

Ohio Valley Bank Co. v. Mack, 20 A. B. R. 919, 163 Fed. 155 (D. C. Ohio): Bankrupt's attorney in involuntary case allowed \$25 for preparing schedules, etc.

In re Berkowitz, 22 A. B. R. 236 (Ref. N. J.), \$5,000 allowed attorneys for petitioning creditors and trustee, in estate of \$17,362.54, where schedules set forth no assets and entire estate the result of able and vigorous legal work.

§ 2046. "Reasonableness" Left to Sound Judicial Discretion of Court.

Page 1267, note 79. See, in addition, In re Hill Co., 20 A. B. R. 73, 159 Fed. 73 (C. C. A. Ills.).

Page 1268, note 80. In re Irwin, 23 A. B. R. 487, 174 Fed. 642 (C. C. A. Pa.).

§ 2047. Various Elements to Be Considered, Each Having Modifying Effect.

Page 1268, note 81. See, in addition, In re Berkowitz, 22 A. B. R. 236 (Ref. N. J.).

Page 1270, note 83. Instance, In re Berkowitz, 22 A. B. R. 236 (Ref. N. J.): \$5,000 allowed attorneys in an estate of \$17,000, where the bankrupt's schedules originally showed no assets and entire estate result of attorney's vigorous work in uncovering the fraud of an alleged corporation formed to aid bankrupt to conceal assets; instance, In re Fidler & Son, 23 A. B. R. 16, 172 Fed. 635 (D. C. Pa.) where, though fine work was done, the pecuniary benefit to the estate was not very great.

§ 2048. Sixth Element, in Bankruptcy Cases, "Economy."

Page 1271, note 85. In re Kyte, 19 A. B. R. 768, 158 Fed. 121 (D. C. Pa.); impliedly, Ohio Valley Bank Co. v. Mack, 20 A. B. R. 919, 163 Fed. 155 (D. C. Ohio); impliedly, In re Huddleston, 21 A. B. R. 669, 167 Fed. 428 (D. C. Ga.); Dunlap Hardware Co. v. Huddleston, 21 A. B. R. 731, 167 Fed. 433 (C. C. A. Ga.); instance, In re Fidler & Son, 23 A. B. R. 16, 172 Fed. 635 (D. C. Pa.).

§ 2052. Showing to Be Made of Propriety and Reasonableness.

Page 1275, note 87. See, in addition, *Ohio Valley Bank Co. v. Mack*, 20 A. B. R. 919, 163 Fed. 155 (D. C. Ohio).

§ 2052½. Mere Employment and Service Not Sufficient.

Merely that an attorney has been employed and services been rendered by him is not sufficient to warrant a charge therefor out of the estate. Showing of necessity or propriety and reasonableness is requisite.

In re (T. E.) Hill Co., 20 A. B. R. 73, 159 Fed. 73 (C. C. A. Ills.): "Ordinarily, the duties of this statutory receiver neither require nor justify employment of an attorney, and it is plain that no claim for such services is chargeable per se against the estate, predicated alone upon the fact of employment and service rendered. The court may well reject claims therefor, as 'not a proper charge on said trust estate' (in the terms of the present order), in the exercise of a sound discretion to limit expenditures of administration within just bounds, and various considerations may enter into the disapproval."

§ 2054. Trustee's and Receiver's Attorney's Fees.

Page 1277. Likewise the receiver is entitled in proper cases to employ counsel.

Page 1277, note 91. For instances, see ante, § 2045. **Not to Employ Bankrupt's nor Petitioning Creditor's Attorney:** But it has been held he should not employ either the bankrupt's nor the petitioning creditor's attorney, In re Strobel, 20 A. B. R. 22, 160 Fed. 916 (C. C. A. N. Y.).

Page 1277. Ordinarily, however, the duties of the receiver, as a mere custodian, neither require nor justify the employment of an attorney; and certainly an attorney is not to be employed as a mere matter of course nor his services compensated for out of the estate merely because rendered.

In re (T. E.) Hill & Co., 20 A. B. R. 73, 159 Fed. 73 (C. C. A. Ills.): "Ordinarily, the duties of the statutory receiver neither require nor justify employment of an attorney, and it is plain no claim for such services is chargeable per se against the estate predicated alone upon the fact of employment and service rendered."

§ 2055. Not to Employ Attorney to Do Ordinary Business Duties of Trustee.

Page 1278. Obiter, *Ohio Valley Bank Co. v. Mack*, 20 A. B. R. 919, 163 Fed. 155 (D. C. Ohio): "The trustee is a lawyer and an able one, and should not employ lawyers to do any work which the law requires him to do."

§ 2057. But Creditors Not So Entitled, Even for Successful Objections to Claims, before Election of Trustee.

Page 1279, note 102. Perhaps, In re Coventry Evans Furn. Co., 22 A. B. R. 623, 166 Fed. 516, 171 Fed. 673 (D. C. N. Y.).

§ 2060. Attorneys for Creditors Co-Operating with Trustee's or Receiver's Attorney Not Entitled.

Where the trustee or receiver has an attorney, no compensation is allowable out of the estate to attorneys for creditors assisting him or co-operating with him, even though the services be valuable.

Probably, *In re Coventry Evans Furn. Co.*, 22 A. B. R. 623, 166 Fed. 516, 171 Fed. 673 (D. C. N. Y.).

Compare, *In re Fidler & Son*, 23 A. B. R. 16, 172 Fed. 635 (D. C. Pa.), wherein it was held that where a trustee had been derelict to his duty to such an extent that he had subsequently resigned to escape removal, an attorney for creditors who had stepped in and recovered assets and had become attorney for the new trustee was entitled to compensation from the estate from the time he took steps to have the former trustee removed. So far as this point is concerned, creditors might have been entitled to reimbursement for their attorney's fees and expenses from even an earlier period, under the provision of Bankr. Act, § 64 (b) (2). See ante, § 2016.

Page 1282. *In re Roadarmour*, 24 A. B. R. 49, 177 Fed. 379 (C. C. A. Ohio): "No authorities are cited in support of a proposition that an attorney employed by creditors to oppose claims, after the appointment of a trustee, may be allowed compensation for such services, unless in a case where the trustee has improperly refused to make defense. Such a rule would open the door to a confused and disorderly practice, entirely out of harmony with the theory of the Bankrupt Act. We do not wish to be understood as holding that creditors may not be permitted, under proper safeguards, to defend against the allowance of claims where the trustee refuses to make defense, or that the bankruptcy court has no authority in such case, under its general equity powers, to allow compensation to attorneys employed by creditors for the purpose of such defense—as was permitted in *re Little River Lumber Co.*, 3 Am. B. R. 682, 101 Fed. 558. It is enough to say that such a case is not before us."

§ 2062. Fee Bills, Properly, Should Be Itemized.

Page 1282. And "lump sums" should not be allowed.

In re Knight, see note to *In re Smith*, 5 A. B. R. 560.

§ 2063. Petitioning Creditors' Attorney's Fees.

Page 1282, note 106. As to what are "reasonable" fees, compare § 2045.

§ 2066. Apportionment Where Intervening Creditors Assist.

Page 1283, note 112. Also, compare, *In re Fischer*, 23 A. B. R. 427, 175 Fed. 531 (C. C. A. N. Y.).

Page 1283. Indeed, in one case, *In re Southern Steel Co.*, 22 A. B. R. 476, 169 Fed. 702 (D. C. Ala.), the intervening creditors' attorneys alone were granted the fee, since the original petition was insufficient to warrant adjudication and other facts appearing in the case made it equitable to so order.

§ 2068. For What Services Allowable to Petitioning Creditors.

Page 1284, note 116. But compare, *In re Southern Steel Co.*, 22 A. B. R. 476, 169 Fed. 702 (D. C. Ala.).

§ 2076. Review of Allowance of Petitioning Creditor's Fees by Appeal.

Page 1286. It is also reviewable by petition to revise.

Instance, *In re Fischer*, 23 A. B. R. 427, 175 Fed. 531 (C. C. A. N. Y.).

§ 2077. Bankrupt's Attorney's Fees.

Page 1286, note 125. See, in addition, *In re Christianson*, 23 A. B. R. 710, 175 Fed. 867 (D. C. N. C.).

§ 2078. In Involuntary Cases, Confined to Services Rendered While Bankrupt in Performance of Duties Prescribed by Law.

Page 1287, note 126. *In re O'Hara*, 21 A. B. R. 508, 171 Fed. 290 (D. C. Pa.).

§ 2079. Actual Benefit to Estate Not Test, However.

Page 1288. *In re Christianson*, 23 A. B. R. 710, 175 Fed. 867 (D. C. N. C.): "The services are not confined to those which are beneficial to the estate, but embrace those which are reasonably necessary to enable the bankrupt to perform his duties under the act and secure the benefit of its provisions. It should not be forgotten that the Bankruptcy Act is for the benefit of the bankrupt as well as his creditors. It is no less concerned that he shall be discharged from the burden of his debts than that he shall turn over all his property except his exemptions for the benefit of his creditors."

§ 2085. And None for Services in Opposing Bankruptcy Proceedings.

Obiter, *In re Christianson*, 23 A. B. R. 710, 175 Fed. 867 (D. C. N. C.): "It cannot include services performed in an attempt to aid the bankrupt in cheating his creditors, or evading any of the provisions of the act intended for their protection."

§ 2086. For Attendance at Bankrupt's Examination Allowable.

Page 1291, note 136. Impliedly, *In re Adler & Co.*, 21 A. B. R. 302, 170 Fed. 634 (D. C. La.), wherein the court even refused to allow the bankrupt's attorney to be present.

§ 2087. Whether Fees Allowable for Petition for Discharge, etc.

Page 1891, note 137. Obiter, *In re O'Hara*, 21 A. B. R. 508, 171 Fed. 290 (D. C. Pa.).

§ 2088. No Allowance for Bankrupt's Admission in Writing of Inability to Pay Debts, etc., nor for Services in Aid of Adjudication; nor in Contests over Exemptions.

Page 1293. No attorney's fees should be allowed for services rendered the bankrupt in a contest over his exemptions.

But compare, *In re Christianson*, 23 A. B. R. 710, 175 Fed. 867 (D. C. N. C.), also quoted at § 2079.

Page 1293. *In re O'Hara*, 21 A. B. R. 508, 171 Fed. 290 (D. C. Pa.): "There was considerable controversy over the exemption, including a hearing before the referee and an appeal to the court; and although the claim in both instances was disallowed, it may well be, that, as between the bankrupt and his attorney, the amount now asked for was fully earned. But the Bankruptcy Act only provides, § 64b, 3, for payment out of the estate of 'one reasonable attorney's fee * * * for professional services actually rendered * * * to the bankrupt in involuntary cases while performing the duties herein prescribed;' evidently referring to those previously enumerated in § 7a. *In re Woodard*, 2 Am. B. R. 692, 95 Fed. 955; *In re Payne*, 18 Am. B. R. 192, 151 Fed. 1018. These are duties which aid in the settlement of the estate, which is no doubt the reason for the allowance to counsel, and among them the endeavor to secure for the bankrupt his exemption claim is not one. *In re Castleberry*, 16 Am. B. R. 430, 143 Fed. 1021. The same is true where the services have to do with obtaining a discharge; which shows the principle involved. *In re Brundin*, 7 Am. B. R. 296, 112 Fed. 306. The exceptions are overruled, and the action of the referee is affirmed."

§ 2090. Test in Voluntary Cases, in General.

Page 1294, note 148. Also, compare contra, *In re Christianson*, 23 A. B. R. 710, 175 Fed. 867 (D. C. N. C.), quoted at § 2079.

§ 2094. Bankrupt Paying Attorney in Advance.

Page 1296. And such prepayment is neither a preference nor fraudulent conveyance.

Furth v. Stahl, 10 A. B. R. 442, 205 Pa. 439.

In re Wood & Henderson, 20 A. B. R. 1, 210 U. S. 246. "This is not a case of a preference, where part of the estate is transferred to a creditor so as to give to him more of the estate than to others of the same class, under § 60 (a) of the Bankruptcy Act. Nor is it a case of a fraudulent conveyance under § 67. It is a transfer in consideration of future services to be reduced if found unreasonable in amount."

§ 2096. Whether Different Principles Govern from Those Where Allowed out of Estate.

Page 1296, note 158. *Furth v. Stahl*, 10 A. B. R. 442, 205 Pa. 439, rejected in *In re Habegger*, 15 A. B. R. 208, 139 Fed. 623 (C. C. A. Minn.), but cited with approval in *In re Wood & Henderson*, 20 A. B. R. 1, 210 U. S. 246; *Pratt v. Bothe*, 12 A. B. R. 529, 130 Fed. 670 (C. C. A. Mich.), cited with approval in *In re Wood & Henderson*, *supra*.

Page 1296. Prepayment of attorneys' fees by bankrupts is not favored in bankruptcy, it is said in one case.

In re Blanchard, 20 A. B. R. 417, 161 Fed. 793 (D. C. N. Car.).

§ 2098. Prepaid Fee, to Be "Reasonable" and Subject to Re-Examination.

Page 1298, note 161. Instance, In re Christianson, 23 A. B. R. 710, 175 Fed. 867 (D. C. N. C.): "It would be unwise both for creditors and bankrupts to make the compensation so parsimonious that attorneys of standing and experience would be reluctant to act on behalf of bankrupts. If, however, the sums mentioned in the opinion by Judge Brown are to be applied by a hard and fast rule to all cases, and counsel who accept from bankrupts a larger sum are to be exposed to a citation to return the money to the trustee, and the reflection arising from the fact of receiving as attorney's fees sums forbidden by law, the result cannot fail to deter attorneys of reputation and standing from acting on behalf of bankrupts."

See, in addition, In re Wood & Henderson, 20 A. B. R. 1, 210 U. S. 246.

§ 2099. Summary Jurisdiction over Attorney to Require Repayment of Excess.

The court has jurisdiction over the attorney to determine any excessiveness and in proper cases to require repayment by him. Such jurisdiction may be exercised in the bankruptcy proceedings themselves; and its exercise is not violative of the rules regarding the forum for suits against adverse claimants.

In re Ellis Bros. Printing Co., 19 A. B. R. 472, 156 Fed. 430 (D. C. N. Y.), quoted at § 1863; impliedly, In re Shiebler & Co., 20 A. B. R. 777, 163 Fed. 545 (D. C. N. Y.).

Summary Jurisdiction over Bankrupt's Attorneys in General.—Summary jurisdiction exists over bankrupt's attorneys with regard to funds of the bankrupt collected by them even though applied on claims for attorney's fees for services already rendered, In re Ellis Bros. Printing Co., 19 A. B. R. 472, 156 Fed. 430 (D. C. N. Y.).

Nor is it violative of the Seventh Amendment of the Constitution securing the right of trial by jury.

In re Wood & Henderson, 20 A. B. R. 1, 210 U. S. 246: "The construction which we have given § 60d does not deprive parties of rights secured under the Seventh Amendment of the Constitution to trials by jury in suits at common law where the value in controversy exceeds twenty dollars. This provision of the constitution extends to rights and remedies peculiarly legal in their nature and such as it was proper to extend in courts of law by the appropriate modes and proceedings of such courts."

Moreover, it is provided for by a special clause of the Bankrupt Act itself. Indeed it is the Bankruptcy Court alone that has jurisdiction to "examine" in such cases, and the State court is without jurisdiction.

In re Wood & Henderson, 20 A. B. R. 1, 210 U. S. 246: "Jurisdiction to

re-examine the transfer to counsel was certainly not conferred upon any State court. When the statute says that if the transfer in contemplation of filing a petition in bankruptcy shall be found to be excessive it may be reduced by 'the court,' is it possible that it was intended to give the State courts jurisdiction of that much of the administration of the estate, and oust the District Court of the United States, and perhaps delay the settlement of the estate until the State courts of original and appellate jurisdiction shall determine the reasonableness of the counsel fee provided for in contemplation of bankruptcy? The answer to this question is obvious, and clearly, against a construction which has this effect upon the system of bankruptcy to be administered in the District Courts of the United States established by the act of Congress. It is true that the State courts under the Bankruptcy Act as it stood before the Amendment of February, 1903, were given jurisdiction to entertain suits to recover preferences to the exclusion of the Federal courts, unless the defendant consented to be sued in the Federal court. *Bardes v. Hawarden Bank*, 178 U. S. 524, 4 Am. B. R. 163. * * * If suit was begun in the State court of Arkansas, that court would have answered, as did the Supreme Court of Missouri in *Swartz v. Frank*, 183 Mo. 439, 82 S. W. 60, the Bankruptcy Act confers no jurisdiction upon a State court to entertain an application of the trustee, or of a creditor to reduce the provision made for counsel, that jurisdiction is given alone to the District Court of the United States administering the property. If the action had been brought in the United States court it would have made the same answer, and, in addition thereto, the jurisdiction of the Circuit or District Court of the United States could have been ousted, prior to the Amendment of 1903, by the defendants withholding their consent to the jurisdiction of the Federal court."

And a plenary suit is not necessary to jurisdiction to determine whether the fee is excessive.

In *re Wood & Henderson*, 20 A. B. R. 1, 210 U. S. 246: "This section does not undertake to provide for a plenary suit, but for an examination and order in the course of the administration of the estate with a view to permitting only a reasonable amount thereof to be deducted from it because of payments of money or transfers of property to attorneys or counsellors in contemplation of bankruptcy proceedings. There is no provision for the enforcement of this section in another court of bankruptcy, where the bankrupt may be personally served with process in a plenary suit; such court is not given authority to re-examine the transaction. No other court has authority to determine the reasonable amount for which the transaction can stand. *Swartz v. Frank*. 183 Mo. 439."

Page 1298, note 162. In *re Wood & Henderson*, 20 A. B. R. 1, 210 U. S. 246; In *re Lewin*, 4 A. B. R. 634, 103 Fed. 852 (D. C. Vt.), cited with approval in *re Wood & Henderson*, *supra*.

Page 1298, note 163. See, in addition, In *re Wood & Henderson*, 20 A. B. R. 1, 210 U. S. 246.

Procedure.—It is said in one case that the procedure should be by motion to fix the allowance and for an order directing the return of the excess, "unless an issue is raised," In *re Shiebler & Co.*, 20 A. B. R. 777, 163 Fed. 545 (D. C. N. Y.).

Such notice may be by service of a rule or order to appear and show cause served either personally or by mail.

In re Wood & Henderson, 20 A. B. R. 1, 210 U. S. 246: "The section makes no provision for the service of process, and in that view such reasonable notice to the parties affected should be required as is appropriate to the case, and an opportunity should be given them to be heard. We see no reason why notice of the proceedings under § 60d may not be by mail or otherwise, as the court shall direct, so that an opportunity is given to appear in the court where the estate is to be administered and contest the reasonableness of the charges in question."

Perhaps the order reducing the fees should not also command the return of the excess unless the attorney be shown to be able to respond to the demand. In the event of his inability so to respond or of his non-residence, it might be that the order determining the amount of the excess, though binding upon the parties, could not be made finally effectual until a judgment were rendered thereon in a jurisdiction where it could be executed.

In re Wood & Henderson, 20 A. B. R. 1, 210 U. S. 246.

§ 2103. Referee's Commissions Computed on Disbursements to "Creditors."

Page 1299, note 167. See, in addition, *Bray v. Johnson*, 21 A. B. R. 383, 166 Fed. 57 (C. C. A. W. Va.), quoted in this §.

Page 1299. Thus, commissions are not to be computed on amounts paid out as expenses for the continuance of business.

Bray v. Johnson, 21 A. B. R. 383, 166 Fed. 57 (D. C. W. Va.): "The precise questions presented for consideration are what compensation, if any, the referee is entitled to receive upon funds handled through the bankrupt's trustees, in conducting the business ordered to be continued by the referee; and what effect should be given to a decree of the court entered making an allowance on account of such compensation to the appellee, and from which no appeal was taken. The first question is one that would seem to be determined by the plain letter of the Bankruptcy Act, and the rules prescribed by the Supreme Court in pursuance thereof. Section 40 of the Act of 1898 on this subject, provided for a commission of one per centum on the sums paid as dividends, or one-half of one per centum on the amount to be paid creditors upon the confirmation of a composition. The act as amended on the 5th of February, 1903, § 40-a, is as follows: [quoting § 40 (a) 166] The amended section, it will be observed, modifies the language of the original act, which allowed a commission of one per centum on sums paid as dividends, and in addition to otherwise providing largely for the increase of the compensation of referees, authorizes a commission on one per cent. on 'all moneys disbursed to the creditors by the trustee.' This language is clear, and its meaning too plain to admit of controversy. It is as positive as its purpose is apparent, to fix definitely what this judicial officer shall receive from the funds coming under the administration of the court, as to which he might be called upon to take official action. The amendment of 5th of

February, 1903, by § 72, emphasized the meaning of the previous provision, and is as follows: 'That neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act.' Section 2 of the General Orders, No. 35, prescribed by the Supreme Court for the enforcement of the bankruptcy law, also expressly prohibits this charge by the referee, in that it provides that: 'The compensation of referees prescribed by this act shall be in full compensation for all services performed by them under the act, or under these general orders,' but this rule provides for certain expenses which may be allowed by the court. The claim here asserted is clearly not authorized by the original Bankrupt Act, nor under the amendment of February 5th, 1903, and § 72 of the amendments expressly prevents referees from receiving in any 'form or guise' anything other than his statutory compensation, and expressly inhibits the court from making such allowance. The reason why this allowance cannot and should not be made or thought of for a moment, is apparent. The courts are authorized to continue the business of bankrupts, and this referee exercised this authority, which in passing it may be said as to a transaction of this magnitude, without the express sanction of the court, was of exceedingly doubtful propriety, and the issuance of trustees' certificates for \$75,000.00 or indeed for any amount, assuming it should be done in a bankruptcy case at all, ought manifestly not to be thought of by a referee. The temptation, if a referee could thus increase his compensation, to err, would be too great. Serious questions involving his personal interest, upon which he would have judicially to pass, would be continually presented, and the result of such a system would soon be disastrous, and bring the courts of bankruptcy into disrepute. The objections to such an allowance are fundamental, aside from the fact that the compensation is fixed by law. To have the pay of a referee, acting in a purely judicial capacity, respecting a particular transaction, in which he acts for and on behalf of the court, measured by the extent of the fund that might be handled under and in pursuance of decrees and orders entered by himself, would be as anomalous as it would be unfortunate, because of the delicate and embarrassing position in which he would be constantly placed, as manifestly his personal and financial interest in what he was doing would frequently arise, and result in having his best motives impugned. This case affords a striking illustration of why such a thing should not be done, and the consequences that could be expected to flow therefrom. The fund on which a commission can be allowed, as between two referees, is some \$30,000.00, or \$300.00, whereas the claim asserted by one referee is on some \$480,000.00, or for \$4,800.00, being on the amount expended in creating the \$30,000.00, a difference to the referee of \$4,500.00 in his compensation in a single case, as the result of the exercise of his own judicial discretion in deciding to complete partly executed contracts of the bankrupt company. Judicial officers should not be placed in a position where their private interests necessarily become involved in their official action; and should it ever be done to the extent that the view of the bankrupt law contended for by the referee, would bring about, the federal judicial system would sustain a serious blow, and quickly be deprived of its independence, its greatest source of strength with the people and bar. The Bankrupt Act, in our judgment, affords no ground for an interpretation that would be so far reaching in its results, or bring about such serious consequences. It is not intimated or suggested here that the referee was guilty of the slightest impropriety. On the contrary, he was supported in all that

he did, by the creditors and trustees, and their counsel, and he expended much time, and performed great labor, showing the utmost fidelity to his trust throughout. But the hazard of such an undertaking as was embarked upon, was too great for a court or referee to enter on. The contracts themselves were of a kind extremely difficult to handle, subject to many vicissitudes; and while it may have been supposed that considerable money could be realized the result proved how far all such calculations were; \$28,000.00 instead of from \$150,000.00 to \$200,000.00 was realized as the result of more than 18 months' work; and it may be said that this was rather providential."

§ 2105½. Also Where Creditor Purchases and Applies Dividend on Price.

Also, the referee is entitled to commissions where a creditor buys in the property and applies his dividends in part payment therefor.

Impliedly, In re Morse Iron Works & Dry Dock Co., 18 A. B. R. 846, 154 Fed. 214 (D. C. N. Y.).

§ 2107½. Referee Acting as Special Master.

Where the referee is acting as special master (as he may do in contested adjudications, discharges and compositions, and on applications for injunctions against a court or an officer thereof, and also in independent equity suits for the recovery of transferred property) he is by the weight of authority to be allowed additional compensation, though such additional compensation has been denied him since the Amendment of 1903, by other authorities.

See ante, § 2011; post, § 2660.

§ 2108½. Amendment of 1910—Trustee's Ordinary Compensation.

The Amendment of 1910 does not change the compensation of the trustee for the performance of his ordinary duties, but leaves such compensation as before, simply making definite and certain that this compensation shall be computed upon amounts paid to lienholders and other persons.

See Bankruptcy Act, § 48 (a), as amended in 1910.

§ 2109. Commissions Computed on Disbursements for Expenses and to Creditors.

Page 1302. The rule laid down in this paragraph, § 2109, is not changed by the Amendment of 1910. On the contrary, that amendment enunciates the rule expressly, allowing commissions on all amounts disbursed or turned over to any person, including lienholders.

See Bankr. Act, § 48 (a), as amended in 1910.

§ 2110. Except That in Composition Cases Computed Only on Disbursements to Creditors.

The Amendment of 1910 to Bankruptcy Act, § 48, has not changed this rule, save and except that the trustee may also be allowed additional compensation where he has conducted the business of the bankrupt.

See Bankr. Act, § 48 (a) and (e), as amended in 1910.

Such additional compensation being allowable up to a further one half of one per cent. upon the amounts disbursed to creditors.

The same manner of computation and rate of commissions in composition cases, prevails in allowances to receivers, by the Amendment of 1910.

§ 2111. Whether "Disbursement" Includes Proceeds of Property and Trust Funds Surrendered to Adverse Claimants, and Exempt Property Sold by Trustee.

Page 1302. The Amendment of 1910 places beyond doubt the right of the trustee to commissions upon the proceeds of property and trust funds surrendered to adverse claimants, such amendment providing for "commissions on all moneys disbursed or turned over to any person, including lienholders, by them, etc."

See Bankr. Act, § 48, as amended in 1910.

Compare instance and reasoning before the Amendment of 1910, wherein expense and compensation for care and custody in preserving specific property were taxed against an unsuccessful claimant; *In re Schocket*, 24 A. B. R. 47, 177 Fed. 583 (D. C. R. I.): "Blankenstein's petition prayed for a return to him of specific personal property which was in the hands of a receiver when he filed his petition, and which subsequently came into the hands of the trustee upon his appointment. The relief sought—i. e., a return of specific property—was inconsistent with a sale by the trustee. Neither Blankenstein nor the trustee made application for a sale of the property and to hold the proceeds in lieu thereof. The trustee contends that the reclamation proceedings prevented a sale and gave rise to expenses in preserving the property; that these expenses were the result of a fraudulent claim, and should not be cast upon the estate, but should be borne by the petitioner for reclamation and taxed against him. While it is doubtful if this expense falls strictly within the usual meaning of the term 'costs of suit,' and while no statutory provision in terms covers a charge of this character, yet in a proceeding in equity the taxation of similar charges seems to have been allowed. In *Burns v. Rosenstein*, 135 U. S. 449, 10 Sup. Ct. 817, 34 L. Ed. 193, which related to proceedings in equity, the court said: 'The allegations of the original bill justified the issuing of the attachment. It was right that the property taken under it should be cared for, and, as the court found that the plaintiffs were entitled to a decree against the defendants, a judgment for costs properly followed; and we perceive no reason why the plaintiffs should not have been allowed, as part of their costs, a reasonable amount for the expenses incurred in preserving the attached property, and for which they became primarily liable to the officer keeping

it. We cannot say, upon the record before us, that the court below exceeded its discretion in apportioning the expenses thus incurred.' A court of equity, in extending an order for the taxation of costs so that it may include charges and expenses properly incurred, seems to proceed rather upon considerations of the substantial equities of the parties than upon ordinary statutory provisions concerning costs. 3 Daniell's Chancery (1st Am. Ed.), p. 1586. The petitioner in reclamation having made application to a court exercising chancery powers in the administration of the bankrupt's assets, seeking a determination of his right to have returned to him specific property held by the trustee for the benefit of the creditors, is justly chargeable for such necessary expenses in the custody of the goods as were occasioned by the proceedings instituted by him, and which would not have been incurred but for his intervention. To cast upon the property belonging to the creditors the costs of preservation pending the fraudulent claim of an intervener is contrary to equity. I am of the opinion that the court has authority to so extend an order for the taxation of costs against the intervener as to include a direction to tax charges and expenses of custody, as well as ordinary costs. Such charges and expenses should cover only the custody and expense which were the direct result of the intervention proceedings. Charges for expense of keeping, that would have been necessary irrespective of the filing of the reclamation proceedings, should be disallowed."

Notwithstanding the breadth of the term used, it is still doubtful whether commissions to "any person" should be held to include commissions on exempt property where it has been sold by consent, since § 48 should be read in connection with other sections in *pari materia*, such as § 6, wherein it is provided that "this act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force, etc." Furthermore, § 48, in this regard is to be read in the light of the well-known policy of the law, as expressed in the decisions of great liberality towards debtors in the allowance of exemptions.

See *ante*, § 1093½.

However, where exempt property is sold by the trustee, there is considerable justification for charging commissions therefrom against the bankrupt, since he has received the benefit of the trustee's work in this regard, and it may be that the courts will charge commissions upon exempt property where it has been sold by the trustee either for the sole benefit of the bankrupt, or for the conjoint benefit of the bankrupt and creditors. In no event, however, can commissions be charged upon exempt property set over to the bankrupt "in kind."

§ 2112. Entitled Even Where Outside Agreement to "Credit" Exists and Actual Money Does Not Pass.

And the trustee, similarly to the referee [*ante*, § 2105], is entitled to commissions upon all amounts that would be disbursed by him but for outside agreement between the parties, as, for instance, where a lien-

holder buys in the property and applies his debt on the purchase price, etc., or where a creditor buys it in and credits his dividends thereon.

In *re* Morse Iron Works & Dry Dock Co., 18 A. B. R. 846, 154 Fed. 214 (D. C. N. Y.).

The Amendment of 1910 would not affect the doctrine of this paragraph.

§ 2113. No Absolute Right to Full Commissions: Less May Be Allowed or All Allowance Withheld.

Page 1303, note 180. See, in addition, In *re* Leverton, 19 A. B. R. 434, 155 Fed. 925 (D. C. Pa.). See *ante*, § 947½.

The doctrine of this paragraph is not affected by the Amendment of 1910, see Report No. 691 of the Judiciary Committee of the Senate, 61st Congress, Second Session: "Of course, the rates of commissions prescribed are maximum limitations. Less, but not more, may be allowed; and it is hoped the courts will exercise their discretion still in allowing less amounts where proper."

§ 2115. Extra Compensation for Conducting Business.

Page 1303, note 182. See, in addition, In *re* Pequod Brew. Co., 18 A. B. R. 352 (Ref. N. Y.); In *re* Shiebler & Co., 23 A. B. R. 162, 174 Fed. 336 (C. C. A. N. Y.); compare, In *re* Russell Card Co., 23 A. B. R. 300, 174 Fed. 202 (D. C. N. J.).

Page 1304. The Amendment of 1910 permits additional compensation to trustees and receivers (and marshals) for continuing the business of the bankrupt and specifies extent and the manner of the fixing thereof.

See Bankr. Act, § 48: "(e) Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two of this act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and, in cases of receivers or marshals, also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees: such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: Provided, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition: Provided further, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this act."

§ 2116. But Not to Exceed Rate for Trustee's Ordinary Services.

Page 1304. The additional compensation allowed for continuing the bankrupt's business, doubtless, must not exceed the same rate allowed trustees as commissions for performing their other usual duties.

In re Leonard, 24 A. B. R. 97, 177 Fed. 503 (D. C. Nev.).

Page 1304, note 185. See, in addition, In re Shiebler & Co., 23 A. B. R. 162, 174 Fed. 336 (C. C. A. N. Y.).

Page 1305. And, at any rate, the compensation for conducting the business cannot be fixed upon in advance.

In re Russell Card Co., 23 A. B. R. 300, 174 Fed. 202 (D. C. N. J.), quoted at § 431.

The ambiguity and indefiniteness of the terms "similar services," above adverted to, as well as the difficulty of adopting a commission basis for the allowance of compensation in the conducting of business, finally brought the Circuit Court of Appeals to rule that there was no limitation on the discretion of the court in the fixing of additional compensation for trustees and receivers for conducting the business of the bankrupt.

In re Schiebler & Co., 23 A. B. R. 162, 174 Fed. 336 (C. C. A. N. Y.).

Congress, at the same time was passing the Amendment of 1910, by which the term "similar services" used in the amendment to § 2 (5) in 1903, was made definite, and an entire scheme for allowance of compensation, by way of commissions upon actual amounts realized, with maximum limitations upon the discretion of the courts, was elaborated; the Amendment of 1910, however, simply adopting the rate of commissions prescribed for trustee's ordinary services in the Amendment of 1903, and applying such rate, respectively, to the ordinary compensation of the trustee and receiver and to their additional compensation for conducting the business.

See Report No. 691 of the Senate Judiciary Committee of the 61st Congress, 2nd Session: "As the law originally stood there was no provision whatever regulating the compensation of receivers, although the compensation of trustees (at any rate for the performance of their ordinary duties) was most carefully and economically prescribed and limited. The idea of the framers of the law of 1898 undoubtedly was that the administration of bankrupt estates would be placed in the hands of trustees who were to be elected by creditors and whose compensation was carefully limited. However, it was necessary to provide for the contingency, frequently occurring, of a period of time elapsing after the filing of the petition in bankruptcy and before the election of the trustee, during which interval assets might be in danger of destruction or depreciation, and for this purpose it was provided that receivers might be appointed 'when absolutely necessary for the

preservation of the estate,' and that these receivers (as well as the trustees afterwards) might carry on the business whenever the best interests of the parties required it, though only for 'limited periods.' While the compensation of trustees (at least their 'ordinary' compensation) was carefully limited, yet the compensation of receivers was left wholly to the discretion of the court, a defect which the Amendment of 1903 did not correct. Such unlimited discretion in the allowance of compensation has offered opportunity for certain serious abuses to creep in. Indeed, in some sections of the country, the appointment of receivers and the conducting of the business by them have become the rule rather than the intended exception, a custom which has resulted in estates being kept for prolonged periods, sometimes, indeed, for almost their entire administration, in the hands of receivers appointed by the courts, with compensation allowable in the unlimited discretion of the courts, rather than in the hands of trustees elected by creditors, with compensation carefully and economically limited. As to the matter of additional compensation for the conducting of the business by the receiver or trustee, the Act of 1898, as originally passed, gave no such additional compensation. This was an injustice, because the conducting of the business of the insolvent is frequently necessary, particularly when adjudications are contested or when the assets consist of an active business which can be best sold as a going concern. The Amendment of 1903 sought to correct this injustice by an amendment of § 2, clause 5, of the act—a part of the statute, however, which is not germane to the subject of compensation, for which reason the whole subject is now referred to § 48 of the act. Through the unfortunate wording of the Amendment of 1903, especially through the use of the word 'similar,' this clause regarding compensation was at least ambiguous. It was the actual intention of the framers of the Amendment of 1903 that where the trustee or receiver conducted the business he might be allowed additional compensation, but that such additional compensation should not exceed once again the compensation prescribed in § 48, § 48 carefully limiting the compensation of the trustee to certain fixed percentages upon moneys disbursed. The courts have construed the Amendment of 1903 as allowing additional compensation for conducting the business, to be sure, but have held that there is no limit upon the amount allowable, save and except the 'discretion of the court.' (In re Shiebler & Co., 23 A. B. R. 162; 174 Fed. 336.) A careful reading of the proposed amendments forming new clauses (d) and (e) of § 48, in conjunction with § 48 (a) of the law as the latter clause continues to stand [§ 48 (a) is itself recommended for amendment, as hereinafter noted], will exhibit fully the method proposed to be adopted by the present amendment for compensating receivers for their ordinary duties and for giving additional compensation to trustees or receivers for the conducting of business. As a basis from which to start, the established rate of compensation already prescribed in § 48 (a) of the act for trustees for the performance of their ordinary duties is adopted. Trustees for their ordinary services already are compensated in § 48 (a) of the act by way of commissions on moneys actually disbursed by them, the rate being 6 per cent on the first \$500, 4 per cent on the next \$1,000, 2 per cent on the next \$8,500, and 1 per cent above \$10,000, averaging, in an estate of \$5,000, less than 3 per cent on the whole; in an estate of \$10,000, less than 2½ per cent on the whole; and in an estate of \$20,000, less than 2 per cent—a very low rate of commission. The present amendment fixes the maximum compensation that can be allowed receivers for the performance of their ordinary duties at precisely his same rate, instead of leaving it to the un-

limited discretion of the court. It also fixes the extra compensation, whether it be to the receiver or trustee, for the conducting of the business, to once again this same rate; so that, at best, the ordinary and extraordinary compensation taken together, in the event that both a receiver and trustee have successively had charge of the estate and even have both conducted the business, cannot exceed four times the amount allowable to trustees by § 48 (a) of the act for the performance of his ordinary duties. The practical difficulty in the way of allowing commissions to receivers, where the receivers turn over to the trustee in specie the property which they have been taking care of, is obviated by the provision that the commissions are to be figured upon the amounts thereafter actually realized upon sale of such property so turned over in specie. Thus the bill seeks to reduce to the one rational basis of commissions, on moneys actually realized, the compensation, both ordinary and extraordinary, of both trustee and receiver; and by this is done away with, also, the unlimited discretion of the courts in the allowance of compensation to such officers. Of course, the rates of commission prescribed are maximum limitations. Less, but not more, may be allowed, and it is hoped the courts will exercise their discretion still in allowing less amounts where proper. It is further to be observed that creditors are to be given notice of all applications for allowance, and thus there is afforded an additional safeguard. The changes proposed by §§ 1, 9 of the amendatory bill will then, it is thought, tend to prevent extravagance in the administration of insolvent estates and to remove the temptation which now exists toward the creation of prolonged receiverships, and will also tend to put the administration of bankrupt estates promptly into the hands of trustees elected by the creditors, in accordance with the actual design of the framers of the bankruptcy act, rather than in the hands of receivers appointed by the courts."

§ 2117. No Additional Compensation Allowable "in Any Form or Guise."

Page 1305. *In re Coventry Evans Furn. Co.*, 22 A. B. R. 623, 166 Fed. 516, 171 Fed. 673 (D. C. N. Y.): "Prior to the amendment it was customary to make extra allowances to trustees and this was in some cases upheld; but it is seen that the amendment is prohibitory on the court, and absolutely bars all such allowances, however onerous, meritorious, and valuable the services of the trustee."

Page 1306. The Amendment of 1910, to § 72, includes the receiver and marshal among those thus prohibited.

See Bankruptcy Act, § 72, as amended in 1910.

Of course this prohibition refers only to allowance of compensation out of assets and would not refer to costs taxed against unsuccessful petitioning creditors, in favor of receivers or marshals where no adjudication occurs and no moneys are realized in the estate. The Amendment of 1910 in this regard, should, of course, be construed in the light of the evils it sought to correct, which were extravagance and uncertainty in the allowance of compensation out of assets in process of administration—not to the taxing of costs against unsuccessful parties litigant.

Likewise, the ordinary fees of the marshal for the service of papers, etc., are governed by § 52 (b) of the act and are not within the contemplation of Bankr. Act, § 48.

See Bankr. Act, § 52b: "Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their services in the proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals."

In cases where there is no adjudication and no composition under § 12a, but where there is a dismissal of the petition without adjudication, and without judgment against the petitioning creditors, as, for example, in cases of "friendly settlements" where the entire bankruptcy proceedings are "lifted" by consent of all creditors, of course, the compensation of the receiver and trustee may be agreed upon and paid by consent of all parties.

§ 2118. Receivers' Compensation.

Page 1306, note 188. Bankr. Act, § 48 (d) and (e), as amended in 1910.

§ 2119. Receiver's Maximum Allowance Properly Not to Exceed Trustee's.

Page 1306, note 189. Apparently, *Dunlap Hardware Co. v. Huddleston*, 21 A. B. R. 731, 167 Fed. 433 (C. C. A. Ga.); instance, evidently contra, *In re Hughes*, 22 A. B. R. 303, 170 Fed. 809 (D. C. N. J.); *In re Leonard*, 24 A. B. R. 97, 177 Fed. 503 (D. C. Nev.).

Page 1307, note 190. Instance, *In re Kyte*, 19 A. B. R. 768, 158 Fed. 121 (D. C. Pa.). Compare, as to compensation for conducting business, §§ 2115, 2116.

Other Instances of Allowance of Receiver's Compensation.—*In re Huddleston*, 21 A. B. R. 669, 167 Fed. 428 (D. C. Ga.).

Page 1307. Also for the conducting of the business.

In re Shiebler & Co., 23 A. B. R. 162, 174 Fed. 336 (C. C. A. N. Y.); compare, also, ante, § 2116.

Page 1308. The Amendment of 1910, to § 48, Bankr. Act, has expressly adopted as the statute the rule of discretion above laid down by the author.

See Report, No. 691 of the Senate Judiciary Committee of the 61st Congress, Second Session, quoted ante, at § 2116.

§ 2119¼. Amendment of 1910 in Composition Cases.

By the Amendment of 1910, the trustee or receiver or marshal is to be allowed only one-half of one per cent upon amounts disbursed to

creditors, for his ordinary compensation, and an additional one-half of one per cent upon such amounts where he has conducted the business of the bankrupt.

Bankr. Act as amended in 1910, § 48a: “ * * * And in case of the confirmation of a composition after the trustee has qualified, the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition. * * * (d) Receivers or marshals appointed pursuant to section two, subdivision three, of this act shall receive for their services, payable after they are rendered, compensation by way of commissions, etc. * * * Provided, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to paid creditors on such compositions: * * * (e) Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two of this act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, etc. * * * Provided, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition.”

§ 2119½. Notice of Application for Allowance of Compensation.

By the Amendment of 1910 to § 48 d and e, it is prescribed that (except as to the allowance of the trustee's ordinary compensation), notice of the application therefor must be given to all creditors, stating the amount applied for.

See Bankr. Act, § 48 b and e: “Provided further, that before the allowance of compensation, notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this act.” See also, ante, § 565¾.

See Report No. 691 of the Senate Judiciary Committee of the 61st Congress, Second Session: “Of course, the rates of commission prescribed are maximum limitations. Less, but not more, may be allowed; and it is hoped the courts will exercise their discretion still in allowing less amounts where proper. It is further to be observed that creditors are to be given notice of all applications for allowance, and thus there is afforded an additional safeguard. The changes proposed by sections 1 and 9 of the amendatory bill will then, it is thought, tend to prevent extravagance in the administration of insolvent estates and to remove the temptation which now exists toward the creation of prolonged receiverships, and will also tend to put the administration of bankrupt estates promptly into the hands of trustees elected by the creditors, in accordance with the actual design of the framers of the Bankruptcy Act, rather than in the hands of receivers appointed by the courts.”

§ 2121. Appraiser's Fees.

Page 1308. Minute calculations as to the value of each article in detail is not required.

In re Gordon Supply & Mfg. Co., 13 A. B. R. 352, 133 Fed. 798 (D. C. Pa.).

In re Kyte, 19 A. B. R. 768, 158 Fed. 121 (D. C. Pa.): “The main purpose

of an appraisement is simply to get a general idea of the extent of the estate, so as to charge the party in whose custody it is with its value, and at the same time enable all concerned the better to keep track of it. Incidentally it may serve as a guide also to prospective buyers, but it is not to be independently undertaken with that in view, and except for this purpose it is difficult to see what object was gained in going over the same goods a second time."

In *re Fidler & Son*, 23 A. B. R. 16, 172 Fed. 635 (D. C. Pa.): "The expense of taking the inventory is outrageous, each appraiser receiving \$40. This is an extravagance which cannot be countenanced. The cost of appraisements is getting to be an abuse, which if not taken in hand by the courts, will lead to radical action by Congress. A per diem fee of \$5 is all that is allowed in this district, and it must be an extraordinary case where over two or three days are necessary. If there is occasion for anything more than that, the trustee must justify it."

§ 2129. Marshal's Fees.

The marshal's fees, as distinguished from his compensation as custodian of the property, and in the conducting of the business, are not affected by the Amendment of 1910; that amendment referring simply to allowances out of the assets, being administered for caring for the assets, § 48d referring to the marshal's compensation when appointed under Bankruptcy Act, § 2 (3), whilst 48e refers to the compensation of the marshal for conducting of the business under § 2 (5). His service of papers is prescribed by § 52b, taken in connection with § 829 of the Revised Statutes of the United States.

§ 2132½. Amendment of 1910.

The compensation of the receiver and trustee, as distinguished from their expenses, allowable out of the assets administered for making seizures under Bankr. Act, § 2 (3), is established by the Amendment of 1910 upon a commission basis, upon moneys disbursed by them or afterwards realized by the trustee from property turned over in specie to him.

Bankr. Act, § 48 (d): "(d) Receivers or marshals appointed pursuant to section two, subdivision three, of this act shall receive for their services, payable after they are rendered, compensation by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees, as the court may allow, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: Provided, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such compositions: Provided further, That

when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two of this act, he shall not receive nor be allowed in any form or guise more than two per centum on the first thousand dollars or less, and one-half of one per centum on all above one thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee: Provided further, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this act."

See also, ante, § 2115, et seq. Where no adjudication results, the compensation, so far as allowable out of the assets administered, cannot exceed the maximum commissions established by the statute in § 48; although as to any compensation taxed as part of the costs to be paid by petitioning creditors by way of a moneyed judgment against them, neither the rate of § 48 nor the prohibitions of § 72 are applicable.

§ 2134. Order of Priority in Distribution Prescribed by Act.

Page 1317, note 1. See, in general, Bankr. Act, § 64; also inferentially, *Martin v. Orgain*, 23 A. B. R. 454, 174 Fed. 772 (C. C. A. Tex.).

§ 2134½. Law in Force at Date of Adjudication Controls.

The statute in force at the date of adjudication controls the right of priority throughout the case.

In re Photo Engraving Co., 19 A. B. R. 94, 155 Fed. 684 (D. C. N. Y.).

§ 2139. No Special Form of Proof nor Assertion of Demand Requisite.

Page 1319. And it is not necessary that the right of priority be asserted before the expiration of the year limited for proving claims, if the debt itself be proved in time.

In re Ashland Steel Co., 21 A. B. R. 834, 168 Fed. 679 (D. C. Ky.): "The privilege was not a detached right, which could only be fastened by special proceedings taken to enforce it, as by an attachment or an execution or the enforcement of a mechanic's lien. It needed only to be proved, when the time should arrive for distributing the assets. * * * We think that, the substantive claims having been proven within the time allowed by the act, it was within the power of the court to allow the claims priority, and give them the preference to which by law they were entitled, notwithstanding no definite claim of the kind had been made during the year. It was not the allowance of a new claim, as counsel for petitioners insist, but the giving full scope to one already proved. It was essentially the ascertainment of its rank to be regarded in the distribution of the assets. The word 'claim,' in § 57n we should suppose, refers to the substance of the obligation, rather than to any mere attribute of it."

Page 1319. And the fact that the priority claimant inadvertently participated in the election of the trustee, as if his claim were not

entitled to priority, will not constitute an estoppel nor a waiver of the priority.

In re Ashland Steel Co., 21 A. B. R. 834, 168 Fed. 679 (C. C. A. Ky.). See also, ante, § 576.

§ 2141. Taxes.

Page 1319, note 12. See, in addition, In re Lange Co., 20 A. B. R. 478, 159 Fed. 586 (D. C. Iowa); In re Halsey Electric Generator Co., 23 A. B. R. 401, 175 Fed. 825 (D. C. N. J.); In re Weissman, 24 A. B. R. 150, 178 Fed. 115 (D. C. Conn.).

Page 1320. In re Halsey Electric Generator Co., 23 A. B. R. 401, 175 Fed. 825 (D. C. N. J.): "Keeping the legislative purpose of the Bankruptcy Act in mind, and viewing the language employed in the act in dealing with priorities, in the light of the foregoing suggestions, I am of the opinion that in the distribution of the assets of the bankrupt, the actual and necessary costs of preserving and administering the estate have priority over taxes."

Page 1321. In re Halsey Electric Generator Co., 23 A. B. R. 401, 175 Fed. 825 (D. C. N. Y.): "To my mind Congress has by apt words signified its intention to make taxes subordinate to the payment of the cost of preserving and administering a bankrupt's estate."

Page 1321. And it seems improper in theory and unnecessary from the point of view of statutory construction to place taxes in advance of costs of administration. Were they so placed, the administration of the estate might be completely blocked. The State is no more interested in the collection of taxes for the support of the government in its general functions than in the collection of the costs of its support in administering justice in the particular case immediately at hand—both taxes and costs are for the support of the government in the performance of its functions, and the particular support should have precedence over the general support, else the general support itself will fail.

Page 1321, note 16. Two cases indeed [disapproved in In re Halsey Electric Generator Co., 23 A. B. R. 401, 175 Fed. 825 (D. C. N. J.)] hold that taxes are to be paid before even costs of administration: *Obiter*, In re Prince & Walter, 12 A. B. R. 678, 131 Fed. 546 (D. C. Pa.); In re Weiss, 20 A. B. R. 247, 159 Fed. 295 (D. C. N. Y.).

§ 2143. Back Taxes, Omitted, to Be Paid.

Page 1321, note 18. In re Weissman, 24 A. B. R. 150, 178 Fed. 115 (D. C. Conn.), quoted at § 2144.

§ 2144. Delinquent Penalties and Interest.

Page 1322, note 19. *Pro* In re Scheidt Bros., 23 A. B. R. 778, 177 Fed. 599 (D. C. Ohio): "No question as to taxes accruing and penalties imposed subsequent to the institution of the bankruptcy proceedings is involved."

Whatever may be the rule elsewhere, in Ohio the penalty takes the place of interest. *Bridge Co. v. Mayer*, 31 Ohio St. 317, 328. Its allowance is intended to cover interest until the delinquent taxes are put into judgment (*Wheeling & Lake Erie Ry. Co. v. Wolfe*, 13 Ohio C. C. 374), or are paid voluntarily, or by special effort of the treasurer in person or by his agent—in some manner other than by process of law. The penalty, being treated as interest, is collectible as a part of the tax itself. 27 Am. & Eng. Ency. Law, 777, 778, 779. Under § 64 of the Bankruptcy Act the referee should have directed payment of both taxes and penalty."

See, in addition, *In re Cosmopolitan Power Co.*, 14 A. B. R. 604, 137 Fed. 858 (C. C. A. Ills.); *In re Schuyler & Co.*, 21 A. B. R. 428 (Ref. N. Y.).

Page 1322. Back taxes are to be paid, even though they absorb all, or a great part, of the assets; and even though the tax collectors have been negligent in making collection.

In re Weissman, 24 A. B. R. 150, 178 Fed. 115 (D. C. Conn.): "By this legislation Congress seems to have placed valid and subsisting taxes in a class by themselves and of the highest rank. The only possible question to be decided is whether the taxes, which the trustee has not been ordered to pay, were collectible from the bankrupt prior to adjudication. If they were legally due and owing at that time, they must be paid now. The referee seems to think that they were not, because the collectors had been guilty of laches in failing to collect sooner. Without explanation of the reasons for non-collection, it strikes one that the collectors have been disgracefully slack, but I cannot believe that in a suit against Weissman before bankruptcy such a defense would have been made, or, if it had been made, would have been seriously listened to by any court."

And taxes are not to lose their priority in favor of creditors whose assets have recently gone to swell the insolvent fund.

In re Weissman, 24 A. B. R. 150, 178 Fed. 115 (D. C. Conn.), quoted, on another point, *supra*.

§ 2150. Must Be Owing by Bankrupt and Assessed against Him.

Page 1328. The tax must be owing by the bankrupt and be owing by him to the municipal, State or federal government.

In re Wyoming Valley Ice Co., 16 A. B. R. 594, 145 Fed. 267 (D. C. Pa.).

Page 1328. Nor does a mere obligation on a bankrupt corporation to collect taxes from bondholders entitle them to priority out of the bankrupt's estate.

Obiter, *In re Wyoming Valley Ice Co.*, 21 A. B. R. 1, 165 Fed. 789 (D. C. Pa.): "But * * * as to the taxes on corporate loans, it was held [in *In re Wyoming Valley Ice Co.*, 16 A. B. R. 594, 145 Fed. 267] that being due in realty from bondholders, the company [bankrupt] being merely a collector, they are not a tax as to it, but merely a liability arising out of the duty to collect imposed by the statute, and were not therefore entitled to the priority of payment contended for."

§ 2151. Firm Taxes in Individual Bankruptcies, etc.

Page 1329. An individual partner's personal tax is not to be paid out of firm assets, in a partnership bankruptcy, until firm creditors are paid.

In re Flatau & Stern, 21 A. B. R. 352 (Ref. N. Y.).

§ 2152½. Broad Use of Term "Tax" in Bankruptcy.

It is obvious that the word "tax" as used in the Bankruptcy Act is not used in any restricted or narrow sense.

In re Lange Co., 20 A. B. R. 478, 159 Fed. 586 (D. C. Iowa): "It is obvious that the word 'tax,' as used in the Bankruptcy Act, is not used in any restricted or narrow sense, but is used broadly to include all obligations imposed by the State and general governments under their respective taxing or police powers for governmental or public purposes. That a tax so imposed may not be a general property tax does not deprive it of the character of a tax. Many taxes are imposed under the name of license fees, franchise taxes, or taxes for special purposes under some other name, and are therefore special taxes; but they are nevertheless taxes imposed for a public purpose, no matter what the name under which they are levied or imposed, and are clearly within the meaning of the term 'tax' as used in the Bankruptcy Act."

It includes personal taxes.

In re Flatau & Stern, 21 A. B. R. 352 (Ref. N. Y.).

§ 2154. Nature of Tax, Whether License, Penalty or Tax, Generally Determined by State Law.

Page 1330. Thus, water rates have been held to be "taxes" in Pennsylvania.

In re Industrial Cold Storage & Ice Co., 20 A. B. R. 904, 163 Fed. 390 (D. C. Pa.).

And in New York.

In re Broom, 10 A. B. R. 427, 123 Fed. 639 (D. C. N. Y.).

But in New York to be taxes against the landlord and not entitled to priority of payment out of the bankrupt tenant's estate. And the "Mulct. tax" of Iowa has been held not to be a "tax" entitled to priority of payment but a mere license fee to conduct a saloon.

Page 1330, note 40. Evidently reversed by later decisions. See, In re Lange Co., 20 A. B. R. 478, 159 Fed. 586 (D. C. Iowa).

Although this holding is perhaps incorrect even in accordance with Iowa law.

In re Lange Co., 20 A. B. R. 478, 159 Fed. 586 (D. C. Iowa).

Whilst the "cigarette tax" of the same State has been held to be a "tax."

In re Lange Co., 20 A. B. R. 478, 159 Fed. 586 (D. C. Iowa).

§ 2155. But Not Always.

Page 1330, note 41. See, in addition, In re Lange Co., 20 A. B. R. 478, 159 Fed. 586 (D. C. Iowa).

§ 2156. Thus, Franchise Tax.

Page 1331, note 42. See, in addition, In re Halsey Electric Generator Co., 23 A. B. R. 401, 175 Fed. 825 (D. C. N. J.).

Adjudication of a Corporation as a Bankrupt, Not a "Dissolution" of It.—See ante, § 451½.

§ 2158. And Decision of State Board of Assessment Not "Res Judicata."

Page 1332, note 45. Compare, In re Wyoming Valley Ice Co., 21 A. B. R. 1, 165 Fed. 789 (D. C. Pa.).

§ 2160. Whether Taxes "Provable" Debts.

Page 1333, note 47. See, in addition, In re Flatau & Stern, 21 A. B. R. 352 (Ref. N. Y.); obiter, In re Schuyler & Co., 21 A. B. R. 428 (Ref. N. Y.).

§ 2164. "Wages of Workmen, Clerks and Servants."

Page 1335, note 51. In re Strickland, 20 A. B. R. 923 (Ref. Ga.), although in this case the referee erroneously allowed the wages to have priority over exemptions!

Law in Force at Date of Adjudication Controls.—The right of priority will be determined in each case by the law as it stood at the date of the adjudication. In re Photo Engraving Co., 19 A. B. R. 94, 155 Fed. 684 (D. C. N. Y.).

§ 2165. Must Be "Wages," and Be "Due" and "Earned."

Page 1335. It is for "wages" that the priority is given.

"Wages."—See In re Fink, 20 A. B. R. 897, 163 Fed. 135 (D. C. Pa.).

And for such wages as are "due" and "earned." But "wages" may include payments for piece work or by commissions.

See §§ 2170½, 2175.

§ 2167. Only "Workmen," "Clerks" or "Servants" Entitled.

Page 1336, note 54. Compare ante, § 47.

§ 2169. "Workman," "Clerk" and "Servant" to Be Given Ordinary, Popular Meaning.

Page 1337, note 57. In re Zotti, 23 A. B. R. 607 (Ref. N. Y.).

Page 1337, note 58. In re Zotti, 23 A. B. R. 607 (Ref. N. Y.).

Page 1337. In re A. O. Brown & Co., 22 A. B. R. 496, 171 Fed. 254 (D. C. N. Y.): "Act 1867, * * * provided that priority should not be given, 'except that wages due from him [the bankrupt] to any operative or clerk or house servant' shall be preferred. Under the present act * * * the words are 'workman, clerk, or servant.' 'Workman' is possibly a wider phrase than 'operative,' and 'servant' is undoubtedly wider than 'house servant;' but the section is obviously copied after the law of 1867."

Page 1337. Musicians, employed at regular wages, to play on the bankrupt's roof garden, have been held entitled to priority as "servants."

In re Caldwell, 21 A. B. R. 236, 164 Fed. 515 (D. C. Ark.): "A musician employed by the day, week or month at regular wages, while not a 'menial servant' in any sense of the word, is still one who labors for the benefit of an employer. He is not in pursuit of an independent calling and is subject to his master's commands and must do as directed. The fact that his work is that of an artist does not deprive him of the benefit which the law intended to give to those working for wages for their living. An artist of the highest class might be employed to do some fresco painting at daily wages. Should the fact that he is an artist deprive him of any rights under that provision of the Bankruptcy Act, although his work is performed as a hired employee? I do not think the intent of Congress was so narrow, but rather that it took the broad view that every laborer, clerk, servant or employee working for wages for the benefit of a master or employer, when such wages furnish the means of his livelihood, and where the relationship of master and servant exists within the well known meaning of the law, shall have priority over ordinary creditors for the sum due him for such services, not to exceed three months' wages. Any other construction would do a great injustice to a large class of wage earners to whom their daily earnings are absolutely necessary for their support and that of their families, an injustice which I am not inclined to assume Congress intended to inflict on them. The priorities provided for by the Bankruptcy Act are remedial and should be liberal rather than strictly construed."

They were entitled to such priority, at any rate, as either workmen or servants.

A bookkeeper is a "clerk" within the meaning of the statute, even though temporarily employed in adjusting the books and accounts.

In re Baumbblatt, 19 A. B. R. 500, 156 Fed. 423 (D. C. Pa.); (1867) *Ex parte Rockett*, Fed. Cas. No. 11977.

§ 2170. "Traveling or City Salesman" Also Entitled to Priority.

Traveling or city salesmen before the Amendment of 1906 were not entitled to priority under § 64 (b) (4); but were entitled to priority under § 64 (b) (5), if the State law recognized the priority.

But traveling and city salesmen are now entitled to priority, by the Amendment of 1906.

In re New England Thread Co., 20 A. B. R. 47, 158 Fed. 788 (C. C. A. Mass.), quoted *supra*; In re Fink, 20 A. B. R. 897, 163 Fed. 135 (D. C. Pa.).

Page 1338. But only in bankruptcies wherein the adjudication has occurred since 1906.

In re Photo Engraving Co., 19 A. B. R. 94, 155 Fed. 684 (D. C. N. Y.).

§ 2170½. Though Paid by Commissions.

And the traveling or city salesman may be entitled to such priority even though he receive his compensation by way of commissions and not salary.

In re Fink, 20 A. B. R. 897, 163 Fed. 135 (D. C. Pa.).

In re New England Thread Co., 20 A. B. R. 47, 158 Fed. 788 (C. C. A. Mañs.): "A traveling salesman, as commonly understood, may be defined as a man who travels about the country soliciting orders for goods, which orders are sent to his employer for approval. This is the primary service for which he is employed, and it measures the full extent of his responsibility. He is not employed or authorized to fix prices. He cannot pass upon the credit or standing of customers. He does not collect accounts. He is not responsible for the quality, condition, or delivery of the goods. He makes no personal contracts, and he has no other interest in the sales than his compensation for those which are approved by his employer. But, while the field of service and responsibility of traveling salesmen is limited the agreements which they make with their employers vary greatly in such details as the form of compensation, the extent of territory, and in many other particulars. A traveling salesman may be paid a fixed sum per day, week or month, or a yearly salary, or a commission on the amount of goods sold, or both a fixed sum in the form of wages or salary, and, in addition thereto, a commission on the amount of goods sold when the sales exceed a certain amount. The territory assigned to him may be confined to a single city or State, or it may cover many cities or States. Commonly, the employer pays the salesman's expenses, but sometimes, especially if he works for a commission, he pays his own expenses. Sometimes the employer has a list of customers, and the salesman receives a commission upon all orders sent in by those customers. Sometimes he is allotted a certain territory, and he receives a commission upon all sales which are sent in from that territory. In some cases the employer may direct the routes he is to travel, and in other cases the salesman chooses his own routes. Sometimes the salesman sends the orders directly to his employer, and sometimes the customers themselves send in the orders to the employer. We do not think any of these details takes a man out of the category of traveling salesman, because, under all these different arrangements, the service and responsibility of the salesman are substantially limited to the obtaining of orders in a certain territory, and having them sent to his employer. * * * The remaining question is whether the word 'wages' in any way limits the class of traveling salesmen who are included within this provision of the Bankruptcy Act. If this provision had been restricted to 'workmen' and 'servants,' it might perhaps be urged that 'wages' should be construed in its narrow and popular sense as meaning the payment of a fixed sum per day, week, or month for manual labor, or other labor of a menial or mechanical kind. But since this provision also includes 'clerks' and 'traveling or city salesmen,' if we construe 'wages' in this narrow sense we necessarily limit the operation of the statute to those clerks and traveling salesmen who happen to be paid

for their services in a particular way; in other words, the question of preference is made to turn upon the mode of payment rather than upon the kind of service rendered. The result would be that a clerk who was paid a fixed sum per day, week, or month, which during the year amounted to \$1,000, would be entitled to a preference, while a clerk who was paid this sum in the form of a yearly salary would be excluded; and, further, a traveling salesman who was paid a fixed sum of \$100 or \$500 a month would be entitled to a preference, while a traveling salesman who only earned from \$30 to \$40 per month in the form of commissions would be excluded. It is plain therefore, that 'wages' must be construed in its broader and more general sense as meaning compensation for services rendered, since to hold otherwise would lead to glaring inconsistencies and manifest injustice."

And it has been held so, even where he was paid by a percentage of the gross sales of his employer and where he was required to pay the incidental expenses of an office and stenographer, besides.

In re New England Thread Co., 18 A. B. R. 840, 154 Fed. 742 (D. C. R. I.): "There is no apparent reason why a salesman may not be paid for his services as salesman by a per centage of the employer's gross sales, as well as by a per centage of those sales procured by his immediate solicitation. Practically, it is a somewhat difficult matter to determine what orders received by an employer are due to the efforts of an experienced and important salesman like the petitioner. Many of the orders received by the employer might have been a consequence more or less direct of previous efforts of the salesman. If practical men deem it proper that the arrangement for compensation should be based on the entire sales in the salesman's territory, whether they are directly traceable to him or not, we cannot say that compensation of this character is not as strictly compensation for services of the salesman as a fixed salary or a fixed per centage of sales actually traceable to the salesman. It is also suggested that, as the petitioner was under expense for an office and stenographer, it is impossible to apportion his wages from his expenses. The fact that by an arrangement between employer and salesman the salesman is to pay his own expenses cannot lessen the salesman's right to the agreed compensation, where the expenses are fairly incidental to the service to be performed."

§ 2176. Idea of Subordination Implied.

Page 1340, note 73. See, in addition, In re Zotti, 23 A. B. R. 607 (Ref. N. Y.).

Page 1341. In re A. O. Brown & Co., 22 A. B. R. 496, 171 Fed. 254 (D. C. N. Y.): "It is quite clear that Olmsted is not a 'workman' for the bankrupt. Nor is he a 'servant,' because the term does not include all instances of the formal relation of master and servant. * * * The only thing left that he could be, therefore, is a 'clerk.' No one would think of calling the manager in charge of the Chicago branch of a broker's office a 'clerk'—he himself least of all. Whether or not he is employed for 'wages,' he is much distinguished from a clerk."

But compare, In re New Eng. Thread Co., 20 A. B. R. 47, 158 Fed. 788 (C. A. Mass.): "There is a general argument of some force which has been brought to our attention against any construction of this provision which would include the present claimant. This argument is that Congress in-

tended by this provision to carry out the policy of the law of giving a preference to those who serve in a subordinate or menial capacity, and who are therefore presumed to be dependent upon their earnings for their present support; and, such being the intention of Congress, this provision should not be held to cover the case of a man who earns \$4,000 a year as commissions for selling goods. While this argument is plausible, it will not bear analysis. Had Congress intended to give a preference only to a subordinate class of clerks and traveling salesmen, it should have so framed the statute as to limit the preference to clerks and traveling salesmen who received a comparatively small compensation for their services, and should not have used language which applies equally to all classes of clerks and traveling salesmen, without regard to the amount of their remuneration."

Thus, similarly, the editor of a bankrupt newspaper is not entitled to priority.

Page 1341, note 74. In re Zotti, 23 A. B. R. 607 (Ref. N. Y.).

§ 2178. Must Be Performed within Three Months before Bankruptcy.

Page 1341, note 76. See, in addition, In re Huntenberg, 18 A. B. R. 697, 153 Fed. 768 (D. C. N. Y.).

§ 2179. Whether May Be for Services Covering Longer Period if Priority Claimed Not under § 64 (b) (4) but under § 64 (b) (5).

Page 1341, note 79. See post, §§ 2194, 2203.

No priority to infant's wages (not within § 64 (b) (4)) on theory that contract of employment repudiated gives right of return of proceeds of labor, In re Huntenberg, 18 A. B. R. 698, 153 Fed. 768 (D. C. N. Y.).

§ 2179½. Application of Payments to Wages Earned before Three Months.

The ordinary rules as to the rights of parties in the application of payments apply; thus, where part of the unpaid wages were earned before the three months period and part within that period the claimant is at liberty to apply the payments on the unpaid wages not entitled to priority in the absence of previous application by the bankrupt.

In re Andrews, 19 A. B. R. 441 (Ref. N. Car.); compare, In re McIntyre Bros., 21 A. B. R. 588 (Ref. Miss.). Also, see ante, § 1189. But compare, In re Flick, 5 A. B. R. 465, 105 Fed. 503 (Ref.).

§ 2183. Nor Is Priority Lost by Assignment of Claim.

Page 1342, note 82. Compare, same rule as to priorities under Bankr. Act, § 64 (b) (5), In re Bennett, 18 A. B. R. 320, 153 Fed. 673 (C. C. A. Ky.). Compare, however, post, § 2279.

Page 1343. Obiter, In re Fuller & Bennett, 18 A. B. R. 443, 152 Fed. 538 (D. C. W. Va.): "That § 64b of the Bankrupt Act was designed to protect

the wage-earner, dependent for his living upon his daily wage, cannot be questioned. That it gave a preferential lien for the wages earned three months prior to the bankruptcy proceeding, without requiring notice by recordation or otherwise, of such lien, is also true. Common experience tells us that laboring men, owing to their financial exigencies, constantly find it necessary in some way to forestall the securing the benefit of their wages prior to the time fixed for them to become due and payable by their employers. Thus, nothing is more common than for them to secure a certificate of some kind or form, showing that they have earned or are entitled to a sum for such wages, which they can assign to another and thereby secure money or supplies necessary for their immediate needs. To say that a person cannot take an assignment of such wages without losing the lien which the laborer by law clearly has, would in very many cases militate against the interests of the laborer and not in his favor. It would in many cases cause him to sell such demands at ruinous discounts. Certainly this was exactly the opposite of the humane purpose of the statute. To say that he may, after proving his claim for wages in the bankruptcy proceeding, which necessarily causes delay, assign it and preserve the lien to the assignor, but cannot do so before such proof in bankruptcy or before bankruptcy proceeding commenced against his employer, seems to me to be a narrow and technical construction, not warranted. Suppose his claim be wholly undisputed and admitted; what possible reason is there why he should be required to either starve or suffer, awaiting the law's delays, before realizing, by assignment, upon it? Both before and after proof in bankruptcy, it is the claim for the same labor performed, and supported by the same equities, and in either case he has derived the same relief from the assignment. It therefore seems to me that one who takes by assignment from a wage-earner such claim, who has in this way aided and relieved the wage-earner in realizing without delay the means required by his necessities, ought not to be in a sense discriminated against and punished for so doing. Therefore it seems to me that the assignee of such labor claim who presents it as such, in its original form and subject to its original equities, should be held to take by such assignment all the rights of the assignor, including the right to preference given by this § 64b."

§ 2183½. Whether Priority Lost by Assignee's Acceptance of Note.

It has been held, however, that such priority is lost by the assignee's acceptance of new obligations payable to the assignee himself, or where the assignee otherwise novates the debt or merges it with other debts; thus, as to the acceptance of a new promissory note.

In *re Fuller & Bennett*, 18 A. B. R. 443, 152 Fed. 538 (D. C. W. Va.): "But this [the principle of § 2183, ante], it seems to me, should always be subject to this important condition and limitation: That, after having so acquired by assignment he must not novate the debt nor merge it with other debts, or take from the debtor new obligations and securities therefor wholly due and payable to himself. It is not to be forgotten that the liens of this kind are not recorded, and the outside creditors can obtain no notice of them in that way. When presented in their original form, either by the wage-earner or by his assignee, it is easy enough for other creditors to ascertain whether the claim is just and comes within the limits of the statute; but on

the other hand, suppose one takes by assignment from say 50 or 100 different laborers their several claims and merges them together and secures from the employer a new obligation for the total amounts, made to himself, does he not novate the debt?"

Yet, the question of waiver of the priority is largely a question of intent, as shown by the facts; whilst difficulties in the way of verifying the propriety of the various claims should not be erected into a rule of law that an assignment to one by several or many deprives the claims assigned of the priority which they would have retained had they been assigned each to a different assignee.

And the salutary rules enunciated in the next paragraph, § 2184, regarding equitable subrogation of parties advancing moneys to meet pay rolls, should not be lightly thrown aside.

§ 2186. Wages Claims "of Workmen, Clerks and Servants" No Precedence over Valid Prior Liens.

Page 1344, note 87. See, in addition, *In re Proudfoot*, 23 A. B. R. 106, 173 Fed. 733 (D. C. W. Va.); *In re Allert*, 23 A. B. R. 101, 173 Fed. 691 (D. C. N. Y.).

§ 2187. Priorities Granted by State and Federal Laws.

Page 1345. The State priorities, of course, are not priorities over all other claims whatsoever but only over those that are not specified in § 64 of the Bankruptcy Act as being higher in right.

In re Consumers' Coffee Co., 18 A. B. R. 500, 151 Fed. 933 (D. C. Pa.).

§ 2188. "Priority" to Be Distinguished from "Liens," etc.

Page 1345. Also, priority is to be distinguished from expenses of administration. Thus, the rent for the receiver's or trustee's use and occupation of the premises, is not a "priority" but an "expense" of administration.

In re Hersey, 22 A. B. R. 860, 171 Fed. 1001 (D. C. Iowa).

§ 2189. Federal and State Government and Municipality, as Priority Claimants.

The federal [perhaps] and State governments, municipal corporations, counties and quasi public corporations, in general, may be entitled to priority under § 64 (b) (5).

In re Western Implement Co., 22 A. B. R. 167, 166 Fed. 576 (D. C. Minn., affirmed sub nom. *In re Mercer*, 22 A. B. R. 413, 171 Fed. 81); *In re Mercer*, 22 A. B. R. 413, 171 Fed. 81 (C. C. A. Minn.).

Thus, the federal government may be a priority claimant, it has been held, under § 64 (b) (5); for instance, for damages for breach of contract by contractors.

Page 1346, note 91. See, in addition, *Guaranty Co. v. Guarantee Co.*, 23 A. B. R. 340, 174 Fed. 385 (C. C. A. Pa.).

But, on the other hand it has been held that the federal government is not "any person" within the purview of Bankr. Act, § 64 (b) (5); but is entitled to an earlier priority, ahead of workmen, clerks and servants, under United States Rev. Stats., § 3466.

See post, § 2191; also, see *Guaranty Co. v. Guarantee Co.*, 23 A. B. R. 340, 174 Fed. 385 (C. C. A. Pa.), quoted at § 2191.

Likewise, a county may be a priority claimant.

Likewise the State government may be entitled to priority, it has been held under § 64 (b) (5); for instance, for goods manufactured at the penitentiary and sold to a bankrupt.

In re Western Implement Co., 22 A. B. R. 167, 166 Fed. 576 (D. C. Minn., affirmed sub nom. In re Mercer, 22 A. B. R. 413, 171 Fed. 81); In re Mercer, 22 A. B. R. 413, 171 Fed. 81 (C. C. A. Minn.).

§ 2190. Priority Given to "Any Person" by United States Law Preserved.

Page 1346. Taxes do not come within § 64 (b) (5), but it is not necessarily because the government and State are not to be considered as being "any person" within the meaning of clause "5."

In re Western Implement Co., 22 A. B. R. 167, 166 Fed. 576 (D. C. Minn., affirmed sub nom. In re Mercer, 22 A. B. R. 413, 171 Fed. 81); In re Mercer, 22 A. B. R. 413, 171 Fed. 81 (C. C. A. Minn.). But compare *Guaranty Co. v. Guarantee Co.*, 23 A. B. R. 340, 174 Fed. 385 (C. C. A. Pa.), to the effect that the United States government is not "any person" within the meaning of this clause.

Page 1346. But it has been held that the government is not "any person" within the purview of this clause.

Guaranty Co. v. Guarantee Co., 23 A. B. R. 340, 174 Fed. 385 (C. C. A. Pa.), quoted at § 2191.

§ 2191. Government Contracts.

Page 1346. Damages suffered by the United States government are given, by federal statute [U. S. Rev. Stat. § 3466]. "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

Page 1346, note 93. See, in addition, *Guaranty Co. v. Guarantee Co.*, 23 A. B. R. 340, 174 Fed. 385 (C. C. A. Pa.).

Page 1346. And the surety paying the damages is subrogated to the same priority.

U. S. Rev. Stat., § 3468: "Whenever the principal in any bond given to the United States is insolvent, or whenever such principal, being deceased, his estate and effects which came to the hands of his executor, administrator or assigns, are insufficient for the payment of his debts, and in either of such cases any surety on the bond, or the executor, administrator or assigns of such surety pays to the United States the money due on such bond, such surety, his executor, administrator or assignees shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond in law or in equity, in his own name, for the recovery of all moneys paid thereon." See also, *Guaranty Co. v. Guarantee Co.*, 23 A. B. R. 340, 174 Fed. 385 (C. C. A. Pa.), quoted at § 2191.

And it has been held that this priority of the government is not dependent on Bankr. Act, § 64 (b) (5), which would place it subsequent in order to the wages of workmen, clerks and servants but is dependent rather upon United States Revised Statutes, § 3466, which places it ahead of all other priority claims, except, perhaps, taxes.

Guaranty Co. v. Guarantee Co., 23 A. B. R. 340, 174 Fed. 385 (C. C. A. Pa.): "To sustain the contention of the appellee it must be held, first, that the United States is included in the word 'person' in subdivision (5), viz: 'Debts owing to any person,' etc., or, secondly, that the designation of taxes under clause 'a,' viz: 'All taxes legally due and owing by the bankrupt to the United States,' etc., as entitled to priority, was an exclusion of priority to the United States in all other matters. On the first point the authorities are uniform that the sovereign power is not included by the general language of a statute. In *Dollar Savings Bank v. United States*, 19 Wall. 239, it is said: 'It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. * * * The rule thus settled respecting the British Crown is equally applicable to this government and has been applied frequently to the different States, and practically in the Federal courts.' Moreover, that such was the intent of the act will appear in § 1, clause 19, where a more inclusive meaning is given to the word 'person,' such inclusion goes no further than 'corporations * * * and officers, partnerships and women.' It therefore unquestionably follows that by the passage of the Bankruptcy Act there was no intent by the use of the word 'person' in subdivision (5), to restrain, diminish or affect the existing priority given to debts of the United States under R. S., § 3466. And as the surety claims not on the general right of a surety under the law against a defaulting principal, but on its right of statutory subrogation under R. S., § 3468, to 'the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to

the United States,' it is evident that its right, like the right of the United States, is unqualified by the bankruptcy law. The clear purpose of the two sections in question is to confer and enforce the statutory rights of the United States for the benefit of the surety, and unless the principle here shown to apply to the United States is also extended to the paying surety the latter is not awarded 'the like priority * * * as is secured to the United State.'"

§ 2194. State Law Priorities Adopted Where Claimants Not in Classes Already Covered by Express Bankruptcy Priorities.

Page 1347. But, as noted ante, § 2179, and post, § 2203, where the State priority covers the same class of claimants covered by § 64 (b) (4) of the Bankruptcy Act, the better rule is that the bankruptcy priority displaces the State priority.

In re Rouse, Hazard & Co., 1 A. B. R. 234, 91 Fed. 96 (C. C. A. Ills.); In re Slomka, 9 A. B. R. 635, 122 Fed. 630 (C. C. A. N. Y.), quoted ante, § 2179; contra, In re Laird, 6 A. B. R. 1, 109 Fed. 550 (C. C. A. Ohio), discussed by same court in In re Bennett, 18 A. B. R. 320, 153 Fed. 673.

Thus, a State statute, granting priority to the claims of resident creditors over the claims of foreign corporations which have not complied with the State law regulating the doing of business by foreign corporations, have been recognized in bankruptcy.

In re Standard Oak Veneer Co., 22 A. B. R. 883, 173 Fed. 103 (D. C. Tenn.), quoted at § 2196.

§ 2196. Whether State Priorities in Cases of Assignments, Receiverships, etc., Preserved When Custody Superseded by Bankruptcy.

Page 1347, note 98. Impliedly and a fortiori, In re Iroquois Mach. Co., 22 A. B. R. 183, 166 Fed. 629 (D. C. R. I.); compare, In re Bennett, 18 A. B. R. 320, 153 Fed. 673 (C. C. A. Ky.), discussing In re Laird, supra. See, In re Standard Oak Veneer Co., 22 A. B. R. 883, 173 Fed. 103 (D. C. Tenn.), quoted at § 2196. See ante, § 1266.

Page 1348. Thus, where the costs of an attachment, which itself is dissolved by subsequent State insolvency or assignment proceedings, are nevertheless given priority by State law in such subsequent insolvency or assignment proceedings, they will be accorded the same priority in bankruptcy distribution.

A fortiori, In re Iroquois Mach. Co., 22 A. B. R. 183, 166 Fed. 629 (D. C. R. I.), quoted post, § 2197.

Page 1349. Thus, it has been held that the bankruptcy court will recognize in the distribution of the assets of a bankrupt foreign corporation the priority of the claims of resident creditors over the claims of for-

eign corporations which have not complied with the statute regulating the doing of business within the state by foreign corporations, such statute (whether constitutional or not being beside the question here involved) conferring substantive rights of priority rather than rights dependent upon resort to particular State remedies.

In *re Standard Oak Veneer Co.*, 22 A. B. R. 883, 173 Fed. 103 (D. C. Tenn.): "It is also urged in behalf of petitioners that, although § 64b (5) of the Bankruptcy Act provides that in the administration of the bankrupt's estate priority shall be given to 'debts owing to any person who by the laws of the State or the United States is entitled to priority,' the provision of the Act of 1877 should be regarded as an insolvency law in reference to foreign corporations, which was superseded by the Federal Bankruptcy Act, and that hence the priorities which it gives should not be recognized. While, however, it is true that the enactment of the Federal Bankruptcy Act superseded all State insolvency or bankruptcy laws relative to persons or acts declared by the Congress to be subjects of bankruptcy, so that no further proceedings could be had under such State laws (1 Remington on Bankruptcy, p. 993, § 1628), yet this rule relates merely to the administration of the State laws in proceedings in the State courts, and does not prevent the enforcement in the Federal bankruptcy proceedings of any general priorities recognized by the State laws, where such priorities are conferred by the State statutes as substantive rights of priority not dependent upon the resort to particular remedies accessible only in proceedings in the State courts, and where such priorities are not in conflict with the express priorities declared by the Federal Bankruptcy Act itself or otherwise in conflict with its provisions. 2 Remington on Bankruptcy, p. 1346, et seq., §§ 2194, 2198. Furthermore, the rule relied on by petitioners can have no application to the statutes in question, which are not, strictly speaking, State insolvency laws within the general rule of suspension, but merely statutes prescribing the conditions upon which foreign corporations may enter the State for purposes of business."

§ 2197. Whether State Priorities Dependent on Resort to Particular Remedies, Such as Insolvency or State Bankruptcy Proceedings, to Be Recognized.

Page 1349, note 99. Impliedly, In *re Standard Oak Veneer Co.*, 22 A. B. R. 883, 173 Fed. 103 (D. C. Tenn.), quoted ante, § 2196. See ante, § 1266.

Page 1349. Thus, it has been held, that where attachment costs could have had priority had State insolvency or assignment proceedings actually been instituted, they will have priority in bankruptcy, under § 64 (b), (5), even though such proceedings have not been instituted.

Page 1350. In *re Iroquois Mach. Co.*, 22 A. B. R. 183, 166 Fed. 629 (D. C. R. I.): "It seems to be very clear that it has been for many years the clearly defined policy of the State of Rhode Island, as expressed in its former and present general insolvency laws, as well as in the act regulating general assignments, that, whenever for the benefit of the general creditors an attachment is dissolved, the costs justly accruing prior to the moment of dissolution should be regarded as a charge upon the funds. * * * It is true that in the present case there had been no assignment for the benefit of cred-

itors, but the recognition by the United States court of priorities under the laws of the State is not dependent upon acts of the parties under State laws, but rather upon the existence of statutes clearly defining the policy of the State under circumstances similar to those arising under the bankruptcy administration. * * * It seems to be the policy of the Bankruptcy Act to recognize both exemptions and priorities created by the State law, though this leads to some diversity in the administration of the Bankruptcy Act in various administrations."

§ 2199. But Claimant Must Comply with All Regulations and Prerequisites of State Priority.

Page 1352, note 106. Compare, *In re Bennett*, 18 A. B. R. 320, 153 Fed. 673 (C. C. A. Ky.), wherein it was held that the particular priority therein concerned—for furnishing materials for a manufacturing concern—did not require recording. Compare similar rule in regard to exemptions, § 1048.

§ 2200. Whether, Where Bankruptcy Prevents, Compliance Dispensed with, or Levy Permitted and Discharge Stayed to Enable Perfecting of Priority.

Where a priority or lien given by a State statute is declared to be lost unless followed by legal proceedings within a specified time, either such condition subsequent is avoided by the bankruptcy since the property involved is already in the custody of a court and further legal proceedings are impossible, as, for instance, where a landlord is prevented from perfecting his lien by distraint;

In re Bishop, 18 A. B. R. 635, 153 Fed. 304 (D. C. S. Car.): "The court, however, holds that inasmuch as by this action in taking possession of the property the landlord is prevented from making an actual levy and distress, that the court will permit him to present his claim as a preferred claim, and claim in priority what is due to him as landlord."

Or perhaps the bankruptcy court would permit the legal proceedings to be taken, at least to the extent necessary to perfect or maintain the lien.

§ 2202. Relative Precedence among State Priorities Preserved.

Thus, the relative priorities of the landlord over persons who have furnished material or supplies for a manufacturing concern, under the Kentucky statute, are preserved in bankruptcy.

But the trustee may not be surcharged by the landlord because of the fact that by running the bankrupt's hotel he has permitted liens for supplies to acquire precedence over the landlord's priority for rent, the landlord having taken no steps to cause the hotel to be shut, compare, ruling in Pennsylvania, *In re Bayley*, 22 A. B. R. 249 (D. C. Pa.).

Right of Distraint in Pennsylvania Not Superior to Execution Lien.—*In re DeLancey Stables Co.*, 22 A. B. R. 406, 170 Fed. 860 (D. C. Pa.).

§ 2203. Where Both State Law and Bankrupt Act Give Priority to Same Class, Bankrupt Act Excludes State Law.

Page 1354, note 111. *Contra*, *In re Laird* (*In re Coe, Powers & Co.*), 6 A. B. R. 1, 109 Fed. 550 (C. C. A. Ohio), explained and reaffirmed in *In re Bennett*, 18 A. B. R. 320, 153 Fed. 673 (C. C. A. Ohio).

§ 2204. Landlord's Priorities.

Page 1356, note 112. See discussions, *ante*, §§ 663, 664, 665, 1160, 1437, 1444, 2188; also, compare, *In re Consumers Coffee Co.*, 18 A. B. R. 500, 151 Fed. 933 (D. C. Pa.); also, compare, *In re Bishop*, 18 A. B. R. 635, 153 Fed. 304 (D. C. S. Car.).

Page 1356, note 114. See, in addition, *In re Ketterer Mfg. Co.*, 20 A. B. R. 694, 162 Fed. 583 (D. C. Pa.); compare, *In re Consumers Coffee Co.*, 18 A. B. R. 500, 151 Fed. 933 (D. C. Pa.); *In re Morris*, 19 A. B. R. 781, 156 Fed. 597 (D. C. Pa.); compare, *In re Piano Forte Mfg. Co.*, 20 A. B. R. 899, 163 Fed. 413 (D. C. Pa.); *In re Pittsburg Drug Co.*, 20 A. B. R. 227, 164 Fed. 482 (D. C. Pa.); compare, *In re West Paper Co.*, 20 A. B. R. 660, 162 Fed. 110 (C. C. A. Pa.); instance, *In re DeLancey Stables Co.*, 22 A. B. R. 406, 170 Fed. 860 (D. C. Pa.).

Covenant that on default of one installment, all become due, causes all rent to become entitled to the priority, *In re Pittsburg Drug Co.*, 20 A. B. R. 227, 164 Fed. 482 (D. C. Pa.); but if the landlord stands by and permits a sale in bulk of all fixtures, etc., and accepts purchaser as tenant, etc., he will not be allowed priority out of the commingled proceeds, *Vollmer v. McFadgen*, 20 A. B. R. 540, 161 Fed. 914 (C. C. A. Pa., affirming *In re McFadgen*, 19 A. B. R. 481, 156 Fed. 715); also, *In re McFadgen*, 19 A. B. R. 481, 156 Fed. 715 (D. C. Pa.).

Page 1356, note 116. See, in addition, *In re Byrne*, 3 A. B. R. 268, 97 Fed. 762 (D. C. Ky.).

Page 1357. And he has priority or rather a lien, in Iowa.

Page 1357, note 118. *In re Hersey*, 22 A. B. R. 860, 171 Fed. 1001 (D. C. Iowa).

Page 1357. Likewise, in South Carolina, the landlord has the old common-law right of distraint, but since the bankruptcy prevents levy thereof, such levy is considered as dispensed with.

In re Bishop, 18 A. B. R. 635, 153 Fed. 304 (D. C. S. Car.), quoted at § 2200.

The costs and expenses of sale and only such may first be deducted from the proceeds of sale before payment of the lien.

Similarly, the landlord has priority in Texas for rent due and becoming due for the current contract year, and this priority will be respected in bankruptcy.

Martin v. Orgain, 23 A. B. R. 454, 174 Fed. 772 (C. C. A. Tex.).

The landlord is entitled to priority by way of lien in Georgia.

In re Burns, 23 A. B. R. 642, 175 Fed. 633 (D. C. Ga.). See, *In re V. D. L. Co.*, 23 A. B. R. 643, 175 Fed. 635 (D. C. Ga.).

§ **2205. Priorities for Furnishing Supplies and Materials for Manufacturing Establishments: Fiduciary Debts as Guardian: Community Property of Husband and Wife, etc.**

Page 1357, note 122. See, in addition, *In re Bennett*, 18 A. B. R. 320, 153 Fed. 673 (C. C. A. Ky., affirming 18 A. B. R. 847, 153 Fed. 673); *In re Starks-Ullman Saddlery Co.*, 23 A. B. R. 596, 171 Fed. 834 (C. C. A. Ky.).

Thus has been considered the effect of accepting a note therefor.

In re Bennett, 18 A. B. R. 320, 153 Fed. 673 (C. C. A. Ky. App., 18 A. B. R. 847, 153 Fed. 673).

And the effect of an assignment of the claim.

In re Bennett, 18 A. B. R. 320, 153 Fed. 673 (C. C. A. Ky.).

§ **2207. To Be Paid in Two Dividends.**

Page 1358. And the final dividend may be declared, if the facts warrant it, four months after adjudication.

In re Eldred, 19 A. B. R. 52, 155 Fed. 686 (D. C. N. Y.), quoted at § 2214.

Page 1358, note 128. **No Withholding of Creditor's Dividend Because of Misconduct Towards Purchaser.**—Where a creditor repudiates agreement with a purchaser of the assets, nevertheless his dividends may not be withheld. *In re Augusta Pottery Co.*, 21 A. B. R. 64, 163 Fed. 1011 (D. C. W. Va.).

§ **2209. First Dividend.**

Page 1359, note 129. Also, see *In re Eldred*, 19 A. B. R. 52, 155 Fed. 686 (D. C. N. Y.).

§ **2214. Need Not Retain Funds until Expiration of Year's Limitation for Proving Claims.**

Page 1360, note 133. See ante, § 731.

Page 1360. *In re Eldred*, 19 A. B. R. 52, 155 Fed. 686 (D. C. N. Y.): "As the prior provisions of the act have made it necessary to declare a first dividend within thirty days after adjudication, if there are funds sufficient to do so, and as the statute has provided that creditors who are not diligent, are permitted only to share in the estate that remains, and not to interfere with the funds already divided, it would appear that the court has the power to make a final dividend and to approve of a final report at any time after four months have elapsed subsequent to adjudication, if the other conditions are present showing the estate to be apparently ready for the final accounting."

§ **2218½. Interest.**

Interest on claims drawing interest is to be computed to the date of the filing of the bankruptcy petition; and on claims not drawing interest but falling due after the filing of the petition, a rebate shall be deducted to the date of such filing.

See ante, § 598.

Where a mortgagee or other lienholder is seeking to share in dividends after application of his security on his claim, the interest on his claim is to be restricted to that due at the date of the filing of the bankruptcy petition, though it is computable to the date of the payment where it is paid from the proceeds, notwithstanding the bankruptcy.

Obiter, *Coder v. Arts*, 18 A. B. R. 513, 152 Fed. 943 (C. C. A. Iowa), quoted at § 1146.

§ 2220. Postponing Dividends of Some Creditors to Others, Because of Equities.

Page 1362. But the court has refused to give creditors whose debts had been assumed by the bankrupt a preference out of the proceeds of the property transferred by the original debtor to the bankrupt as consideration for the transfer.

In re Baumbblatt, 18 A. B. R. 720, 153 Fed. 485 (D. C. Pa.).

§ 2221. Thus, Dividing Fund, on Setting Aside Void Transfer, Solely among "Subsequent" Creditors.

Page 1362. But this is dependent on State law; and in one State where a transfer has been set aside the setting aside has been held to redound to the benefit of all creditors, not simply to the benefit of those as to whom it was void.

See ante, § 1225½; also, *In re Kohler*, 20 A. B. R. 89, 159 Fed. 871 (C. C. A. Ohio).

§ 2222. Requiring Surrender of Illegal Advantage before Allowing to Share in Dividends.

Page 1363, note 144. Instance, but case reversed on facts, *In re Kessler & Co.*, 23 A. B. R. 391, 174 Fed. 906 (D. C. N. Y.), involving retention of stock paid for by a nonbankrupt who had gone into a separate joint stock enterprise with bankrupt.

§ 2224. Dividends Not to Be Subjected by Garnishment.

Page 1363, note 146. See, in addition, (1867) *In re Bridgham*, Fed. Cas. No. 1866; *Jackson v. Miller*, 9 Nat. Bankr. Reg. 143.

Page 1363. *Savings Bank v. Alden*, 19 A. B. R. 886, 68 Atl. (Me.) 863: "But inasmuch as it is uniformly held by all courts that, in the absence of special statutory provisions to the contrary, money which is properly said to be in custodia legis cannot be reached by the process of foreign attachment, the question more specifically stated is whether a fund in the situation existing at the time of the service of the process in this case is still in the custody of the law, or whether, after distribution is ordered, and the checks are drawn and countersigned, but not delivered, the money has ceased to be in the possession of the court, or in the custody of the law. The plaintiff contends that the final order for distribution had been given by the United

States court, that the purpose of the legal custody had been accomplished, that nothing further remained to be done by that court, and that the money cannot now be properly considered as in the custody of the law. The decisions in the Federal courts have uniformly recognized the doctrine that funds thus situated belonging to a bankrupt estate are in the custody of the law, and not amenable to process of foreign attachment against the trustee in bankruptcy. * * * Numerous decisions may be found in the State courts holding that funds in the hands of executors and administrators are subject to the trustee process; but it will be found that they are controlled by special statutory provisions, or influenced by considerations not applicable to the case at bar."

§ 2225. But Probably May Be by Equitable Action.

But probably dividends may be subjected by equitable action wherein a receiver is appointed to apply to the bankruptcy court for the dividends.

(1867) *Jackson v. Miller*, 9 Nat. Bankr. Reg. 143.

But the State court cannot bring the trustee before it for such purpose.

Akins v. Stradley, 1 N. W. Rep. (N. S.) 609; [1867] *In re Cunningham*, 19 Nat. Bankr. Rep. 276.

§ 2229. Attorney's Right to Lien.

Page 1364. But compare, *In re Baxter*, 18 A. B. R. 450, 154 Fed. 22 (C. C. A. N. Y.): "We should entertain no doubt that no lien existed, if it were not for the effect to be given to the statute of New York respecting attorney's liens. An attorney has a lien upon the papers of his client in his possession, and a lien upon the fund or judgment which he has recovered for those whose interests he has represented in the suit. But, in the absence of some statutory provision, he has no lien upon the naked cause of action of his client. Indeed, the whole law of an attorney's lien rests upon the principle that he has secured the fruits of a litigation of which he ought not to be deprived by the unfair conduct of his client. But the courts have always recognized the right of the client to settle the controversy with the opposite party against the consent of his attorney, and, where this has been done after an action has been commenced, have repeatedly declared as in *Emma Silver Mining Co. v. Emma Silver Mining Co.* (C. C.), 12 Fed. 815, that the attorney's lien cannot stand in the way, unless the settlement was made for the purpose of depriving the attorney of his costs. The proposition has never been more plainly and concisely stated than by Judge Brewer, now Mr. Justice Brewer, in *Swanson v. Chicago Ry. Co.* (C. C.), 35 Fed. 638, where he said: 'It is unquestioned that parties to a lawsuit may settle and compromise their litigation without consulting their counsel; and that, in the absence of a statute giving the attorney a lien for his fees, courts will not intervene unless there has been collusion between the parties, and an attempt to defraud the attorney out of his fees.' Upon the argument of the case, we were disposed to regard the New York statute as one merely regulating practice in the courts of the State, but a more careful reading of the statute satisfies us that it was intended to have a wider application, and

should be treated as one establishing a substantive right. As merely a practice act, it would not affect the present proceeding, which is essentially an application to the equity powers of the court, as the courts of the United States, when exercising equity jurisdiction, are not controlled by the procedure established by the statutes of the States. But there are many instances when an enlargement of equitable rights or remedies by a State statute may be administered by the federal courts sitting within the State. * * * The federal courts have treated the question of an attorney's lien as depending upon the effect of local laws. In *re Paschal*, 10 Wall. 483, 495, * * * *Central R. Co. v. Pettus*, 113 U. S. 116, etc." * * * The result of these decisions [of New York] is that the statute does not preclude a settlement between the parties made in good faith and not intended to deprive the attorney of his compensation; and, if the client prefers to abandon the action, or release his cause of action for a nominal consideration, he is at liberty to do so, and the lien becomes practically of no value to the attorney; but whatever is received as a consideration becomes a fund impressed with the lien in the hands of the opposite party."

Of course an attorney's lien upon his client's papers is valid in bankruptcy to the same extent that it is valid elsewhere.

In *re Brown & Fleming Co.*, 21 A. B. R. 662 (Ref. N. Y.). Although in case it is the bankrupt who is the client, it could hardly be inferred that the right of retention should be absolute.

§ 2231. Where Partnership Bankrupt, Whether Individual Estates Brought in Though Individuals Not Adjudged Bankrupt.

Page 1365, note 153. Also, see § 65. But compare, § 477½; In *re Latimer*, 23 A. B. R. 388, 174 Fed. 824 (D. C. Pa.).

Page 1366. Contra, In *re Bertenshaw*, 19 A. B. R. 577, 157 Fed. 363 (C. C. A.): "But, as we have seen, the Act of 1867 expressly provided that 'where two or more persons who are partners in trade shall be adjudged bankrupt'—the only way in which it provided for the adjudication of a partnership—'all the joint stock and property of the copartnership and also all the separate estate of each of the partners shall be taken' and administered (14 Stat. 534, § 36), while the Act of 1898 has no such provision for the taking of the separate estates upon the adjudication of the partnership. On the other hand, the Act of 1898 provides for the adjudication of a partnership bankrupt without an adjudication of any of its partners bankrupt, while the Act of 1867 has no such provision. Again, the Act of 1898 expressly prohibits the administration of the partnership property, and by so much the more the administration of the individual property of unadjudicated partners without their consent, while the Act of 1867 contained no such provision. Thus, while the Act of 1867 expressly required the court which adjudged a partnership insolvent to take and administer the separate estates of the partners and thereby sustained the rule in *Amsinck v. Bean*, the Act of 1898 contains no such requirement, but forbids not only the administration of his individual estate, but the administration of the estate of the partnership without the consent of the unadjudicated partner (section 5h); so that the rule in *Amsinck v. Bean* is not only without support, but it is inhibited by the provisions of the Act of 1898, and cannot prevail under it. This conclusion is supported by the actual decision rendered in *Amsinck v. Bean*, and by the reason which the court gave for it. The decision was that the assignees in

bankruptcy of the estate of a partner could not take and administer the property of the partnership, and the reason given for it was that, while there was a provision in the Act of 1867 for the administration of the individual estate of a partner upon the bankruptcy of the partnership, there was no provision for the administration of the partnership's estate upon the bankruptcy of an individual partner, and hence it could not be made. By the same mark, the court of bankruptcy cannot take and administer the individual estate of an unadjudicated partner upon an adjudication of the bankruptcy of the partnership under the Act of 1898, because, while there is a provision for the administration of the partnership estate upon the adjudication of a partner bankrupt in certain circumstances (§ 5c), there is no provision in that act for the administration of the individual property of an unadjudicated partner upon an adjudication of a partnership bankrupt, and there is an express prohibition of the administration of the partnership estate in such a case without the consent of the solvent partner (§ 5h), and by so much the more an inhibition of the administration of his individual estate without his consent, * * * and the conclusion is that a court of bankruptcy upon an adjudication of a partnership bankrupt may not draw to itself and administer without his consent the individual estate of a solvent partner who has not been adjudicated a bankrupt."

And an individual partner, not himself adjudicated bankrupt, may be required to transfer his individual interest in the firm property to the firm trustee.

In re Latimer, 23 A. B. R. 388, 174 Fed. 824 (D. C. Pa.).

§ 2232. And "Consent" Not Necessary—True Meaning of § 5(h).

Page 1366, note 154. See, in addition, In re Bertenshaw, 19 A. B. R. 577, 157 Fed. 363 (C. C. A.), but the dissenting opinion in this case seems to present the preferable rule.

Page 1366, note 155. See, in addition, In re Solomon & Carvel, 20 A. B. R. 488, 163 Fed. 140 (D. C. N. Y.); In re Bertenshaw, 19 A. B. R. 577, 157 Fed. 363 (C. C. A.), but the dissenting opinion presents the truer rule.

Page 1366, note 156. Compare post, §§ 2251, 2791.

No "consent" of the individual member is requisite in cases of partnership bankruptcies for administration either of firm assets or of individual assets.

Page 1366. See dissenting opinion in In re Bertenshaw, 19 A. B. R. 577, 157 Fed. 363 (C. C. A.): "It is said this paragraph means that, when a partnership has been declared bankrupt and also one or more but not all of its members, the court has no power to administer the partnership estate without the consent of the non-bankrupt members. And the argument is that, as the court has no such power, much less has it the power when actually administering the partnership estate, to compel a non-bankrupt partner to bring in his individual property. But it is manifest that § 5h does not bear the construction given it. It deals with the bankruptcy of individual partners, not with the bankruptcy of the firm. If an individual partner becomes bankrupt, it becomes important to know the effect upon the firm of which he is a member. It not infrequently happens that a firm remains solvent and prosperous, though a member becomes insolvent and commits an act

of bankruptcy not chargeable to or connected with the business of the partnership. The provision for such cases is found in the paragraph quoted, and it has nothing to do with the bankruptcy of the partnership. It recognizes, however, that before the bankrupt partner receives a discharge his beneficial interest in the firm property, after the payment of firm debts, should be applied to the payment of his individual obligations. But, since his associates have an interest in the partnership property to which his individual creditors cannot look, they are justly given the preference in liquidating their joint affairs. Eventually, however, the net share of the bankrupt partner is brought into the individual proceedings. That a partnership may be an entity for certain purposes and its property its own does not prevent the bankruptcy of a single partner from resulting in a liquidation of the joint business, and the application of his net share therein to the payment of his individual debts. Rightly regarded the paragraph quoted suggests the true rule for the converse situation—the bankruptcy of the partnership and the nonbankruptcy of a member. There is, however, this distinction. In a case covered by § 5h, the nonbankrupt partner has no contractual connection with the debts of his bankrupt copartner. He is not liable for them, and should, therefore, suffer no loss or inconvenience, save what comes from a necessary winding up of the partnership as in other cases of dissolution. Therefore he is given the preference in the settlement of the firm business of which he is part owner. But these reasons do not apply in a case like the one before us. The nonbankrupt partner is liable for all the debts of his bankrupt firm, and the firm creditors may look to his property for satisfaction subject to equitable limitations in favor of his individual creditors. A court of equity, with all parties before it, partnership and members, grants full relief, and the law has not required it to intrust the administration of estates to resisting debtors."

§ 2233. Partnership Trustee, Trustee Also of Individual Estates.

Page 1366, note 157. See ante, §§ 65, 477½, 866.

Page 1367, note 158. See, in addition, *In re Coe*, 18 A. B. R. 715, 154 Fed. 162 (D. C. N. Y.), quoted at § 867½.

Page 1367. At any rate the individual member may himself be ordered summarily to transfer his individual interest in property to the trustee for administration.

In re Latimer, 23 A. B. R. 388, 174 Fed. 824 (D. C. Pa.).

§ 2238. Partnership Creditors to Exhaust Partnership Assets, Individual Creditors to Exhaust Individual Assets; Each to Share in Other Only in Surplus.

Page 1369, note 166. Also, see post, § 2255.

Page 1369, note 166. See, in addition, *In re Blanchard*, 20 A. B. R. 417, 161 Fed. 793 (D. C. N. Car.).

Page 1370. The rule obtains though the debt be a "priority" debt; thus the personal tax of a member of a partnership is not to be paid out of firm assets until firm creditors are satisfied in full.

In re Flatau & Stern, 21 A. B. R. 352 (Ref. N. Y.).

§ **2239. Section 5 Refers Only to Actual Partnerships, Not Those by "Holding Out."**

Page 1370, note 168. See ante, § 63.

Page 1370, note 168. **"Universal" Partnerships.**—Compare, *In re Culver*, 23 A. B. R. 779, 176 Fed. 450 (D. C. Minn.).

§ **2242. But Assumption Must Be Acquiesced in by Creditor.**

Page 1371, note 175. **Assumption of Corporate Debts on Buying Out Corporation.**—Where an individual bought out the assets of a corporation and assumed its debts and later formed a partnership which took over the same property and debts and later still became bankrupt, the original corporate creditors are firm creditors, not individual. *In re Sickman & Glenn*, 19 A. B. R. 232, 155 Fed. 508 (D. C. Pa.).

Page 1371, note 176. Inferentially, *In re Blanchard*, 20 A. B. R. 417, 161 Fed. 793 (D. C. N. Car.).

Page 1371. Again, a mortgage of partnership property, given by one partner to secure his individual indebtedness, even with the consent of the other partner, has been held not enforceable in bankruptcy against firm creditors.

In re Blanchard, 20 A. B. R. 417, 161 Fed. 793 (D. C. N. Car.).

§ **2245. Parol Evidence Admissible to Show Obligations Apparently Individual, to Be Firm Debts.**

Page 1372, note 180. See, in addition, *In re Stoddard Bros. Lumber Co.*, 22 A. B. R. 435, 169 Fed. 190 (D. C. Idaho).

Compare, *In re Lamon*, 22 A. B. R. 635, 171 Fed. 516 (D. C. N. Y.), wherein evidence held not to sustain contention that it was a partnership obligation.

Page 1372. Thus, parol evidence is admissible to show written obligations signed in the individual names of the several partners nevertheless to be firm obligations.

In re Stoddard Bros. Lumber Co., 22 A. B. R. 435, 169 Fed. 190 (D. C. Idaho).

§ **2247. Secret Partner's Claim, Not Debt against Partnership.**

Page 1372, note 182. Inferentially, *In re Stoddard Bros. Lumber Co.*, 22 A. B. R. 435, 169 Fed. 190 (D. C. Idaho).

No Notice Requisite on Retirement of Secret Partner.—*In re Stoddard Bros. Lumber Co.*, 22 A. B. R. 435, 169 Fed. 190 (D. C. Idaho).

§ **2247¼. Nor Is a Partner's Contribution of Capital.**

Nor is a partner's contribution to the capital of the firm a provable debt against the partnership assets.

In re Floyd & Co., 19 A. B. R. 438, 156 Fed. 206 (D. C. N. Car.); *In re Rice*, 21 A. B. R. 205, 164 Fed. 514 (D. C. Pa.), quoted at § 2260. But his excess of contribution may be proved against the other partner's individual estate. See post, § 2259.

§ 2247½. Nor Is a Note by One Partner for Buying Out Retiring Partner.

Nor is a note given by one partner for the purchase price of a retiring partner's share a firm obligation.

Compare analogous proposition post, § 2262; In re Stoddard Bros. Lumber Co., 22 A. B. R. 435, 169 Fed. 190 (D. C. Idaho).

§ 2248. Trustee in Individual Bankruptcy of Partner Not to Interfere with Firm Assets, without Consent.

Page 1373. *Obiter*, Mills v. Fisher & Co., 20 A. B. R. 237, 159 Fed. 897 (C. A. Tenn.): "When there is no adjudication against the firm, the firm assets cannot be administered by the bankrupt court, if there be one member not adjudicated, unless he consent. In such cases the unadjudicated partner has the right to wind up the firm, paying over only the share of the bankrupt partner to his trustee."

Page 1373, note 183. **Sub-Partnerships.**—Where a bankrupt partnership has itself been a partner in another and quite separate partnership enterprise, the same rules would apply—the sub-partnership's affairs are not to be administered in the partnership bankruptcy without the consent of the solvent sub-partner. Instance, but point not raised, In re Kessler & Co., 23 A. B. R. 391, 174 Fed. 906 (D. C. N. Y.), wherein the court held the foreign solvent sub-partner might retain certain shares of sub-partnership stock which had been wholly paid for by the foreign solvent sub-partner.

Lien of Solvent Sub-Partner on Sub-Partnership Assets.—See In re Kessler & Co., 23 A. B. R. 391, 174 Fed. 906 (D. C. N. Y.).

§ 2250. In What Court Trustee to Seek Accounting.

The trustee must seek such accounting in the court which would have had jurisdiction had there been no bankruptcy.

Compare, In re Walker, 23 A. B. R. 805, 176 Fed. 455 (D. C. Ala.).

But the bankruptcy court will not necessarily attempt to determine the equities of the two partners inter sese, but will remit the solvent partner to a court of equity for a settlement of his claim against the bankrupt co-partner, where the bankrupt co-partner was indebted neither to the firm nor to the solvent partner at the date of adjudication and the solvent partner's claim arose during the process of liquidation, after the adjudication of bankruptcy.

In re Walker, 23 A. B. R. 805, 176 Fed. 455 (D. C. Ala.).

§ 2251. Partnership Affairs Not to Be Administered in Individual Bankruptcy, Except by Consent.

Page 1374, note 186. Instance, In re Walker, 23 A. B. R. 805, 176 Fed. 455 (D. C. Ala.). See ante, § 2248.

§ **2252. But May Be So Administered if Nonbankrupt Partner Consents.**

Page 1374, note 187. In re Filmar (*Lippincott v. Klosterman*), 24 A. B. R. 194, 177 Fed. 170 (C. C. A. Ill.), quoted at § 2269.

§ **2253. "Consent," a Question of Fact.**

Page 1374. The joining by the non-bankrupt partner with a firm creditor in a petition asking that the former firm assets be applied first on firm debts, has been held such a consent.

In re Filmar (*Lippincott v. Klosterman*), 24 A. B. R. 194, 177 Fed. 170 (C. C. A. Ill.), quoted at § 2269.

§ **2254. Partnership Property Comes into Individual Bankruptcy Burdened with Lien in Favor of Firm Creditors.**

Page 1374, note 189. Impliedly, In re Blanchard, 20 A. B. R. 417, 161 Fed. 793 (D. C. N. Car.); In re Filmar (*Lippincott v. Klosterman*), 24 A. B. R. 194, 177 Fed. 170 (C. C. A. Ill.), quoted at § 2269. Compare post, § 2269.

Page 1374. And the trustee of the individual partner may be summarily ordered to surrender the partnership assets to the trustee of the partnership where the partnership is subsequently adjudged bankrupt.

Manson v. Williams, 18 A. B. R. 674, 153 Fed. 525 (C. C. A. Me.).

§ **2255. Individual Creditors Exhaust Individual Property, Firm Creditors, Firm Property—Each Sharing Only in Any Surplus of Other.**

Page 1375, note 190. See ante, § 2238; In re Blanchard, 20 A. B. R. 417, 161 Fed. 793 (D. C. N. Car.).

Page 1375. *Obiter*, *Mills v. Fisher & Co.*, 20 A. B. R. 237, 159 Fed. 897 (C. C. A. Tenn.): "In bankruptcy the assets of a bankrupt partnership must be first applied to the payment of partnership debts and the individual assets to the payment of individual debts. The joint creditors are only entitled to share in the surplus of the individual assets and the individual creditors only in the surplus of joint or firm assets."

§ **2258. Joint and Several Obligations for Partnership Debt, Share in Individual Estate.**

Page 1383, note 194. See, in addition, In re Terens, 23 A. B. R. 680, 175 Fed. 495 (D. C. Wis.).

Page 1384. Thus, misappropriations by a partnership may result in provable claims both against the firm and also against the guilty partners individually.

In re Coe, 22 A. B. R. 384, 169 Fed. 1002 (D. C. N. Y.), quoted at § 2349; (1867) In re Baxter, 8 Nat. Bankr. Reg. 62; (1867) In re Blackford, 35 App. Div. 330, 54 N. Y. Supp. 972; (Eng.) *Re Parkers*, 19 Q. B. Div. 84.

And a composition effected by the partnership alone will not affect the claims against the individual estate.

In re Coe, 22 A. B. R. 384, 169 Fed. 1002 (D. C. N. Y.), quoted at § 2349.

Except, of course, to the extent of the amount applied upon the claim by the composition.

Page 1385. On the same theory, where the partners and the firm have misappropriated property left with them as bailees, the owner may prove against both the partnership estate and the estate of each partner who participated in the wrong.

In re Coe, 22 A. B. R. 384, 169 Fed. 1002 (D. C. N. Y.). Also that a composition effected by the partnership alone would not prevent proof of the debt against the estate of the individual partner, *Ibid*.

§ 2259. Partner's Right of Contribution for Paying Firm Debts, Provable in Other Partner's Bankruptcy.

Page 1385, note 197. Compare, also, ante, § 2247½.

However, it has been held that the claim of a solvent partner who is liquidating the partnership affairs instead of having them administered in bankruptcy, is not a provable debt against the bankrupt partner, where the bankrupt partner was not indebted to the firm nor to the solvent partner at the time of adjudication, the solvent partner's claim arising from subsequent events.

In re Walker, 23 A. B. R. 805, 176 Fed. 455 (D. C. Ala.): "The certificate shows an admission by the parties that at the time of the filing of the petition there was no indebtedness existing upon a partnership settlement, as between the partners, and that the partnership assets, without resort to the individual property of either partner, were amply sufficient to fully pay all the partnership debts. At the time of the filing of the petition in bankruptcy, the bankrupt partner owed the solvent partner nothing, either because of greater contribution to the firm assets by the solvent partner or larger withdrawals therefrom by the bankrupt partner, or because, in order to pay the firm indebtedness, recourse would be necessary upon the solvent partner or his property, after exhaustion of the firm assets. * * * The case is, therefore, not one of an unascertained or unliquidated indebtedness due the solvent partner, Peter Pappas, but one in which there was no indebtedness at all due him at that time from his bankrupt partner. The indebtedness claimed by him arose subsequent to the filing of the petition in bankruptcy, by reason of the solvent partner having elected to take the administration of the partnership assets, which, when the petition was filed, were admittedly ample to pay all partnership debts, but which, owing to subsequently arising causes, failed to realize enough to do so, and by reason of his having undertaken with them to satisfy all the firm debts. If any claim arose in favor of the solvent partner against his copartner because of the insufficiency of the partnership assets to liquidate partnership debts and the consequent necessary resort to the property of the solvent partner for that purpose, it was of subsequent origin to the filing of the petition in bankruptcy, and is

not a provable claim against the bankrupt partner, nor one from which a discharge in bankruptcy would release him."

Compare, analogous doctrine, ante, §§ 640, 645, 709, 711.

§ 2260. On Marshaling Partnership and Individual Estates, Solvent Partner's Excess Contribution Provable against What Estate.

Page 1385. But it may not share in partnership assets until partnership creditors are paid.

In *re Rice*, 21 A. B. R. 205, 164 Fed. 514 (D. C. Pa.): "The referee's decision is attacked on the ground that the claim of Joseph A. Rice against the firm is an asset of his individual estate, which belongs to his individual creditors and should not be withheld from them and thus applied in effect to the claims of other partnership creditors than himself. But this argument fails to state the situation precisely. No doubt the claim of Joseph A. Rice against the firm of which he was a member is an asset of his individual estate, but it is an asset with a particular disability, and in this respect it differs from the claims of other partnership creditors. Its disability consists in the fact that, according to the well-settled rule governing the marshaling of partnership and of individual assets, it cannot participate in the distribution of the partnership assets until other partnership creditors have been satisfied in full. For this reason the individual creditors of the claimant cannot profit by it as completely as if he were an ordinary creditor of the firm and not a member also. But nothing is taken away from the individual creditors to which they are equitably entitled, because the claimant himself could not share in the distribution of the partnership assets *pari passu* with other partnership creditors. To sustain the claimant's position would give to his individual creditors a more extensive right against the bankrupt firm than he himself possesses and would thus do violence to the rule that the individual creditors succeed only to such equity in the firm assets as belongs to their debtor himself."

§ 2262. But Claim of Retiring Partner for Unpaid Purchase Price of Partnership Share, Not to Share with Partnership Creditors in Surplus of Remaining Partner's Individual Estate.

Page 1386, note 200. Compare, ante, § 2247½.

§ 2263. Obligation Signed in Individual Name, Prima Facie Individual Debt.

Page 1386, note 202. See, in addition, *In re Stoddard Bros. Lumber Co.*, 22 A. B. R. 435, 169 Fed. 190 (D. C. Idaho).

§ 2265. "Preferences" and "Legal Liens" on Individual Property Not Nullified by Firm Bankruptcy; and Vice Versa.

Page 1386. The firm and its individual members preserve their separate identities.

After dissolution by selling out to remaining partner, whether levy by partnership creditor a partnership lien, see ante, §§ 64, 171.

§ 2266. Thus, "Legal Liens" within Four Months, on Individual Property Not Affected by Partnership Bankruptcy.

Page 1386, note 204. But compare principle underlying *In re Stokes*, 6 A. B. R. 262, 106 Fed. 312 (D. C. Pa.).

§ 2267. Nor Are Similar Liens on Partnership Property Affected by Individual Bankruptcy.

Page 1387, note 205. Compare, *Smedley v. Speckman*, 19 A. B. R. 694, 157 Fed. 815 (C. C. A. Pa.), where court found existence of partnership not proved.

§ 2268. Nor Are "Transfers" by Partnership Voidable as "Preferences," by Bankruptcy of Partner.

Page 1387, note 207. See ante, § 2265, et seq.; post, § 2274.

§ 2268¼. Nor Transfers by Individual Partners, Voidable as "Preferences" in Firm Bankruptcies, unless Individual Also Bankrupt.

Nor, in general, are transfers by individual partners of individual assets voidable as preferences in partnership bankruptcies [unless the individual be also bankrupt].

Miller v. Acid & Fertilizer Co., 21 A. B. R. 416, 211 U. S. 496.

Obiter, *Mills v. Fisher & Co.*, 20 A. B. R. 237, 159 Fed. 897 (C. C. A. Tenn.): "But it is not an act of bankruptcy for which a firm may be adjudged a bankrupt, that one of its members, out of his individual estate, prefers one of his own or one of the firm's creditors. * * * The application by one partner of his individual property to the payment of one firm creditor would be an individual act and not the joint act of the firm, and, therefore, not an act for which the firm could be adjudged bankrupt."

But a transfer of individual assets by one member to pay a firm creditor a greater percentage than another firm creditor would get from the same individual estate may be a preference, since the individual estates constitute sub modo funds to which partnership creditors are entitled to resort, in proper order of priority after individual creditors are satisfied in full, so that a transfer to one firm creditor without a like transfer to other firm creditors would be the giving of a greater percentage to one creditor than to another of the "same class" in the order of priority.

Mills v. Fisher & Co., 20 A. B. R. 237, 159 Fed. 897 (C. C. A. Tenn.), quoted at § 1291. Compare, *Speckman v. Smedley Bros.*, 18 A. B. R. 717, 153 Fed. 771; also compare, ante, §§ 171, 1387½.

And by State law such an individual transfer may be a voidable preference in a partnership bankruptcy of which the trustee in bankruptcy

may avail himself by subrogation to the rights of any creditor who has already instituted proceedings.

Miller v. Acid & Fertilizer Co., 21 A. B. R. 416, 211 U. S. 496.

§ 2268½. **Retiring Partner's Mortgage on Partnership Assets for Unpaid Purchase Price, Preference in Partnership Bankruptcy.**

A mortgage given on firm assets within four months of the bankruptcy of the firm to secure a retiring partner for the unpaid purchase price of his share, is a partnership preference.

In re Floyd & Co., 19 A. B. R. 438, 156 Fed. 206 (D. C. N. Car.); analogously, compare, In re Stoddard Bros. Lumber Co., 22 A. B. R. 435, 169 Fed. 190 (D. C. Idaho).

§ 2269. **First, Where One Partner in Insolvent Firm Sells Out to Other Who Thereafter Becomes Bankrupt.**

Page 1387, note 208. Whether a levy by a firm creditor on former firm property is a firm levy sufficient to warrant the adjudication of the firm, see *Holmes v. Baker & Hamilton*, 20 A. B. R. 252, 160 Fed. 922 (C. C. A. Wash.); also, see ante, §§ 64, 65½, 171.

Page 1388. In re Terens, 23 A. B. R. 680, 175 Fed. 495 (D. C. Wis.): "On the other hand, it is contended, and the referee ruled, that by virtue of the dissolution agreement of December 15th Terens became the sole owner, and that there is now no partnership fund to be administered. * * * Under these circumstances, what was the legal effect of the dissolution agreement? What did Oswald sell? It was not specific articles of personal property. It was not a transfer of the corpus of the estate, but of only such interest in the surplus after the firm debts had been provided for. At the outset the distinction must be sharply drawn between such a transfer by one insolvent partner to another, and a sale by both partners of certain specific property to a third party. In the latter case the entire title passes by the transfer, and it has been repeatedly held that the legal right of either or both partners to sell the firm assets and transfer good title thereto is not impaired by the fact of insolvency. In my judgment the dissolution agreement, under the peculiar circumstances of this case, did not work a liberation of the firm assets and convert the same into the individual assets of Terens, but that, when the property came to the custody of the court, Oswald still retained the right to insist upon the payment of the firm debts out of the firm assets, as he does by his consent to the administration by the court, and that by subrogation or derivation the firm creditors are justified in insisting upon such a marshaling of assets as is provided for in the Bankruptcy Act."

Page 1388. But retiring partners may, effectually, sell not only their firm interests but also the specific property of the partnership to a remaining partner who assumes the debts, even though insolvent, and thus convert firm property into individual property; for the correct doctrine is that until partnership property is placed in the custody of the law by some suit or act which invokes the interposition of a court to administer

it, partners, with the consent of each, have the right and the power to convert it into individual property, to apply it to the payment of individual debts in preference to the payment of partnership debts, or to make any other disposition of it in good faith which does not constitute a voidable preference; and that insolvency does not destroy or diminish this right of disposition; that the right of the creditors of partnership to be paid out of the partnership property in preference to the individual creditors does not attach until an application is made to some court for the administration of the partnership property, nor then unless some partner has at that time that right, the preferential equity of the partners being the mere right to enforce the right of the partners to compel such a preference; in short, that, before the partnership property is placed in *custodia legis* it is not held in trust for the partnership creditors and they have no lien upon it; and that the covenant of the remaining partner to pay the firm debts, though both he and the firm are insolvent is a sufficient consideration; and that the assumption of payment of partnership debts by one partner in consideration of an absolute transfer to him of the partnership property by the other creates no trust in and fastens no lien upon the property thus transferred in favor of the partnership creditors prior to any application to a court to interpose and assume administration of the property.

Sargent v. Blake, 20 A. B. R. 115, 160 Fed. 57 (C. C. A. Mo.): "There are two rules of law which at different times apply to the management and disposition of the property of a partnership, first, partners own, and, with the consent of each, have the right and power to sell and dispose of the partnership property, to transform it into the individual property of one or more of the partners, to apply it or its proceeds to the payment of their individual debts in preference to those of the partnership, and to make such other honest disposition of it as they deem fit; second, in the administration of the property of a partnership in the courts the creditors of the partnership have the right to the application of the partnership property to the payment of the partnership debts in preference to the individual debts of the respective partners. The first is a rule of operation, the second a rule of administration. The first governs during the operation of the partnership business and the disposition of the partnership property by the partners, the second operates during the administration of the partnership property after it is brought into the custody of a court. The first rule prevails until by some suit or act the interposition of some court is invoked to administer the partnership property, and until that time the second rule is ineffective. Before the partnership property is placed in *custodia legis* for administration, it is not held in trust for the payment of the partnership creditors in preference to the creditors of the individual partners. The partnership creditors have no lien upon it, and no independent right to its application to the payment of their claims in preference to the claims of the creditors of the individual partners. Each partner, however, has the right to require the partnership property to be applied to the payment of the partnership debts in preference to the debts of the individual partners, to the end that he may not be required to pay the former out of his individual estate. The right of the creditors of the

partnership to payment out of the partnership property in preference to the individual creditors is the mere right by subrogation or derivation to enforce this right of one of the partners after the partnership property has been placed in the custody of the law. Until it has been so placed each partner has plenary power at any time to release or waive this right, and if each partner has done so and at the time the property comes within the jurisdiction of a court no partner has this right, then no creditor of the partnership has it, for a stream cannot rise higher than its source."

Nor do the provisions of § 5 of the Bankruptcy Act cause a different rule to prevail in bankruptcy.

Sargent v. Blake, 20 A. B. R. 115, 160 Fed. 57 (C. C. A. Mo.): "The clause of § 5f upon which counsel rely is nothing but the familiar rule of administration of partnership and individual estates which has been imported into the bankruptcy law from the courts of equity. 'The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of the individual debts.' The partnership property and the individual estate at what time, four months, or at some indefinite time within four month before the petition is filed, or at the time it is filed? This section treats of administration in the bankruptcy court and hence of the partnership and individual property, the title to which is in the bankrupt at the time the petition against him is presented to the court and that which he had transferred in fraud of his creditors. Section 70. Any other interpretation would produce intolerable vexation and confusion, for in the daily conduct of business, partners are necessarily and constantly applying partnership property to the payment, not only of large individual obligations, but to the payment of their petty individual debts, for living expenses, and are often devoting their individual property to the promotion of the partnership business and the discharge of the partnership debts. It never could have been, it never was, the intention of Congress that these transactions—these transformations of partnership into individual and of individual into partnership property within four months, or within any other time preceding the commencement of bankruptcy proceedings—should either be rescinded or avoided by subsequent adjudications in bankruptcy unless they were actually fraudulent or voidably preferential. It did not make them fraudulent in themselves. The terms of § 5f and the natural and rational interpretation of them in the light of the general rules of law and of the entire act in which they appear, limit their application to partnership and individual property at the commencement of bankruptcy proceedings, and to property the transfer of which is fraudulent for other reasons than that partnership property was applied to the payment of individual debts, or individual property to the payment of partnership debts. This conclusion is in accord with the general principles applicable to the management and disposition of partnership property."

Such right of the firm creditor to pursue firm assets into the hands of the remaining partner after dissolution and sale of the outgoing partner's interest, is purely derivative, such creditor deriving his rights through the right of the outgoing partner to have the assets first applied to partnership debts; so that if the outgoing partner has relinquished this right the creditor has no right to which he may be subrogated.

Huiskamp v. Wagon Co., 121 U. S. 310; *Cave v. Beauregard*, 99 U. S. 125. *Fitzpatrick v. Flannagan*, 106 U. S. 648: "The legal right of a partnership

creditor to subject the partnership property to the payment of his debt consists simply in the right to reduce his claim to judgment, and to sell the goods of his debtors on execution. His right to appropriate the partnership property specifically to the payment of his debt, in equity, in preference to creditors of an individual partner, is derived through the other partner, whose original right it is to have the partnership assets applied to the payment of partnership obligations. And this equity of the creditor subsists so long as that of the partner through which it is derived remains; that is, so long as the partner himself 'retains an interest in the firm assets, as a partner, a court of equity will allow the creditors of the firm to avail themselves of this equity, and enforce through it the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration.' Such was the language of this court in *Case v. Beauregard*, 99 U. S. 119, 25 L. Ed. 370, in which Mr. Justice Strong, delivering the opinion, continued as follows: 'It is indispensable, however, to such relief, when the creditors are, as in the present case, simply contract creditors, that the partnership property should be within the control of the court, and in the course of administration, brought there by the bankruptcy of the firm, or by an assignment, or by the creation of a trust in some mode. This is because neither the partners nor the joint creditors have any specific lien, nor is there any trust that can be enforced until the property has passed in *custodiam legis*.' Hence it follows that 'if, before the interposition of the court is asked, the property had ceased to belong to the partnership, if by a bona fide transfer it has become the several property of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end.'"

In *re Terens*, 23 A. B. R. 680, 175 Fed. 495 (D. C. Wis.): "It is also well settled that while each partner has the right to require the partnership property to be applied to the payment of partnership debts in preference to the debts of the individual partner, to the end that he be not required to pay the former out of his individual estate, still the right of the creditor of the partnership to payment out of the partnership property in preference to the individual creditor is derivative in nature, and is worked out by subrogation to the existing right of one of the partners to assert this equitable principle. Until the assets have been brought under the custody of the law, each partner has plenary power at any time to release or waive this right. If no partner retains this right, then no creditor of the partnership has it."

Such outgoing partners, for instance, will be held to have waived their right to insist upon application of the former firm assets to firm debts where both the partners unite in selling to a third person.

In *re Terens*, 23 A. B. R. 680, 175 Fed. 495 (D. C. Wis.); *Huiskamp v. Wagon Co.*, 121 U. S. 310; *Fitzpatrick v. Flannagan*, 106 U. S. 648; *Case v. Beauregard*, 99 U. S. 119.

Again, the outgoing partner may relinquish his right to have the firm assets applied to the firm debts by expressly applying the firm property to individual debts, in which event the firm creditor again has no right to which he may be subrogated.

Sargent v. Blake, 20 A. B. R. 115, 160 Fed. 57 (C. C. A.); In *re Terens*, 23 A. B. R. 680, 175 Fed. 495 (D. C. Wis.); *Thayer v. Humphrey*, 91 Wis. 276.

Instance, where outgoing partner had not relinquished the equity, In *re*

Filmar (*Lippincott v. Klosterman*), 24 A. B. R. 194, 177 Fed. 170 (C. C. A. Ills.), quoted post.

The same rule, namely, that the creditors' right is a derivative right, applies where the partnership was solvent when the sale was made.

In re Filmar (*Lippincott v. Klosterman*), 24 A. B. R. 194, 177 Fed. 170 (C. C. A. Ill.): "Swigert, a merchant tailor, in October, 1905, sold a third interest in his business to Filmar. The firm of Swigert & Filmar continued the business till January 8, 1906, when Swigert sold his interest to Filmar in consideration of a small money payment and Filmar's agreement to pay the partnership debts and save Swigert harmless therefrom. Partnership assets were then in excess of partnership debts. By payment and novation Filmar very shortly settled all partnership debts except one to appellant Lippincott. Lippincott refused to accept Filmar as debtor in place of the partnership, and proceeded to press Filmar for payment. Filmar, by various promises and representations, warded off Lippincott until February 20, 1906, when he filed his voluntary petition in bankruptcy. The property scheduled by Filmar and turned over to the trustee had all been property of the partnership. The scheduled debts were all separate individual debts of Filmar's except the debt to Lippincott. Thereupon Lippincott filed his petition, asking that his debt be paid from the assets ahead of the claims of Filmar's individual creditors; and Swigert filed a like petition, asking the same relief, without offering to repay the consideration he received on selling his interest to Filmar. The final decree dismissed these petitions for want of equity; and the petitioners have severally appealed. With the property in custody and all the parties present, and no rights of innocent purchasers or transferees having intervened, a court of general equity powers would concededly award priority to Lippincott, because there had been no application of the property with the consent of the partners, to the payment of individual debts (*Sargent v. Blake* (C. C. A., 8th Cir.), 20 Am. B. R. 115, 160 Fed. 57, * * *) because Lippincott in his own right as a partnership creditor would be entitled to equity's rule of distribution, and because Swigert for his own protection would have the right to ask that Lippincott be first paid. Was there less power in the bankruptcy court? Section 5a * * * declares that: 'A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.' Section 5f explicitly adopts the equity rule of administration. Section 5g authorizes the bankruptcy court to 'marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.' These provisions, we think, indicate very clearly that Congress intended that the bankruptcy courts should have full equity powers in dealing with partnership matters."

Of course, where the outgoing partner has not relinquished his equity but joins with the firm creditors in asking precedence for firm debts, the firm debts will have precedence.

In re Filmar, 24 A. B. R. 194, 177 Fed. 170 (C. C. A. Ill.), quoted supra.

§ 2270. But if Partnership Creditors Assent to Assumption They Become Individual Creditors.

But, of course, in any event, if the partnership creditors assent to the

assumption of the partnership debts by the remaining partner, they become thereby his individual creditors and lose their lien.

Page 1388, note 209. Compare, instance, where partnership creditor did not assent, *In re Filmar* (Lippincott v. Klosterman), 24 A. B. R. 194, 177 Fed. 170 (C. C. A. Ill.), quoted at § 2269.

§ 2270½. Where Outgoing Partner's Relinquishment of Right to Apply on Firm Debts, Is in Bad Faith or Would Work Preference.

Page 1389. There is to be recognized a modification, in bankruptcy and insolvency law, to the general rule that the firm creditors' right to pursue former partnership assets into the hands of an individual purchasing partner, is merely derivative and such that it may be relinquished by the acts of the outgoing partners. This modification is that such relinquishment will not be valid to deprive the firm creditor of the right where the relinquishment was made in bad faith or to effect a "preference" of individual creditors over firm creditors, "preference" in this connection referring not to the technical preference defined in § 60 of the bankruptcy law, but referring, rather, to the broader meaning of preference.

Thus, the Bankruptcy Act itself, in § 5 (g) says that the court "may marshal the assets of the partnership and individual estate so as to prevent preferences and to seek the equitable distribution of property of the several estates," the use of the word "preferences" in conjunction with "equitable distribution" seeming to indicate that the preferences here referred to are not the technical preferences defined in § 60 of the Bankruptcy Act.

In re Wilcox, 2 A. B. R. 117, 94 Fed. 84 (D. C. Mass.), quoted at § 2257; *In re Head & Smith*, 7 A. B. R. 556, 114 Fed. 489 (D. C. Ark.); *In re Jones & Cook*, 4 A. B. R. 141, 100 Fed. 781 (D. C. Mo.).

In re Denning, 8 A. B. R. 133, 114 Fed. 219 (D. C. Mass.): "Moreover, § 5g of the Bankruptcy Act was intended to clear up the whole matter, and to permit the court to deal with conversions of this kind so as not only to prevent preferences in the technical meaning of that word, but also so as to secure the equitable distribution of the property of the several estates."

In re Terens, 23 A. B. R. 680, 175 Fed. 495 (D. C. Wis.): "It remains to consider and construe § 5g, which is in *pari materiae*, which throws much light on the amplitude of the equitable jurisdiction conferred upon the court. It allows proof of the partnership estate against the individual estate, and vice versa. It expressly suggests the doctrine of marshaling assets to prevent preferences and to secure the equitable distribution among the several estates. The preferences supposed to interfere with a just and equitable distribution may result from the action of partners calculated to convert partnership property into individual assets, thus giving undue advantage to individual creditors. Properly construed, this subdivision meets the very case we have in hand."

Thus, the question sifts down largely to one of good faith. If the transfer be in bad faith towards the firm creditors, it would not be effective to deprive them of their derivative right.

What will amount to bad faith toward firm creditors in this regard is not very clearly outlined. It has been held that a dissolution by insolvent partners, within the four months preceding bankruptcy, where such partners know they are insolvent and which is made to enable the individual creditors of one or both partners to get an advantage over the firm creditors, will be such bad faith as will come under the rule.

In re Terens, 23 A. B. R. 680, 175 Fed. 495 (D. C. Wis.); In re Jones & Cook, 4 A. B. R. 141, 100 Fed. 781 (D. C. Mo.); In re Worth, 12 A. B. R. 566, 130 Fed. 937 (D. C. Iowa).

Indeed, in many cases, under varying circumstances, transfers by one partner to another have been held to be in mala fide, without proof of actual fraudulent intent.

In re Terens, 23 A. B. R. 680, 175 Fed. 495 (D. C. Wis.).

However, where the outgoing partner has not relinquished his equity, no proof of bad faith is requisite on the part of the firm creditor, especially where the outgoing partner joins with the creditor in asking that firm assets be applied first to firm debts.

In re Filmar, 24 A. B. R. 194, 177 Fed. 170 (C. C. A. Ill.), quoted at § 2269.

§ 2271. Where Sale Made to Enable Remaining Partner to Claim Exemptions.

Page 1389. But the better rule would seem to be that, if the sale otherwise be bona fide it would not be invalidated by the mere fact that it was made to enable the remaining partner to claim his exemptions.

Such, at any rate, would appear to be the logical result of an adherence to the rule enunciated ante, in § 2270½ and is the rule in similar situations, adopted in State court decisions.

§ 2272. Retiring Partner, Surety for Remaining Partner, Entitled to Subrogation to Debts He Pays.

Page 1391. But the claim of a solvent partner arising from his liquidation of the firm business, is not a valid debt against the estate of the bankrupt partner, who, at the time of adjudication, was not indebted either to the firm nor to the liquidating partner.

In re Walker, 23 A. B. R. 805, 176 Fed. 455 (D. C. Ala.).

§ 2273. But Retiring Partner's Claim for Purchase Price of Share, Not to Compete with Firm Creditors in Individual Estate of Remaining Partner.

But the retiring partner's claim for the purchase price of his partnership interest, should not share in the old firm assets.

Compare ante, § 2247½; In re Stoddard Bros. Lumber Co., 22 A. B. R. 435, 169 Fed. 190 (D. C. Idaho).

Nor in the individual assets of the remaining partner, until after the firm creditors have been satisfied; for he should not be permitted to compete with his own creditors.

Compare, In re Rice, 21 A. B. R. 205, 164 Fed. 514 (D. C. Pa.).

Retiring Partner's Mortgage on Insolvent Firm Assets Given within Four Months for Unpaid Purchase Price of Share, Preference in Firm Bankruptcy.—A mortgage given on partnership assets within the four months of the partnership bankruptcy to secure a retiring partner for the unpaid purchase price of his share is a partnership preference, see ante, § 2268½.

§ 2274. Whether "Preferential" Transfer by Partnership Voidable Where Remaining Partner Alone in Bankruptcy.

Page 1391, note 215. But compare, § 2268.

§ 2278. Subrogation by Agreement with Bankrupt or Creditor.

Page 1393. Children surrendering a life insurance policy to their father for a specific purpose have been held entitled to subrogation to a mortgage lien paid off by the father's misuse of the policy.

In re MacDougall, 23 A. B. R. 762, 175 Fed. 400 (D. C. N. Y.).

Although a pledge, given to secure money used by the bankrupt to pay the purchase price of manufactured goods and relieve the goods from the lien of the artisan upon them, may have been itself made without authority, yet the person advancing the money by agreement with the bankrupt is entitled to subrogation to the artisan's lien, and the trustee takes the property subject to such right of subrogation.

In re Automobile Livery Service Co., 23 A. B. R. 799, 176 Fed. 792 (D. C. Ala.).

Where the bankrupts were loggers and failed to pay their workmen, and the owners of the logs paid off the workmen's liens to prevent threatened foreclosure and sale, and the time checks representing each man's claim were turned over to the owners of the logs upon such payment, the transaction entitled the owners of the logs to subrogation to the workmen's liens, even if the transaction did not constitute an out and out assignment.

In re Langley & Alderson, 24 A. B. R. 69 (Ref. affirmed by D. C. Wis.).

§ 2280. Subrogation of Sureties for Bankrupt to Creditors' Rights and of Creditors to Indemnity Given Sureties.

Page 1395. Thus, a surety paying a claim after the bankruptcy may be subrogated to the claimant's right to rescind the sale and reclaim the property.

Sessler v. Paducah Distilleries Co., 21 A. B. R. 723, 168 Fed. 44 (C. C. A. La.): " * * * it is also contended that, as Menard Bros. took no express subrogation at the time of payment, they acquired no rights of the original creditor to rescind the sale. There may be some doubt as to whether any subrogation took place by contract; but as Menard Bros. were sureties of David Brunner [the bankrupt], and paid the debt, we think they are legally subrogated under the Louisiana Code. * * * We have no doubt about the right of a surety to prosecute his claim in bankruptcy in the name of the principal creditor, when subrogation takes place after proof of debt."

And of course a surety paying the bankrupt's debt is entitled to subrogation, pro tanto, to the creditor's claim.

See ante, § 613.

Again, children who have surrendered to their father insurance policies for specific purposes, have been held subrogated, as sureties, where the proceeds of the policies have been misapplied to the extinguishment of liens.

In re MacDougall, 23 A. B. R. 762, 175 Fed. 400 (D. C. N. Y.).

§ 2281. Subrogation of Interested Party, Paying to Preserve Assets.

Page 1396. And the doctrine of subrogation will be applied whenever a person, not a mere volunteer, pays a debt or demand, which, in equity and good conscience, should have been satisfied by another.

In re Bruce, 19 A. B. R. 770, 158 Fed. 123 (D. C. N. Y.).

This doctrine has been applied in favor of a partner who had sold out but had failed to notify creditors of the dissolution of the firm, and who was subsequently jointly sued on a debt contracted by the remaining partner after the dissolution, and who had left security with the sheriff to pay the execution in case the remaining partner could not be made to pay it; the court holding the judgment was not "paid," though originally marked so by the sheriff, but was still alive as against the trustee in bankruptcy of the remaining partner.

In re Bruce, 19 A. B. R. 770, 158 Fed. 123 (D. C. N. Y.).

Thus, again, where the owners of logs paid off workmen's liens, in order to prevent foreclosure, the employers of the workmen having be-

come bankrupt, the log owners were held entitled to subrogation to the workmen's liens.

Obiter, In re Langley & Alderson, 24 A. B. R. 69 (Ref. affirmed by D. C.). This case is obiter, because it was held that the transferring of the time checks created an actual assignment.

§ 2282. Mere Volunteers Not Entitled to Subrogation.

Page 1396, note 230. Unreported case Theobald v. Hammond (decided as case No. 1239, C. C. A. Ohio).

§ 2293. Exceptions to Reports and Orders of Distribution.

Of course, exceptions may be taken by parties in interest, to the approval of the reports, and the allowance of expenses and fees and to the order of distribution.

Instance, In re Kyte, 19 A. B. R. 768, 158 Fed. 121 (D. C. Pa.).

§ 2294 $\frac{1}{4}$. And to Be Verified.

And the exceptions should be verified.

In re Ketterer Mfg. Co., 19 A. B. R. 646, 156 Fed. 719 (D. C. Pa.).

§ 2294 $\frac{1}{2}$. Surcharging Accounts for Misconduct.

A receiver's account has been surcharged with part of the loss occasioned by his carelessness in continuing to conduct business at a steady loss, where his books were improperly kept, funds commingled and the management left in the hands of the bankrupt's officers.

In re Consumers' Coffee Co., 20 A. B. R. 835, 162 Fed. 786 (D. C. Pa.).

§ 2305. No Time Limited for Application to Reopen.

Page 1402, note 14. Impliedly (where ten years had elapsed), In re Pier-son, 23 A. B. R. 58, 174 Fed. 160 (D. C. N. Y.). But in this case the facts show that the referee had never called a meeting of creditors in the original bankruptcy.

§ 2306. But Must Be within Reasonable Time: Laches Will Bar.

Likewise, seven years after a bankrupt has been granted a discharge, the proceedings in bankruptcy will not be re-opened for alleged fraudulent concealment of assets, upon the petition of an assignee of a judgment, verified only on information and belief, which fails to show what property was surrendered by the bankrupt or what representations were made in his schedules as to property surrendered by him or that any creditor was deceived as to the facts or when the alleged fraud was discovered.

Vary v. Jackson, 21 A. B. R. 334, 164 Fed. 840 (C. C. A. Ala.).

But, in a case where the referee had never even called a meeting of

creditors in the original bankruptcy, and no trustee had ever been appointed, reopening was permitted after the lapse of nearly ten years.

In re Pierson, 23 A. B. R. 58, 174 Fed. 160 (D. C. N. Y.).

§ 2311. Who May Apply: Only Creditors Who Have Proved or May Prove Claims, Competent.

Page 1404, note 22. Contra, where no claims were originally filed, In re Pierson, 23 A. B. R. 58, 174 Fed. 160 (D. C. N. Y.). But this contra doctrine is not to be approved. The facts in the case, however, seem to disclose great laxity, if not irregularity, on the part of the referee in the original bankruptcy—he did not even call a meeting of creditors!

§ 2314. Trustee Elected Anew and Administration to Proceed in Usual Manner.

Page 1405. Amendment of the schedules may be permitted to claim exemptions out of newly-discovered assets, provided the bankrupt has not been acting in bad faith.

In re Irwin, 22 A. B. R. 165, 177 Fed. 284 (D. C. Pa.).

§ 2315. Reopening Does Not Toll Year's Limitation for Proof of Claims.

Page 1405, note 27. Contra, where no claims originally filed and no trustee originally appointed, In re Pierson, 23 A. B. R. 58, 174 Fed. 160 (D. C. N. Y.); but this doctrine is doubtful. The recounting, however, of the omission of the ordinary steps of the calling of a meeting of creditors, of the appointment of a trustee, etc., displays such a laxity of duty on the part of the bankruptcy referee as to imply an abandonment of the original bankruptcy.

§ 2316. Crimes against the Act.

Receiving any material amount of property from a bankrupt after the filing of the petition with intent to defeat the Act.

Page 1409. Obiter, B'd of Com'rs Kans *v. Hurley*, 22 A. B. R. 209, 169 Fed. 92 (C. C. A. Kans.).

§ 2318. Acts Committed before Bankruptcy Not within Statute.

Page 1410, note 3. Thus, it has been held that an indictment for conspiracy to conceal assets of a bankrupt estate, which shows that the conspiracy was entered into and the assets removed and concealed prior to the bankruptcy, but which does not allege that said acts were done in contemplation of bankruptcy nor that any overt act was committed after the bankruptcy, does not state an offense under U. S. Rev. Stat. 5440, though a further conspiracy to continue to conceal the concealed property is alleged. *United States v. Grodson*, 21 A. B. R. 68, 164 Fed. 157 (D. C. Ills.). But compare post, § 2320½; also, *Alkon v. United States*, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.). Also, compare, *United States v. Young & Holland Co.*, 22 A. B. R. 484, 170 Fed. 110 (D. C. R. I.).

§ 2319. Continuing Concealment.

But concealment from the trustee is perpetrated—continuing concealment—by the bankrupt's failure to reveal recoverable property, when the duty exists for him to reveal it, after bankruptcy, although the initial acts of fraud or secreting occurred before the bankruptcy.

Alkon v. United States, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.), quoted post at § 2320 $\frac{1}{2}$; *United States v. Young & Holland Co.*, 22 A. B. R. 484, 170 Fed. 110 (D. C. R. I.).

§ 2320 $\frac{1}{4}$. Adjudication of Bankruptcy Essential.

It is essential to prove adjudication of bankruptcy.

Gilbertson v. United States, 22 A. B. R. 32, 168 Fed. 672 (C. C. A. Wis.): "Without adjudication as a bankrupt within the meaning of the statute, the conviction cannot be upheld, notwithstanding the proof of flagrant concealment of property from the trustee (de facto), and the single inquiry for solution is the legal effect of the bankruptcy record in evidence—whether it is conclusive in the case at bar of such adjudication."

§ 2320 $\frac{1}{2}$. Conspiracy to Conceal in Contemplated Bankruptcy.

But conspiracy to conceal in a bankruptcy contemplated in the future may be committed before adjudication.

United States v. Young & Holland Co., 22 A. B. R. 484, 170 Fed. 110 (D. C. R. I.); obiter, *Kerrch v. United States*, 22 A. B. R. 544, 171 Fed. 366 (C. C. A. Mass.).

Page 1411. *Alkon v. United States*, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.): "The first proposition is that the indictment alleged no offense because there was no existing bankruptcy when the conspiracy originated, while the statute—§ 29 of the Bankruptcy Act of 1898 * * *—punishes only concealment of goods 'while a bankrupt;' and it is said that, as the alleged conspiracy related only to the doing of something which was not illegal when the conspiracy originated, the statute under which the indictment was found did not apply. That result would follow if the proposition as to the extent of the conspiracy was true; but it included an intent to continue the concealment until after Barish became a bankrupt, and it was like all conspiracies in that it related to something in futuro."

§ 2321. Indictment to Be Specific and to Contain All Essential Elements.

Page 1412. It is unnecessary to specify the particular manner of "concealment," whether it be by "secreting," "falsifying" or "mutilating," nor to set forth the evidence.

United States v. Comstock, 20 A. B. R. 520, 161 Fed. 644 (D. C. Mass.): "The argument is that as the statute says that the word 'conceal' shall include 'secrete, falsify, and mutilate,' three acts widely different in their nature, the indictment should define which one of these acts is intended. The decisions of the Supreme Court as to the words 'wilfully misapply' in the

laws relating to national banks do not seem to be applicable. As the words 'wilfully misapply' in the statute did not set forth all the necessary elements of the offense, it was considered not sufficient to charge the offense in the words of the statute. Under the statute now in question, the mode of concealment is entirely immaterial. The word 'fraudulently' limits the word 'conceal,' and supplies the element of criminality which was not contained in the words 'wilfully misapply,' which were not limited by express terms, but by construction of the statute in view of the subject-matter. It was necessary, therefore, that this limitation arrived at by construction should be set forth in the indictment in specific terms; for otherwise the terms of the indictment addressed to a defendant, informing him of the nature of the act with which he is charged, would be broader than the true import of the statute. By this indictment the defendant is charged with fraudulent concealment of goods, and is given due notice that evidence may be offered against him of various modes of concealment. To require the government to specify a particular mode of concealment would unnecessarily limit it to a particular mode, and deprive it of the right to introduce evidence that all the modes of concealment—the actual hiding of goods, hiding of books, accounts or documentary evidence by secreting or mutilating the same, etc.—were used. It is unnecessary to set forth the evidence upon which the government relies, and the defendant, as in ordinary cases, must take notice that any testimony relevant to the question of fraudulent concealment may be introduced against him."

No allegation of ownership is essential other than that the property was "belonging to his estate in bankruptcy."

United States *v.* Comstock, 20 A. B. R. 520, 161 Fed. 644 (D. C. Mass.).

Nor is it necessary to allege that the bankrupt knew of the appointment of a trustee of his estate.

United States *v.* Comstock, 20 A. B. R. 520, 161 Fed. 644 (D. C. Mass.).

The allegation that the trustee was "duly" appointed and qualified is sufficient, at least on review.

Kerrch *v.* United States, 22 A. B. R. 544, 171 Fed. 366 (C. C. A. Mass.).

§ 2322. Indictment for False Oath or for Concealment of Assets to Aver Falsity and Scienter.

And the indictment for concealment of assets is fatally defective if it fail to characterize the concealment as having been done "knowingly and fraudulently," in the very words themselves or equivalent words,

United States *v.* Comstock, 20 A. B. R. 520, 161 Fed. 644 (D. C. Mass.).

So also with an indictment for conspiracy to conceal.

United States *v.* Comstock, 20 A. B. R. 525, 161 Fed. 644 (D. C. R. I.): "The words 'knowingly and fraudulently' are an essential part of the statute, and describe an essential ingredient of the offense. The omission of these words, or any equivalent, is in my opinion, fatal on demurrer."

It need not be alleged to have been done "wilfully," however, the word "conceal" itself plainly excluding unintentional acts.

United States v. Comstock, 20 A. B. R. 520, 161 Fed. 644 (D. C. Mass.): "The indictment uses the words 'unlawfully, knowingly and fraudulently' to characterize the word 'conceal.' Upon demurrer, it is contended that no wrongful intent is sufficiently charged by these words. The terms of the statute, however, are themselves inconsistent with an honest or lawful purpose, and set forth all the elements of the offense. In such case it is sufficient to charge the offense in the terms of the statute. The defendant assigns as cause of demurrer the omission of the word 'wilfully.' The language of the statute used in the indictment is the substantial equivalent of a charge that the defendant did wilfully conceal. *Bullis v. O'Beirne*, 195 U. S. 606-617, 13 Am. B. R. 108. * * * The term 'conceal,' itself a word of plain interpretation (*United States v. 350 Chests of Tea*, 12 Wheat. 493, 6 L. Ed. 702), when coupled with the words 'unlawfully, knowingly, and fraudulently,' plainly excludes unintentional acts. The word 'conceal' according to Bankruptcy Act, § 1 (22) shall include 'secrete, falsify, and mutilate.'"

§ 2323. Schedules of Bankrupt Not to Be Used in Criminal Proceedings against Him.

Under the protection of U. S. Rev. Stats., § 860 [since repealed, see post, § 2324½], it was forbidden to use the schedules in any criminal proceedings against the bankrupt.

Jacobs v. United States, 20 A. B. R. 550, 161 Fed. 694 (C. C. A.); compare, *Johnson v. United States*, 22 A. B. R. 359, 170 Fed. 581 (C. C. A. Mass.).

Johnson v. United States, 20 A. B. R. 724, 163 Fed. 30 (C. C. A. Mass.): "The government, after putting in the creditors' petition filed against the defendant, the order appointing a receiver, notice to the bankrupt, the adjudication, the appointment of the trustee, the order of reference and the list of debts, offered the schedules of assets and liabilities filed by the bankrupt in the District Court. The defendant objected, the objection was overruled, the schedules were admitted, and the defendant excepted. It is said that the grounds of the objection should have been stated, but we are of opinion that the only possible ground was sufficiently obvious to entitle the defendant in fairness to have it considered by us upon its merits. The ground, of course, was Rev. St., § 860 (U. S. Comp. St. 1901, p. 661): 'No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: Provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid.' The government argues that the schedules are not pleadings, discovery or evidence, and that therefore the section does not apply; but we are not satisfied that the fagot can be taken to pieces and broken stick by stick in this manner so easily. We quite agree that vague arguments as to the spirit of a constitution or statute have little worth. We recognize that courts have been disinclined to extend statutes modifying the common law beyond the

direct operation of the words used, and that at times this disinclination has been carried very far. But it seems to us that there may be statutes that need a different treatment. * * * This section of the Revised Statutes goes beyond and outside the Fifth Amendment. It applies, even to a sworn bill or answer in chancery, what is said to be the rule of common law, that pleadings are not evidence against the party concerned. * * * On the same principle we think that schedules in bankruptcy are protected. We can see no reason that would apply to an answer in equity that does not apply to them. They are required by law. They are a regular step in the written procedure preliminary to the proof of facts. If necessary, it might be argued that they are pleadings within the meaning of the act. Bankruptcy is a proceeding in rem. The schedules indicate those who are to be made parties to the proceeding, the extent of their supposed claims, and the subject matter of the distribution. Bankruptcy Act, §§ 7 (8), 17 (3). * * * They have such characteristics of pleadings as are possible at that stage of a proceeding of this kind against all the world. But it is said that filing the schedules was an act. It was a representation that the property set forth was all the property known to the bankrupt to which the trustee had a right. If the offense punished by the statute had been an active misrepresentation, there might be force in the argument that there was an implied exception from the statute, even as we read it, analogous to the express exception in the case of perjury. But the offense is not making a misrepresentation at a given time and place; it is the continuous concealment of the property from the trustee during the whole course of the bankruptcy proceedings or beyond. The omission from the schedule would amount to nothing if the bankrupt had disclosed the property to the trustee. To prove this continued concealment, it is not necessary, of course, to take up each moment of the bankrupt's life while the proceedings lasted, and to prove what he did as a means of proving what he did not. The moment of filing the schedules is no more important than any other moment, and although the fact of a misrepresentation in them would corroborate testimony that certain property was not disclosed, it is like any other corroborative evidence and is not necessary in order to make out the offense."

Cohen v. United States, 22 A. B. R. 333, 170 Fed. 715 (C. C. A. S. C.): "It was necessary for the defendant in error, in order to prove the allegations of the indictment, to show that certain property mentioned in the indictment, was at one time in the possession of and owned by the plaintiff in error, and that thereafter it was by him concealed from his trustee. For the purpose of doing this the Schedules in Bankruptcy were introduced. The Bankruptcy Act, recognizing the well established rule that admissions of a party obtained by force, threats or duress, or by judicial proceedings, should not be used against him, provided that the testimony given by him in the proceedings connected with his bankruptcy should not be used as evidence in any criminal case against him. No one can be compelled to testify against himself; the immunity referred to is in accordance with the provisions of the Fifth Amendment to the Constitution of the United States, and with it should have a liberal construction. By that amendment all citizens of the United States are given immunity from self-incrimination, and independent of the legislation mentioned, this constitutional provision makes it contrary to the principles of our government to convict any one of crime by compelling the production of his private books and papers, or by resorting to the use of discoveries founded on his oath, required of him in judicial proceedings. Whatever the rule may be in the criminal courts of the States of the Union,

concerning which it may be conceded there is conflict, certainly it must be admitted that in the Federal Courts the exemption from compulsory self-incrimination is secured by the Constitution of the United States.^c The language used in § 7, subdivision 9, of the Bankruptcy Act of 1898—"but no testimony given by him shall be offered in evidence against him in any criminal proceeding"—is simply the recognition of the fact that the law requires the bankrupt to give his testimony in the proceedings by which he petitions for his discharge, and having thus forced him to testify, or to forego the benefits of the law, it proceeds to provide the immunity usual under such circumstances. The words we have quoted are not to be held as modifying or rendering inapplicable the provisions of said § 860, to cases of this character. Rather are they in aid of that section, and even if the contention of the district attorney that the immunity granted in the Bankruptcy Act was only intended to apply to the oral testimony of the bankrupt could be sustained, nevertheless said § 860 would prevent the use of the bankrupt's schedules in a criminal prosecution."

And indirect methods of getting the contents of the schedules into evidence are condemned.

Jacobs v. United States, 20 A. B. R. 550, 161 Fed. 694 (C. C. A.); compare, *Johnson v. United States*, 22 A. B. R. 359, 170 Fed. 581 (C. C. A. Mass.).

Likewise, asking a witness what he testified to before the referee in bankruptcy and then introducing stenographic notes to contradict him was held to be contrary to U. S. Rev. Stats., § 860, and to be reversible error.

Alkon v. United States, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.).

But it was held that the immunity granted by U. S. Rev. Stats., § 860, applied only to prosecutions in federal courts.

Com. v. Ensign, 22 A. B. R. 797, 40 Pa. Superior Ct. 157.

Where the bankrupt has freely testified, or produced documents, without claiming the privilege against self-incrimination, the subsequent use of such testimony or documents is not forbidden either in State or Federal criminal prosecutions.

In re Tracy & Co., 23 A. B. R. 438, 177 Fed. 532 (D. C. N. Y.), quoted ante at §§ 915, 1561, 1562, 1562½.

But where the testimony or the production of documents is not given freely but under compulsion of court order, probably the privilege would continue, so as to prevent use thereof in the subsequent criminal prosecution.

In re Tracy & Co., 23 A. B. R. 438, 177 Fed. 532 (D. C. N. Y.), quoted ante at §§ 915, 1561, 1562, 1562½.

Whilst it may not be the positive duty of the trustee to assist in the criminal prosecution of bankrupts or other parties connected with the bankruptcy proceedings, by allowing inspection of the testimony or of

the documents in his custody, etc., yet it is not improper for the trustee to render such assistance, and it may indeed even be commendable for him so to do in certain cases.

In *re Tracy & Co.*, 23 A. B. R. 438, 177 Fed. 532 (D. C. N. Y.), quoted ante at §§ 915, 1561, 1562, 1562½.

At any rate where the pleadings in the bankruptcy proceedings did not and could not contain anything to sustain the special charge made in the indictment and the only purpose of their introduction was to show there was a bankruptcy proceeding and that the false testimony was probably before the Special Master, such use of schedules before the grand jury is not forbidden.

United States v. Brod, 23 A. B. R. 740, 176 Fed. 165 (D. C. Ga.).

§ 2324. Immunity from Use of Bankrupt's Testimony.

The statutory immunity of § 7 (9) from the use as evidence in any criminal proceedings of the bankrupt's testimony before the referee has been construed by some of the courts to be an effectual obstacle to conviction for perjury. Nor can such immunity be evaded by reading therefrom.

Jacobs v. United States, 20 A. B. R. 550, 161 Fed. 694 (C. C. A. Mass.).

Even though the bankrupt offer himself as a witness.

Jacobs v. United States, 20 A. B. R. 550, 161 Fed. 694 (C. C. A. Mass.).

And, in general, indirect methods of getting the bankrupt's examination or schedules into evidence are forbidden.

Jacobs v. United States, 20 A. B. R. 550, 161 Fed. 694 (C. C. A.); *obiter*, *Johnson v. United States*, 22 A. B. R. 359, 170 Fed. 581 (C. C. A. Mass.); compare, to same effect as to witness, *Alkon v. United States*, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.).

But U. S. Rev. Stat., § 860, did not prevent the introduction in evidence of the bankrupt's books or other "documents" which already were in the possession of the trustee or receiver.

Kerrch v. United States, 22 A. B. R. 544, 171 Fed. 366 (C. C. A. Mass.).

On the other hand the statutory immunity of § 7 has been held in other cases not to give immunity from prosecution for giving false testimony upon general examination.

Wechsler v. United States, 19 A. B. R. 1, 158 Fed. 579 (C. C. A. N. Y.); *Edelstein v. United States*, 17 A. B. R. 649, 149 Fed. 636 (C. C. A., certiorari refused by Supreme Court, 205 U. S. 543), quoted at § 1556.

And the fact that the Bankruptcy Act provides for the crime of "False Oath" does not vitiate an indictment for perjury drawn under the U. S. Rev. Stat., § 5392, for the essential elements are the same.

Wechsler v. United States, 19 A. B. R. 1, 158 Fed. 579 (C. C. A. N. Y.).

Nevertheless, the special provision of the Bankruptcy Act controls, and excludes any other punishment than that prescribed in the Bankruptcy Act.

§ 2324½. United States Revised Statutes, § 860, Granting Immunity, Repealed.

Congress in 1910 repealed § 860 of the Revised Statutes of the United States, which section is frequently involved in the discussions as to the immunity of the bankrupt from use of his schedules, testimony, etc., given in bankruptcy proceedings.

See Report of Senate Judiciary Committee No. 502, 61st Congress, Second Session: "Section 860, which the bill proposes to repeal, reads as follows: 'No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: Provided, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid.' This section was enacted apparently for the purpose of enabling the government to compel the disclosure of incriminating testimony on condition that the witness disclosing the same would be given immunity. In the case of *Counselman v. Hitchcock* (142 U. S. 547) it was held that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect, and that said § 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition, and that in view of the constitutional provision (article 5 of the amendments) a statutory enactment to be valid must afford absolute immunity against future prosecution for the offense to which the question relates."

"Since the decision above referred to § 860 has possessed no usefulness whatever, but has remained in the law as an impediment to the course of justice. Under it a witness cannot be compelled to give any incriminating testimony whatever, but if he chooses to go on the witness stand and testify as to any matter whatever, even of his own volition, and, whether incriminatory or not, his testimony cannot thereafter be brought up against him in any criminal proceedings. He cannot be confronted with his own testimony or his own previous statement under oath even on cross-examination. The statute has become a shield to the criminal and an obstruction to justice. The bill has the approval of the Attorney-General, as will appear by a quotation from pages 22 and 23 of his annual report for the year 1909, which reads as follows: 'In the enactment of this section it was the apparent intention of Congress to create a law which would enable prosecutors to give immunity to witnesses who were compelled to testify against themselves, but the Supreme Court, in the case of *Counselman v. Hitchcock* (142 U. S. 547), held that this section was no substitute for the constitutional guaranty against self-crimination. As a result it is availed of constantly by criminals to prevent the government from using against them any testimony given by them at any time in any proceeding. So far as I am aware no statute in any of the States protects a man who is charged with a crime from having used

against him in a criminal proceeding testimony given by him in a civil suit. The United States attorney for the southern district of New York informs me that it is an everyday occurrence in bankruptcy cases for bankrupts and their witnesses to testify before special examiners, referees, etc., often falsely, and then, when indicted for some offense under the Bankruptcy Act, to appear in court and testify in direct contradiction of what they may have deposed in the proceedings before the referee or examiner; but the government is prevented by the above-quoted section from using such testimony against them.”

§ 2326. But Only Bankrupt Indictable for Concealment of Assets from the Trustee.

But only the bankrupt is indictable for concealment of assets from the trustee.

United States v. Grodson, 21 A. B. R. 68, 164 Fed. 157 (D. C. Ills.).

Page 1413. But there may be a conspiracy to conceal where neither conspirator is, strictly speaking, a bankrupt; thus, if he be an officer of a bankrupt corporation.

United States v. Grodson, 21 A. B. R. 68, 164 Fed. 157 (D. C. Ills.); *United States v. Young & Holland & Co.*, 22 A. B. R. 484, 170 Fed. 110 (D. C. R. I.); *Cohen v. United States*, 19 A. B. R. 8, 157 Fed. 651 (C. C. A. N. Y.).

Where one only is a bankrupt.

Alkon v. United States, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.).

§ 2326½. Corporation Indictable.

A corporation may be indicted for concealment of assets, even concealment in anticipation of bankruptcy.

United States v. Young & Holland & Co., 22 A. B. R. 484, 170 Fed. 110 (D. C. R. I.).

• • § 2327. Essential Elements in Proof of “False Oath.”

Page 1413, note 15. *United States v. Wechsler*, 16 A. B. R. 1 (D. C. N. Y., reversed, on other points, in *Wechsler v. United States*, 19 A. B. R. 1, 158 Fed. 579 C. C. A.).

And it has also been held that an oath before a special commissioner, appointed under § 21a “for general examination,” before adjudication of bankruptcy, is sufficient.

United States v. Liberman, 23 A. B. R. 734, 176 Fed. 161 (U. S. C. C. N. Y.). But compare holdings that there may be no “general examination” under § 21a before adjudication of bankruptcy, ante, § 1543.

§ 2328. In Proof of “Concealment of Assets.”

Page 1413, note 17. See ante, § 2302½; also, *Alkon v. United States*, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.).

Filing amended schedule to escape criminal prosecution ineffective. *Kern v. United States*, 22 A. B. R. 223, 169 Fed. 617 (C. C. A. Tenn.).

Exclusion of evidence, when harmless error. *Kern v. United States*, 22 A. B. R. 223, 169 Fed. 617 (C. C. A. Tenn.).

Trustee testifying, never learned whereabouts of assets from bankrupt but discovered them without bankrupt's assistance. *Johnson v. United States*, 22 A. B. R. 359, 170 Fed. 581 (C. C. A. Mass.).

Admissions, *Alkon v. United States*, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.).

§ 2328¼. Concealment before Appointment of Trustee.

The concealment, to be sure, must be concealment from the trustee.

In re *Adams*, 22 A. B. R. 613, 171 Fed. 599 (D. C. N. Y.).

But if a concealment before the appointment of a trustee continues after his appointment, it constitutes concealment from him.

Cohen v. United States, 19 A. B. R. 8, 157 Fed. 651 (C. C. A. N. Y.): "We think, however, that the indictment is not so limited in scope as claimed by the defendants. It is true that it charges the removal and concealment of certain property before the appointment of a trustee, but it further alleges that a trustee was subsequently appointed and that the property was never turned over to him, but was concealed from him by the procurement of defendant Simpson with the knowledge, consent and connivance of the other conspirators. The case presented by the indictment is therefore one of continued concealment, and we are not called upon to consider whether there is an omission in the Bankrupt Law in respect of the disposition of property in contemplation of bankruptcy. If a bankrupt conceal his property before the appointment of a trustee and continue to conceal it after the appointment he violates the Bankrupt Act, and a conspiracy that he shall do so violates the conspiracy statute."

§ 2328½. Conspiracy to Commit Offense against the Bankruptcy Act.

A conspiracy to commit an offense against the Bankruptcy Act is itself a crime, though it be not specifically mentioned as such in the Bankruptcy Act. Such a conspiracy is cognizable as an offense under § 5440 of the Revised Statutes of the United States.

United States v. Comstock, 20 A. B. R. 525, 526, 161 Fed. 644 (D. C. R. I.); *Cohen v. United States*, 19 A. B. R. 8, 157 Fed. 651 (C. C. A. N. Y., affirming 15 A. B. R. 357). Compare, pleadings in civil action for conspiracy to defraud creditors, *Strasburger v. Bach*, 19 A. B. R. 732, 157 Fed. 918 (C. C. A. Ills.).

Evidence: Admissions, *Alkon v. United States*, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.).

Evidence: No receiving of admissions of alleged conspirators before independent proof of a conspiracy. *Cohen v. United States*, 19 A. B. R. 8, 157 Fed. 651 (C. C. A. N. Y.): "But it is urged that the evidence of Simpson's declarations was received before there was any proof of the conspiracy, and

it is claimed that declarations of an alleged conspirator are not admissible to prove the existence of a conspiracy. We are not disposed to question this last claim. But we are of the opinion that there was proof of the conspiracy in this case other than Simpson's declarations, and the mere fact that all the evidence thereof was not in at the time the declarations were testified to did not render it erroneous to receive them. It was a question of the order of proof and within the discretion of the trial court. Instance, *Alkon v. United States*, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.); *United States v. Young & Holland Co.*, 22 A. B. R. 484, 170 Fed. 110 (D. C. R. I.); instance, *Kerrch v. United States*, 22 A. B. R. 544, 171 Fed. 366 (C. C. A. Mass.).

Evidence: Bankrupt's account books not privileged; bankrupt's books of account, taken possession of by the receiver in bankruptcy, are admissible on proof of conspiracy, notwithstanding claim of privilege under § 860, U. S. Rev. Stat. *Kerrch v. United States*, 22 A. B. R. 544, 171 Fed. 366 (C. C. A. Mass.).

Customary course of business in common carrier's office as proof of receipt of goods by bankrupt, competent. *Kerrch v. United States*, 22 A. B. R. 544, 171 Fed. 366 (C. C. A. Mass.).

Proving identity of goods by similarity of invoices. *Kerrch v. United States*, 22 A. B. R. 544, 171 Fed. 366 (C. C. A. Mass.).

And there may be a conspiracy to commit an offense against the Bankruptcy Act, though the defendant be not, strictly speaking, a bankrupt.

Cohen v. United States, 19 A. B. R. 8, 157 Fed. 651 (C. C. A. N. Y.): "The corporation—the bankrupt—could violate the provision against fraudulently concealing assets. Its acts would be criminal notwithstanding its corporate character would prevent its punishment. Even if the corporation alone could violate the Bankruptcy Act, the defendants could conspire that the corporation should violate it and so be guilty of conspiracy. Although a bankrupt alone can be indicted for violating the Bankruptcy Act, persons combining with him to violate it may be guilty of conspiracy. *United States v. Bayer*, 4 Dill. 467. It is immaterial that the corporation was not indicted for conspiracy or whether it could be indicted. Failure to prosecute all conspirators does not prevent the prosecution of a part of them. *United States v. Miller*, 3 Hughes, 553; *People v. Richards*, 67 Cal. 412; *People v. Mather*, 4 Wend. 229. That a corporation may be a conspirator see *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 42 Hun, 153, 106 N. Y. 607; *Dorsey Machine Co. v. McCaffrey*, 139 Ind. 545; *West Va. Trans. Co. v. Standard Oil Co.*, 50 W. Va. 611."

§ 2329. Advice of Counsel.

Advice of counsel may negative criminal intent.

Page 1413, note 18. See, in addition, *Kern v. United States*, 22 A. B. R. 223, 169 Fed. 617 (C. C. A. Tenn.); post, §§ 2491, 2492, 2536.

§ 2329¼. Receiving Property from Bankrupt.

It is a crime against the act for any person knowingly and fraudulently

to receive a material amount of property from a bankrupt, after the filing of the petition, with intent to defeat the act.

Bankr. Act, § 29b. (4); *United States v. Comstock*, 20 A. B. R. 525, 161 Fed. 644 (D. C. R. I.).

It was said to be such a crime for a creditor to receive settlement money from a bankrupt where after a petition was filed, an order was granted requiring the receiver to turn back the money to the bankrupt because of failure to file his bond, whereupon the bankrupt had proceeded to make a 40 per cent settlement with most of his creditors, but the petition was not dismissed.

Knapp & Spencer v. Drew, 20 A. B. R. 355, 160 Fed. 413 (C. C. A. Neb.).

§ 2329 $\frac{1}{2}$. Statute of Limitations.

No one may be prosecuted under § 29 of the act unless the indictment be found or the information be filed within one year after the commission of the offense.

Bankr. Act, § 29 (d).

But such limitation does not apply to indictments for conspiracy to commit an offense against the Bankruptcy Act, for such indictments are not brought under § 29 of the Bankruptcy Act, but under Rev. Stat., U. S., § 5440.

United States v. Comstock, 20 A. B. R. 525, 161 Fed. 644 (D. C. R. I.).

§ 2329 $\frac{5}{8}$. Suppression of Criminal Prosecution.

The court will not sanction a compromise based upon the stifling of a criminal prosecution of the bankrupt, even though thereby assets are brought into the estate.

In re Rosenblatt, 18 A. B. R. 663, 153 Fed. 335 (D. C. Pa.); *Mulford v. Fourth St. Nat. Bank*, 19 A. B. R. 742, 157 Fed. 897 (C. C. A. Pa.).

§ 2329 $\frac{3}{4}$. Miscellaneous Matters of Practice.

Proofs of claims are not admissible as against the bankrupt, at any rate, not unless showing be made that he had examined and approved them.

Jacobs v. United States, 20 A. B. R. 550, 161 Fed. 694 (C. C. A. Mass.): "Clearly, unless some special reason is shown to the contrary, these proofs were strictly *inter alios*, mere declarations of third persons; and the admission of them was a plain violation of the rule relative to the use of that class of evidence. It is claimed, however, by the *United States*, that it was the duty of *Jacobs*, under the statutes in bankruptcy, to examine the claims when offered in proof, and to advise if they were not correct. This, however, is only a partial statement, and what is omitted is fatal to the proposi-

tion. It is true that section 7 of the Act of July 1, 1898, * * * provides that, in the case of any person having to the knowledge of the bankrupt proved a false claim, he (the bankrupt) shall disclose that fact to his trustee; but it also further provides that he shall not be required 'to examine claims except when presented to him unless ordered by the court or a judge thereof for cause shown.' There is no evidence in the record of any such presentation to Jacobs of the claims in question, or that he had any actual knowledge of what was proved against the estate, or that he had ever been requested in any way to take any part in reference thereto. Consequently, the admission of this evidence was clearly erroneous and prejudicial."

Privileged communications are to be respected; but communications to the wife must be confidential. As to the limits of the right of examination, cross-examination and re-direct examination, see *Jacobs v. United States*, 20 A. B. R. 550, 161 Fed. 694 (C. C. A. Mass.).

The filing of amended schedules or other act "meet for repentance," after discovery, is ineffective to avoid the criminal prosecution, though it may be taken into account in fixing sentence.

Kern v. United States, 22 A. B. R. 223, 169 Fed. 617 (C. C. A. Tenn.), quoted at § 2543.

It would seem that it is not necessary in conspiracy cases that a writ of error to review a conviction be joint; it is in accordance with the authorities and practice that each may sue out separate writs.

Alkon v. United States, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.).

But the citation on the writ is defective where it does not give the names of all applicants for the writ.

Kerrch v. United States, 22 A. B. R. 544, 171 Fed. 366 (C. C. A. Mass.).

Error does not lie for the denial of a motion to quash an indictment on account of anything which may be raised by demurrer.

Kerrch v. United States, 22 A. B. R. 544, 171 Fed. 366 (C. C. A. Mass.).

§ 2330. Contempt, What Constitutes, in General.

Page 1414, note 1. Disobedience of referee's order staying a suit to permit interposition of discharge. In *re Mustin*, 21 A. B. R. 147, 165 Fed. 506 (D. C. Ala.).

Attorneys with knowledge of bankruptcy proceedings, replevying from sheriff whose lien had been annulled by the bankruptcy but who was still holding, under the referee in bankruptcy. In *re Walsh Bros.*, 20 A. B. R. 472, 159 Fed. 560, 163 Fed. 352 (D. C. Iowa).

Disobedience of interlocutory order requiring bankrupt denying insolvency to amend his answer by attaching list of debts and assets, see ante, §§ 179, note; 406, note.

Disobedience of order to produce books, In *re Alper*, 19 A. B. R. 612, 162 Fed. 207 (D. C. N. Y.). See ante, § 1548.

Disobedience of mere general order to turn over all assets, books, etc., contained in order of appointment of receiver. *Skubinsky v. Bodek*, 22 A. B. R. 699, 172 Fed. 340 (C. C. A. Pa.); also, see ante, § 392, note.

Page 1416. The power to punish for contempt may be exercised either under the general power of all courts to punish contempts; or under the specific provision of the Bankruptcy Act, § 2 (13), "to enforce obedience by bankrupts, officers and other persons to all lawful orders by fine or imprisonment or fine and imprisonment."

In re Cole, 20 A. B. R. 761, 163 Fed. 180 (C. C. A. Me.), quoted at §§ 1856; 1859½.

§ 2330¼. Dealing with Bankrupt's Assets after Oral Notice of Bankruptcy.

Oral notice of an injunction or of the appointment of a receiver is sufficient to make subsequent interference with the assets a contempt.

Page 1416. Compare, In re Deeb Lufty, 19 A. B. R. 614, 156 Fed. 873 (D. C. N. Y.): "The attorney for the creditor in the second attachment explicitly warned the sheriff against proceeding, and gave him full notice that the petition in bankruptcy was on file, that a receiver had been appointed and an injunction issued. The sheriff, however, after such notice, on the morning of the 15th, delivered an order for the goods to the attorney for the claimants. The goods were removed. On the argument of this motion the attorney for the claimants stated that they were still in the warehouse and would be returned. He subsequently asserted that he was mistaken, and that the goods had been removed from the country. The attorney for the under sheriff and the deputy sheriff asserts that they inferred, when the attorney for the petitioning creditor informed them that his claim was satisfied, that the bankruptcy proceedings were at an end. But they had no right to make any such assumption. A petition in bankruptcy is not disposed of by paying the petitioning creditor's claim. It may be availed of by any creditor, and sheriffs are bound to know the law in that respect. But upon the whole, although the conduct of the under sheriffs in this case is subject to serious criticism, the proof of contempt in this case is not so clear that I should feel justified in finding them guilty of it."

Instance, replevy after oral notice of appointment of receiver, In re Wilk, 19 A. B. R. 178, 155 Fed. 943 (D. C. N. Y.).

§ 2330½. Failure to File Schedules, as Contempt.

Failure of the bankrupt to file schedules may be a contempt.

In re Schulman & Goldstein, 20 A. B. R. 707, 164 Fed. 440 (D. C. N. Y.).

§ 2330¾. Failure to Obey Summary Orders.

The subject of contempt for the failure of bankrupts and others to obey summary orders to surrender assets is treated ante, § 1856, et seq.

§ 2331. "Wilfully Evasive" or "Flagrantly False" Testimony in Face of Court, Contempt.

Wilfully evasive or flagrantly false testimony given by a witness in the face of the court is a contempt.

Page 1416, note 2. See, in addition, *In re Singer*, 23 A. B. R. 28, 174 Fed. 208 (D. C. Pa.). See ante, § 1851.

Page 1416. *In re Bick*, 19 A. B. R. 68, 155 Fed. 908 (D. C. N. Y.): "It is objected on behalf of the petitioner that he has not been charged with misbehavior within the provisions of the U. S. Rev. Stat., § 725. It is true that this word has not been used, but the District Court has found that the petitioner's testimony is false, vague and evasive with the intent of misleading the court and concealing assets of his estate. It is as clear an instance of misbehavior as if the petitioner had refused to testify at all. Mr. Collier's work on Bankruptcy, page 125, is cited as showing that unsatisfactory answers, even if contemptuous, are not contempt in law and cannot be punished as such. If he includes within the category of unsatisfactory answers such testimony as the petitioner's, I prefer to follow the decision of Hough, J., in the Matter of Fellerman, 17 Am. B. R. 785, 149 Fed. 244."

In re Schulman, 21 A. B. R. 288, 164 Fed. 440, 167 Fed. 237 (D. C. N. Y.): "At first his sole statement was that he had lost money without any statement of how he had lost it. Finally, at the very end of the examination, in answer to his own counsel, he said: 'We sold goods to people, the panic came, and there has been a lot of goods returned, and the goods that were returned had to be sold at a low figure.' All efforts to get him to explain what the transactions were in which money was lost, what goods had been returned, and what goods returned were sold at a low figure entirely failed. To a great many of the questions he replied with the question 'What do you mean?' and it is apparent that in most of those cases he knew what was meant. Although he testified that he could not read or write English, and although it is true that he did not speak English very well, he could understand it and speak it sufficiently for all practical purposes. Whenever his own counsel asked him questions, he comprehended them well enough. On very numerous occasions his reply was the stock answer of the prevaricator, 'I don't remember,' and the whole examination from the beginning to the end is a perfectly transparent case of duplicity, intentional evasion, and refusal to make any explanation of the facts connected with his bankruptcy under the pretense of ignorance and stupidity. The whole attitude of the bankrupt in the entire proceeding is that of contempt of this court, and of its authority, and a deliberate determination to conceal from his creditors all the material facts within his knowledge relating to the affairs of his firm."

Obiter, *In re Gitkin*, 21 A. B. R. 113, 164 Fed. 71 (D. C. Pa.): "An examination of the testimony taken by the referee convinces me that Gitkin was testifying falsely through nearly the entire examination. It shows a determination to refuse to give the trustee and creditors any information whatever as to the disposition of his property, or to explain how it came about that he was indebted in certain amounts, which, from all the facts and circumstances, were plainly and certainly claims set up for the purpose of further depleting the already dissipated estate. He pretended to be ignorant of facts which obviously would have been known to any one who had sufficient intellect to perform the most ordinary duties of life, and the evasion and falsity of the answers are so palpable, so clear and so persistent as to establish beyond any possibility of a doubt the findings as reported by the referee. The referee, however, seems to be in doubt as to whether wilful perjury and the giving of testimony in a vague, unsatisfactory, ambiguous and contradictory manner, with the intention of obstructing the administra-

tion of justice and preventing the collection and distribution of his property, can be punished as a contempt of court. * * * The fourth subdivision of § 41a requires the bankrupt to appear, to take the oath as a witness, and after having taken the oath to submit to an examination according to law. After having taken the oath, as required, a refusal to answer questions at all would subject the witness to punishment for contempt for a refusal 'to be examined according to law.' If a witness be not allowed to obstruct and hinder the administration of a bankrupt's estate and prevent an ascertainment as to the disposition of his property by refusing to answer questions in connection with these matters, and if it be true that a refusal to answer is violative of the command of the fourth subdivision of § 41a of the Bankruptcy Act, requiring a witness to submit to 'an examination according to law,' can it be said that one who deliberately and wilfully makes false answers to all questions propounded thereby as effectually closing the avenues of inquiry as to the bankrupt's estate as if he had refused to answer, has not refused 'to be examined according to law' because he makes answer when his answers are intentionally and plainly false and effects the same result as a refusal to answer at all? It is very plain that where a bankrupt persistently through page after page of his testimony answers 'I don't know' to questions about his property which he must and evidently does know and could make full answers, he refuses 'to be examined according to law' with the same effect as though he refused to make answer at all. An 'examination according to law' requires that questions shall be answered and answered truthfully, and a witness does not satisfy the law by simply making answer which gives absolutely no information whatever in regard to the questions being inquired about, when it is very plain that the witness is entirely competent to give the desired information but is deliberately and wilfully prevaricating in order that the truth may not be discovered. So that it is our judgment that a witness who refuses to answer or makes wilfully false answers and thereby obstructs the prompt and proper administration of the bankrupt law is guilty of contempt and can be punished under § 41b of the act."

In this case the witness continually reiterated "I don't know" to questions the answers to which he obviously must have known, the court, upon the point, saying: "The witness testified that he had borrowed certain sums of money from three different persons, and that at the time he received the last of the sums from each person he noted the amount in a book which he produced at the hearing showing that it was entered therein in June, 1907, and stated he made the entry at that time. An examination of the book shows that it was not published until subsequent to that date, and when the witness' attention was called to this fact, he then said that he had copied it into the book produced at the examination from another book and had thrown the other book away. This is a fair sample of the witness' entire testimony, and is urged by the petitioner to be obviously false, showing wilful and deliberate perjury. There appears page after page of testimony in which the bankrupt pretended not to know the meaning of what he had written in a book only two months before in connection with his business and his customers, and the only response he made to questions in regard to it was 'I don't know.'"

Such testimony is punishable as a contempt, although also punishable as a crime.

Page 1416, note 3. See, in addition, *In re Kretsch*, 22 A. B. R. 284, 172 Fed. 523 (D. C. N. Y.); *Ex parte Bick*, 19 A. B. R. 68, 155 Fed. 908 (D. C. N. Y.); *In re Cashman*, 21 A. B. R. 284, 168 Fed. 1008 (D. C. N. Y.); *obiter*, *In re Gitkin*, 21 A. B. R. 113, 164 Fed. 71 (D. C. Pa.); *In re Magen & Magen*, 24 A. B. R. 63, 179 Fed. 572 (D. C. Pa.), quoted on other point at § 2337½.

Thus, repetition of "I don't know" and "I don't remember" as to transactions directly within the witness' knowledge and which he must have known, may be contempt of court.

In re Schulman, 23 A. B. R. 809, 177 Fed. 191 (C. C. A. N. Y.): "Dis-ingenuous and evasive as his testimony appears when read, it is obvious that the opportunity to 'watch' the bankrupt gave the referee a very marked advantage in determining whether he was acting honestly. His answers, 'I don't remember,' and 'what do you mean?' so often given, might in some instances have been the result of a defective memory or an honest inability to understand. An appellate court may be unable to detect, under such conditions, the false from the true, the honest from the fraudulent, but any intelligent person, after observing the witness for hours on the stand, could not be deceived as to his purpose. The testimony as it appears in the record evinces a deliberate purpose to conceal the truth and prevent the trustee from becoming possessed of facts which would lead to a recovery of the missing property. The witness was being asked regarding transactions directly within his knowledge and facts which he must have known. When, therefore, he answered repeatedly, 'I don't remember,' it is obvious that he was deliberately withholding information to which the trustee was entitled. In effect his attitude was one of defiance. He did not affirmatively tell the referee that he refused to disclose the facts which would enable the trustee to follow the property, although these facts were well known to him, but his conduct produced the same result as if he had stated his purpose openly. * * * He was lawfully summoned to testify and was interrogated as to all of these subjects. He refused to give the information which he possessed and sought to evade his duty by pretended ignorance, deceit and falsehood. We think the action of the District Court was fully justified by the facts and that the order should be affirmed."

See, also, *In re Gitkin*, 21 A. B. R. 113, 164 Fed. 71 (D. C. Pa.), quoted *supra*.

§ 2331½. Interference with Property in Custody.

Interference with property in the custody of the bankruptcy court of course is a contempt.

See instances cited under § 2330; also, compare, *In re Darlington*, 20 A. B. R. 805, 163 Fed. 389 (D. C. N. Y.).

Replevying property after oral notification of the appointment of a receiver is contempt.

In re Wilk, 19 A. B. R. 178, 155 Fed. 943 (D. C. N. Y.): "He told Herman that the receiver had taken possession the day before, and had his lock put on the door; that Herman had no right to enter or interfere with the goods, and that he must not remove any of the goods. Herman said that he did not care for the United States Court, and that he was going to take

the goods away under his writ. * * * The marshal's defense to this motion is, in substance, that as no certified copy of the order of injunction and appointing the receiver was duly served upon him he was not obliged to pay any attention to the information which was given to him that an officer of this court was in possession of the property. The rule is well settled that if a person had actual knowledge of the evidence of an order of court he is liable to the consequences of violating it even if he has not been formally served with it (High on Injunctions, § 1422, and cases there cited). * * * An order will be entered adjudging him in contempt and directing, as a punishment for his contempt, that he be committed to the Tombs Prison for sixty days."

§ 2333. Advice of Counsel.

Advice of counsel may palliate, but it does not always excuse, contempt.

Page 416, note 4. In re Stroebel, 20 A. B. R. 754, 160 Fed. 916 (D. C. N. Y.).

However, sometimes it may wholly negative contempt.

Instance, *Orr v. Tribble*, 19 A. B. R. 849, 158 Fed. 897 (D. C. Ga.); In re *Darlington*, 20 A. B. R. 805, 163 Fed. 389 (D. C. N. Y.).

§ 2334. Contempt before Referee, What Constitutes, Defined by Statute.

Page 1417. A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ;

As to contempt of bankrupts and others for failing to obey orders to surrender property, see ante, subject, "Summary Orders on Bankrupts and Others," § 1856, et seq.

(2) Misbehave during a hearing or so near the place thereof as to obstruct the same.

Instance, *Ohio Valley Co. v. Mack*, 20 A. B. R. 919, 163 Fed. 155 (D. C. Ohio).

(3) Neglect to produce, after having been ordered to do so, any pertinent document.

Instance, In re *Sorkin*, 20 A. B. R. 637, 166 Fed. 831 (D. C. N. Y.).

Or (4) refuse to appear after having been subpoenaed.

Instance, In re *Sorkin*, 20 A. B. R. 637, 166 Fed. 831 (D. C. N. Y.).

Page 1418. Thus a bankrupt, guilty of wilfully evasive or flagrantly false testimony in the face of the court, is guilty of "refusing to be examined according to law."

In re *Schulman*, 23 A. B. R. 809, 177 Fed. 191 (C. C. A. N. Y.): "Under § 7 of the act it was Schulman's duty to 'submit to an examination concerning the conduct of his business, the cause of his bankruptcy, his dealings

with his creditors and other persons, the amount, kind and whereabouts of his property.' He was lawfully summoned to testify and was interrogated as to all of these subjects. He refused to give the information which he possessed and sought to evade his duty by pretended ignorance, deceit and falsehood."

Either some definite order must be disobeyed or obstructive or contemptuous behavior have occurred. Thus, where, before adjudication, it was sought to examine the bankrupt as a witness upon a motion for the appointment of a receiver, to which the bankrupt's attorney objected, the "certificate" of the referee to such facts was held to be insufficient, since it showed no disobedience of any order nor any contemptuous behavior.

Craddock-Terry v. Kaufman, 23 A. B. R. 724, 175 Fed. 303 (D. C. Tex.).

Thus a bankrupt, guilty of wilfully evasive or flagrantly false testimony in the face of the court, is guilty of refusing to be examined according to law.

In re Magen & Magen, 24 A. B. R. 63, 179 Fed. 572 (D. C. Pa.).

§ 2336. Referee Simply to Certify Facts to Judge.

Page 1418, note 7. See, in addition, *In re Gitkin*, 21 A. B. R. 113, 164 Fed. 71 (D. C. Pa.).

Page 1418. And it is necessary that the referee so certify; and the contempt proceedings must not be started before the judge except on the filing of such a certificate.

In re Gitkin, 21 A. B. R. 113, 164 Fed. 71 (D. C. Pa.).

§ 2337¼. Weight of Referee's Findings as to Contemptuous Behavior.

The referee having had the opportunity to see and hear the bankrupt or other witness and to observe the manner of testifying, his findings in regard to such manner should be of great weight, for the testimony of the witness might sound plausible and respectful when read afterwards from a printed book, and yet his conduct on the stand may have been such that no one observing him could have doubted his wilful and contemptuous behavior.

Obiter, *In re Magen & Magen*, 24 A. B. R. 63, 179 Fed. 572 (D. C. Pa.). Impliedly, *In re Schulman*, 23 A. B. R. 809 (C. C. A. Ala.): "In the case at bar we know nothing of the bankrupt, Schulman, except as he is portrayed in the printed record. The referee, on the contrary, had an opportunity to see and hear the bankrupt and observe his manner while testifying, which is an inestimable advantage in cases of this character. The testimony of a witness may sound plausible when read afterwards from a printed book and yet his conduct on the stand may have been such that no one who

heard him testify believed that he was telling the truth. Disingenuous and evasive as his testimony appears when read, it is obvious that the opportunity to 'watch' the bankrupt gave the referee a very marked advantage in determining whether he was acting honestly. His answers, 'I don't remember,' and 'what do you mean?' so often given, might in some instances have been the result of a defective memory or an honest inability to understand. An appellate court may be unable to detect, under such conditions, the false from the true, the honest from the fraudulent, but any intelligent person, after observing the witness for hours on the stand, could not be deceived as to his purpose."

§ 2337½. Entitled to Notice and Hearing before Certificate.

Where the contempt is committed in the face of the court and the referee himself initiates the contempt proceedings, it is probable that notice and further hearing will be unnecessary before the referee makes his certificate. But if the contempt proceedings are begun by a party, then it is essential that the witness or other person be given notice of the application for the certificate, with opportunity to be heard thereon.

In re Magen & Magen, 24 A. B. R. 63, 179 Fed. 572 (D. C. Pa.): "At the trustee's request the referee has certified that the bankrupt's answers upon their examination were manifestly false and evasive, and recommends their punishment for contempt. They did not have notice of the trustee's petition or of the contemplated action thereon, and in this I think the proceeding was erroneous. I see no reason to doubt that the referee may certify such a state of affairs upon his own motion, but if the proceeding is begun by an interested party, the bankrupts are entitled to notice, as of any other action that may affect them personally. The referee exercises a judicial office, and while he cannot himself punish for contempt, he may take the needful preliminary steps to bring the bankrupt's conduct to the attention of the court; and he need not give notice of his intention so to do. The contempt is committed in his presence; and in asking that the court investigate the matter further, he is acting on his official responsibility. The court will then give the bankrupt notice of the proceeding, and will afford him an opportunity to be heard. If, however, the referee does not choose to act upon his own motion, the situation is on a different footing; it is then an ordinary dispute between the party presenting the petition and the bankrupt, and the usual course of notice and a hearing should be followed."

§ 2339. Power to Commit, Cautiously Exercised.

Page 1419, note 9. See ante, § 1840.

Page 1419. And the prescribed method for punishing contempts before referees must be strictly followed.

In re Gitkins, 21 A. B. R. 113, 164 Fed. 71 (D. C. Pa.): "This section makes it plain that the power to commit for contempt before a referee was not conferred upon the latter but was conferred on the judge of the court of bankruptcy before whom the matter must be certified in accordance with its provisions; and in order that the court may take cognizance of the offense and punish the offender, he must be proceeded against strictly in accordance with the mode pointed out by the Bankruptcy Act, and any deviation from that

procedure the bankrupt may take advantage of on a motion to dismiss the proceedings. The statutory procedure being full and complete must be strictly followed, and a failure to do so will be fatal."

§ 2340. **Evidence to Be Beyond Reasonable Doubt.**

Page 1419, note 10. See ante, §§ 1842, 1859.

§ 2341. **No Punishment for Failure to Comply with Order until Opportunity Given to Show Inability.**

Page 1419, note 11. Compare ante, §§ 1845, 1856, 1857, 1858.

§ 2341¼. **Whether Original Evidence on Order to Surrender Assets Re-Examined on Contempt for Disobedience of Order.**

Although some decisions seem to indicate the contrary, it is on principle and by the weight of well-considered authority directly on the point, undoubtedly the true rule that, on contempt for disobedience of an order to surrender assets the evidence on which the original order was based is not to be re-examined—the way to correct erroneous orders for surrender of assets "is by appeal, not by disobedience." This subject is discussed fully at § 1857.

§ 2341½. **Purging from Contempt.**

The ordinary rules with reference to purging from contempt doubtless obtain in bankruptcy.

Thus, it has been held that in cases where the bankrupt has begun by giving even intentionally false testimony, if, during the course of the same examination, he changes his mind and testifies truthfully, he should be regarded as having purged his contempt, unless injury has occurred or the case be exceptional.

In re Gordon, 21 A. B. R. 290, 167 Fed. 239 (D. C. N. Y.): "But there is another ground upon which I prefer to put my decision in this case, and that is the importance of not discouraging bankrupts who have given false testimony from afterwards admitting the truth. Almost every bankrupt who has intentionally concealed his property before bankruptcy concocts a false explanation and, when he is examined, at first gives false testimony in support of such fabricated explanation. Like all false evidence, however, such testimony usually will not stand the test of thorough cross-examination by a competent lawyer. It frequently happens that a bankrupt, after cross-examination has exposed the improbability or absurdity of the evidence given, would be willing to confess the truth if he were not afraid of the consequences of the false evidence that he has given. In such cases, he must take the chances of a prosecution for perjury, but, so far as the charge of contempt is concerned, I think that he should be regarded as having purged his contempt if he has, at any time in the course of his examination, given such full and truthful information concerning his estate as the creditors have a right to

require. I think, therefore, as a general rule, that, in cases in which the bankrupt has begun by giving even intentionally false testimony, if, during the course of the same examination, he changes his mind and testifies truthfully, he ought not to be punished for contempt. In exceptional cases, or in cases where the recantation does not take place until adjourned dates and, in the meanwhile, because of his false testimony any injury has happened to the estate, a different conclusion may be reached."

§ 2343. Not Reviewable by Habeas Corpus.

Page 1419, note 13. See, in addition, *In re Bick*, 19 A. B. R. 68, 155 Fed. 908 (C. C. A. N. Y.).

Compare, analogous proposition, *Peters v. U. S. ex rel. Kelly*, 24 A. B. R. 206, 177 Fed. 885 (C. C. A. Ill., reversing U. S. ex rel. Kelly *v. Peters*, 22 A. B. R. 177, 166 Fed. 613).

§ 2343¼. Review by Circuit Court of Appeals.

Authority to punish contempt exists in the bankruptcy court by virtue of the general power of courts to protect themselves from contempts; but, in addition thereto, as regards disobedience of its orders, the bankruptcy court possesses also express authority, under § 2 (13) to enforce obedience by bankrupts, officers and other persons to all lawful orders by fine or imprisonment or fine and imprisonment; and if review is sought under the general implied power it should be by writ of error, if under the express provision, then by petition for review.

In re Cole, 20 A. B. R. 761, 163 Fed. 180 (C. C. A. Me.): "If Mrs. Cole, who had been adjudged a bankrupt by the District Court, has wilfully disregarded its order in reference to the payment of money to the trustee, she might be proceeded against under the general powers vested in superior courts of judicature with reference to contempt, or also, under the second section of the Act of July 1, 1898, which authorizes the District Courts in bankruptcy 'to enforce obedience by bankrupts,' officers and other persons to all lawful orders by fine or imprisonment or fine and imprisonment. If the proceeding in the District Court was taken by virtue of the specific provision of the statute, it would be the natural presumption that the proper method of reaching us, would be that which was in fact availed of, namely, a petition for revision under the same act. If, on the other hand, the proceeding in the District Court had relation to the general powers vested in superior courts of judicature with reference to contempts, the question would at once arise whether the present petitioner, Mrs. Cole, should not have come to us by writ of error."

§ 2344. Order of District Judge Not Reversed Except for Clear Error.

Page 1419, note 14. **No Right to Jury Trial.**—*In re Bick*, 19 A. B. R. 68, 155 Fed. 908 (U. S. C. C. N. Y.).

Commitment Not Void because Not Running in Name of United States.—*Muller v. Nugent*, 7 A. B. R. 224, 184 U. S. 1.

§ 2344¼. Contempt Proceedings Not "Proceedings in Bankruptcy."

Contempt proceedings in bankruptcy are not to be included as among the steps peculiar to bankruptcy proceedings proper, but are, rather, controversies arising in the course of administration of bankrupt estates.

See post, § 2379 (a); *Morehouse et al. v. (Pacific) Hardware & Steel Co. et al.*, 24 A. B. R. 178, 177 Fed. 337 (C. C. A. Nev.).

§ 2344½. Whilst in Contempt Not to Be Heard.

The general rule is that one who is in contempt is neither to be heard by motion or otherwise until he has cleared his contempt.

But the rule applies to matters of favor and a party, although adjudged in contempt, may be heard in matters of strict right, such as the right to a review or appeal of the order adjudging a contempt to have been committed.

(Exploration) *Mercantile Co. v. Hardware & Steel Co.*, 24 A. B. R. 216, 177 Fed. 825 (C. C. A. Nev.).

§ 2347. Composition Restores Estate to Debtor.

Page 1425. *Gordon v. Mech. & Traders Ins. Co.*, 22 A. B. R. 649, 120 La. Ann. 441, 45 So. 384: "The creditors made a composition with the debtor which was confirmed by the court. The effect of this was to place matters quoad the property covered by the policy as if it had never been tendered to the creditors."

§ 2348. Pendency of Petition for Confirmation Suspends Sale and Distribution of Assets.

Page 1426, note 5. See post, § 2398.

Page 1426. The Amendment of 1910, permitting compositions before adjudication in bankruptcy, specifically provides that action upon the petition for adjudication shall be delayed until it shall be determined whether a composition shall be confirmed.

Bankr. Act, § 12 (a), as amended in 1910: " * * * In compositions before adjudication * * * action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed."

Indeed, an adverse claimant is entitled to have the bankruptcy court pass upon his rights, and such responsibility cannot be shifted by turning the property over to the bankrupt upon confirmation of the composition.

In re *Cadenas & Co.*, 24 A. B. R. 135, 178 Fed. 158 (D. C. N. Y.), quoted at § 2398.

§ 2349. Confirmation of Composition in Effect a Discharge.

Page 1426, note 6. Inferentially, In re *Jersey Island Packing Co.*, 18 A. B. R. 417, 152 Fed. 839 (D. C. Calif.).

Page 1426. In re Jersey Island Packing Co., 18 A. B. R. 417, 152 Fed. 839 (D. C. Calif.): "As long as the order confirming the composition stands, it must have the effect given it by subdivision 'c,' § 14, of the Bankruptcy Act, viz., the discharge of the bankrupt from his debts, 'other than those agreed to be paid by the terms of the composition and those not affected by a discharge,' and the order of confirmation can only be set aside within the time limited by § 13 of the Bankruptcy Act."

Rubber Tire Co. v. Equipment Co., 19 A. B. R. 862, 121 App. Div. 764, 106 N. Y. Supp. 599: "A composition in bankruptcy may be pleaded in bar of an action upon a debt discharged, and in order to be available as a defense, it must be so pleaded."

Page 1427. But the confirmation of a partnership composition will not prevent a creditor holding a joint and several obligation, from further participation in the individual estate of the bankrupt partner as to whom no composition has been effected.

In re Coe, 22 A. B. R. 384, 169 Fed. 1002 (D. C. N. Y.): "For such misappropriation Cadenas & Coe were liable jointly and severally, and upon their bankruptcy the bank could file a double proof, both against the partnership assets and against the individual assets of each partner. * * * It is claimed by the counsel for the trustee that the receipt of the dividend under the composition was an election to treat the indebtedness as a simple contract indebtedness of the firm on the acceptances, but I cannot see that the doctrine of election has any application here. The bank could have originally put in a double proof, against the firm assets and against the individual assets of each partner. As the composition in terms did not propose to make any arrangement for the settlement of the individual indebtedness of Coe, no occasion arose for the exercise of an election, if the doctrine of election applies to such a case at all. * * * As the composition did not purport to settle any questions of the individual liability of Coe, whatever rights the bank had as against his individual estate remained unaffected."

§ 2350. Release of Debts Is by Operation of Law and Not by Consent.

The release effected by a composition is a release by operation of law and not by mutual consent.

In re Jersey Island Packing Co., 18 A. B. R. 417, 152 Fed. 839 (D. C. Calif.).

Page 1427. However, it is altogether likely that if the creditor is one of those whose consents went to make up the requisite majority entitling the bankrupt to file his petition for confirmation, the surety will be released; for in that instance, his own voluntary consent has contributed to the discharge.

In re Benedict, 18 A. B. R. 604 (Ref. N. Y.), quoted at § 1513½; compare, suggestively, Firestone Co. v. Agnew, 21 A. B. R. 292 (N. Y.).

§ 2354¼. Compositions before Bankruptcy.

Frequently debtors endeavor to make compositions out of court before bankruptcy. Indeed, one of the collateral benefits of the Bankruptcy Law is that it enables debtors and creditors to adjust their mutual affairs amicably, without any court proceedings.

See ante, Introduction, § (n).

In accomplishing such object, however, many questions are likely to arise where bankruptcy subsequently follows.

Thus, it has been held that the signing of a liquidation agreement is not per se a waiver of security theretofore given to the creditor.

In re Cyclopean Co., 21 A. B. R. 679, 167 Fed. 971 (C. C. A. N. Y.): "The principal question is whether Rivenburg released his security. That he should have done so seems incredible when we consider the motives which govern human conduct. He was a clear-headed, careful, prudent business man. His agreement with the company of June 4th proves this beyond peradventure. He had come to the assistance of the company when it was in sore need of help, he had lent his money with the distinct understanding that every dollar should be secured by an account or bill receivable of the company. Ten months afterwards he had advanced for its benefit, in round numbers, \$10,000 and held security therefor, which, for aught that appears to the contrary, was perfectly valid and sufficient to satisfy the loan. It is an almost unthinkable proposition that a sane man would, without consideration, obligation or advantage of any kind, relinquish his right to \$10,000. The company and its creditors already had the benefit of Rivenburg's \$10,000. He had, in effect, discounted the company's paper to that amount. If then the avails of these securities are to be taken from Rivenburg, or his assigns, and handed to the creditors, the practical result will be that the creditors will have received \$20,000 and Rivenburg's \$10,000 will be a total loss except for the percentage he may obtain in dividends. The contention of the trustee leads to such inequitable results that it fails to satisfy the conscience of the court. The only act of Rivenburg on which the release of the security is based is the signing by him of the liquidation agreement. * * * The signature in blank is perfectly consistent with the theory that it was only intended to apply to the unsecured debt. When it is sought to deprive of his security one who has come to the relief of an embarrassed corporation, relying upon the collaterals offered by it, clear and positive proof must be produced."

Again, that undistributed portions of the settlement money do not belong to the bankrupt estate where distribution was being made by the lender's agent and no part of the settlement money had been paid to the bankrupt or distributed by him.

Impliedly, In re Smyth, 21 A. B. R. 853, 167 Fed. 871 (D. C. Pa.).

The Amendment of 1910 permits the debtor, after the filing of a petition in bankruptcy and before adjudication thereon, to make a composition with his creditors.

Bankr. Act, § 12a, as amended in 1910: "A bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, but

not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and the list of his creditors required to be filed by bankrupts. In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed."

See Report No. 691 of the Senate Judiciary Committee of the 61st Congress, Second Session: "Compositions can now be obtained only after an adjudication that the debtor is a bankrupt, with the resultant stigma on his name. (In *re* Back Bay Automobile Co., 158 Fed. 679, 685.) The change in § 12 of the law, which would be accomplished by this section of the bill, simply makes it possible for debtors to compose with their creditors before adjudication and without such stigma; in other words, encourages settlements between debtor and creditors under the supervision of the court, and is compulsory upon all creditors when a given proportion in number and amount shall have assented. Such settlements are now accomplished outside of court and frequently do not result in all creditors getting the same percentage, some one or more exercising the leverage of 'holding out' to get for himself a more advantageous settlement in secret. These settlements, before adjudication under court supervision, are exceedingly popular in England, and are specifically provided for by § 3 of the English bankrupt act of 1890. (53 and 54 Vict., c 71.)"

§ 2354½. Constitutionality of Compositions before Adjudication.

The constitutionality of compositions before adjudication is supported on the basis that the "subject of bankruptcies," over which the Constitution gives jurisdiction to Congress, involves the relation of debtor and creditor in its broad sense, not dependent upon adjudication of bankruptcy, though requiring the institution of bankruptcy proceedings in some form.

Under the old Bankruptcy Act of 1867, wherein compositions before adjudication also were authorized, such a composition was upheld on the basis mentioned, where the point was raised that no title to the debtor's property had vested at any time in the creditors. The same point could be raised in every composition before adjudication even under the present Amended Act since the vesting of title is accomplished under the present act "by operation of law," upon adjudication and appointment of the trustee, whilst it was accomplished under the former act by actual assignment, which the bankrupt was compelled to make to his assignee in bankruptcy.

Compare, In *re* Reiman & Friedlander, 11 Natl. Bankr. Reg. 21; 13 Nat. Bankr. Reg. 128; 7 Ben. 455; 12 Blatchf. 562: "But the question recurs 'What is the subject?' The subject is, 'the subject of bankruptcies.' What is the 'subject of bankruptcies?' It is not, properly, anything less than the subject of the relations between an insolvent or nonpaying or fraudulent debtor and

his creditors, extending to his and their relief. It comprises the satisfaction of the debts for a sum less than its amount, with the relief of the debtor from liability for the unpaid balance, and the right of the creditor to require that the amount paid in satisfaction shall be substantially as great a pro rata share of the property possessed by the debtor as it can pay, or can reasonably be expected to pay. * * * And even though there is not in these provisions for composition, any actual *cessio bonorum* through the intervention of an assignee or trustee, yet the property of the debtor is, in substance, distributed ratably among his creditors towards satisfaction of their claims, while he is released from future liability in respect to his debts, upon giving all the aid in his power towards the realization and distribution of his estate for the benefit of his creditors. * * * In view of all these considerations, how can it be said that these provisions of composition do not relate to the 'subject of bankruptcies?' They relate to the subject of debts owing by a debtor to creditors, and to the relation of the debtor to his creditors in view of his assets and of such debts. They place the subject under the jurisdiction of the Court of Bankruptcy, and require a petition in bankruptcy to be pending, either voluntary, which requires prior insolvency to be alleged, or involuntary, which requires the commission of a prior act of bankruptcy to be alleged, and, in either case, proceedings for composition are necessarily predicated on insolvency or existing inability to pay the debts in full. But, even, if a more restricted meaning be given to the expression 'subject of bankruptcies,' there is, within the scope of the discretionary power possessed by Congress of choosing the means to accomplish the end, a substantial appropriation of the existing property of the debtor towards all the debts due by him. There is not, as there is in proceedings carried through in bankruptcy, a pro rata payment on the debts only of those creditors who prove their debts, but all creditors are to have a payment pro rata. It must therefore, be held that the statutory provisions for composition are not open to the objection that they are not warranted by the Constitution."

§ 2355. Offer of Composition.

The Amendment of 1910 applies this same rule to compositions before adjudication.

§ 2357. Irregular Compositions and Settlements in Other than Statutory Manner.

Page 1431. And in one case it was held obiter that creditors had committed the crime of knowingly and fraudulently receiving a material amount of property from a bankrupt after the filing of the petition with intent to defeat the act, where, after an order had been obtained from the court dismissing a receiver and ordering him to turn back property to the bankrupt, the bankrupt had made a 40 per cent settlement with most of his creditors, the petition itself not being dismissed and adjudication of bankruptcy subsequently taking place on the intervening petition of other creditors.

Knapp & Spencer Co. v. Drew, 20 A. B. R. 355, 160 Fed. 413 (C. C. A. Neb.).

Before the Amendment of 1910 it was held that compositions under the Bankruptcy Act could not be had until after adjudication.

In re Back Bay Automobile Co., 19 A. B. R. 835, 158 Fed. 679 (D. C. Mass.): "It cannot be denied, however, that the difficulties in the way of believing that the act does so permit, are many and serious. They may be stated as below; the word 'bankrupt' being understood to include a person against whom, as against this debtor, a petition has been filed, according to section 1 (4). 1. By § 12a, a bankrupt may offer composition after, but not before, he has been examined in open court or at a meeting of his creditors, and filed in court the required schedule of his property and list of creditors. The report states that the bankrupt 'does not object to examination, has been already examined in open court under the present issue, and has filed his schedules of assets and liabilities. The examination contemplated in 12a can only be the examination to which the bankrupt is required to submit by § 7 (9), 'when present at the first meeting of his creditors and at such other times as the court shall order.' The first meeting of this bankrupt's creditors has not been held. It cannot be held until after adjudication, according to § 55a. The court has never ordered any examination of this bankrupt. Examination as a witness upon the issues of insolvency and the commission of the acts of bankruptcy charged, under the pending reference, is plainly not the examination referred to in § 7 (9), whose scope as there defined, is far wider than could be that of any examination possible under such a reference, and whose purpose is to assist that administration of a bankrupt's property which the court undertakes only after adjudication. If the court had ordered or should at this stage of the case order the bankrupt to submit to an examination under § 7 (9) or to appear for examination under § 21 (a), there would still be a doubt too strong to be dismissed as unreasonable whether such examination would be the examination contemplated by § 12a. And the power of the court to order such an examination before adjudication is at best doubtful. If, as the referee states, the bankrupt has filed its schedule of assets and liabilities, the filing has been with the referee only. At present there has been no reference under § 22, and that section permits no such reference until after adjudication. Before such reference it seems to me doubtful whether 'court' can include the referee according to § 1a (7). The bankrupt must file his schedules in court according to § 7a (8) within 10 days after adjudication. It may be true, as the referee says, that there can be no objection to the bankrupt voluntarily filing them at any time. But the filing contemplated in section 12a must, I think, if the most natural and reasonable construction is sought, be the filing required by § 7a (8). 2. By § 12b the court may be asked to confirm a composition 'after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must also represent a majority in amount of such claims.' No claims have yet been allowed. None can be allowed without a meeting of creditors. By § 55b the court is to allow or disallow the claims of creditors presented at the first meeting, before proceeding with the other business. There must be an opportunity for objections to allowance by parties in interest under § 57d. The first meeting of creditors cannot be had until after adjudication. The terms of § 55a make this clear beyond doubt, and no dispute on this point is attempted. It is said however, that a meeting of creditors may be had at any time under § 55e, that at such a meeting, if now had, creditors' claims may be allowed,

and that the required majority of all claims so allowed may make the acceptance required for confirmation by § 12b. It is clear that a meeting of creditors now had, could not be the first meeting of creditors provided for by the act, although in point of fact it would be the first meeting held. The act providing for a 'first' meeting at a given time. * * * There are difficulties in the way of sanctioning the proposed meeting other than those depending upon the provisions regarding the first meeting. By § 55e there must be a written request for a meeting under it from one-fourth or more in number of those creditors who have proven their claims. 'Proven,' it is true, does not necessarily mean 'obtained the allowance' of their claims. But before a claim can be regarded as proven the written proof called for by § 57a must at least have been filed or lodged with the court or some officer thereof. That such written proof has been completed is not enough so long as the proof remains in the hands of the creditor or his attorney. *J. B. Orcutt Co. v. Green*, 204 U. S. 96, 17 Am. B. R. 72, 27 Sup. Ct. 195, 51 L. Ed. 390. Since no trustee has been or can yet be appointed, proofs could not be delivered to him as in the case cited. Possibly delivery to the referee might be enough, although no general reference of the case to him has been or can yet be made. But even if written proofs were now filed in court, they would be proofs of creditors who had chosen to file them now for their own purposes, in the absence of any general notice to all creditors that proofs of claims might now be filed. It would not naturally occur to a creditor to prove his claim at present, because at present there is no bankrupt estate. I find it difficult to believe that the act can intend that any action by the court is to be obtained by the request of one-fourth of the owners of such claims as may be thus filed. 3. If a meeting were called as proposed, the first step toward acceptance of the composition offer would necessarily be the allowance of such claims of creditors as had been then proved. The judge or referee may allow or disallow claims at the first meeting of creditors, according to § 55b; and it seems to me impossible to say that 'first meeting' here means anything different from the first meeting after adjudication, spoken of immediately before, in § 55a. In view of this provision and of the connection in which it stands, and of the fact that from no provision contained in the act can it be gathered that allowance of claims is to be permitted before the first meeting with which §§ 55a and 55b deal, I am obliged to hesitate before the conclusion that claims may be allowed in bankruptcy before it is ascertained that there is an estate to be distributed. To pass from examination of the terms of our present act to more general considerations: It appears that under other bankruptcy systems to which reference has been made composition before adjudication has been allowed, but when allowed it has been done by express and unmistakable statutory provisions. This is true of the English statutes now in force, and it was true of the amendment to our Act of 1867, in force from 1874 to the repeal of the entire Act in 1878."

§ 2358. Special Meeting for Presentation of Offer.

Page 1432, note 7. **No Estoppel of Adverse Claimant after Refusal of Offer Because of His Standing by Silently without Claiming Ownership before Refusal.**—It has been held that where one at a meeting of creditors to consider a composition, keeps silent as to his ownership of certain property in the hands of the trustee, he is not estopped from asserting title where the composition was not agreed upon. *In re Loll*, 20 A. B. R. 548, 162 Fed. 79 (D. C. Conn.).

Page 1432. By the Amendment of 1910, permitting compositions before adjudication of bankruptcy, it is specifically provided that the court shall call a meeting of creditors.

Bankr. Act, as amended in 1910, § 12a.

To be sure, it is not expressly provided that the notice of this meeting shall state its object, although, clearly, the meeting is called for the special purpose of receiving the offer of composition, since a meeting of creditors before adjudication is not elsewhere provided for in the Bankruptcy Act; and the proper practice would be for the notices of this meeting to state the object of it.

Although the statute permitting compositions before adjudication is silent as to the method to be pursued by the bankrupt in the first instance, yet properly the bankrupt should file a motion, or "petition," with the judge, setting forth his desire to make an offer of composition and praying the court to call a meeting of creditors to receive the same, and, ordinarily, for a reference to a referee for the purpose.

§ 2358½. Practice in Compositions before Adjudication.

The proper practice, in cases of compositions to be offered before adjudication of bankruptcy, is for the bankrupt to file with his petition, in cases of voluntary bankruptcy, and after the filing of the creditors' petition in involuntary cases, a "petition," to which should properly be annexed a schedule of creditors with their addresses, in which petition prayer should be made for the calling of a meeting of creditors, and a reference of the case to a referee.

Compare, (1867) *In re VanAuken*, et al., 14 N. B. Reg. 425; *In re Reiman & Friedlander*, 11 N. B. Reg. 21, 13 N. B. Reg. 128, 7 Ben. 455, 12 Blatchf. 562. Compare, also, *In re Trafton*, 14 N. B. Reg. 507; instance, *In re Leibziner*, 17 N. B. Reg. 264.

§ 2359. Examination of Bankrupt and Filing of Schedules Requisite before Offer.

Page 1432, note 8. Bankr. Act, § 12a, as amended in 1910: "A bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and the list of his creditors required to be filed by bankrupts. In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed."

§ 2362½. **Whether Different Terms May Be Offered.**

It is probable that different terms of composition may be agreed upon at the meeting of creditors from those originally offered.

(1867) In re Haskell, 11 Nat. Bankr. Reg. 164.

It is not the same as the case of taking a default judgment, for in cases of compositions there must be assent of creditors and the assent must be in writing.

§ 2363. **Petition for Confirmation of Composition, When May Be Filed.**

Page 1434, note 12. Bankr. Act, § 12b.

§ 2364. **Designation of Amount and Place of Deposit.**

Page 1434, note 13. See, in addition, In re Bloodworth-Stembridge Co., 24 A. B. R. 156, 178 Fed. 372 (D. C. Ga.), quoted supra.

Page 1434. But this preliminary order requiring deposit becomes of more importance than is usually accorded to it, when one comes to consider its possible relation to the rights of unscheduled creditors where the deposit falls short of being sufficient to cover unscheduled claims, as discussed post, § 2367½.

However, the proper practice is to hold before the referee merely the preliminary meeting, for the proof of claims, for the examination of the bankrupt and for the consideration of the offer of composition, all subsequent steps to be taken before the judge himself.

In re Bloodworth-Stembridge Co., 24 A. B. R. 156, 178 Fed. 372 (D. C. Ga.): "Our valuable referee has, I fear, gradually gotten away from the correct practice in cases of composition, and the court has been in some sense particeps criminis in that respect. I have all along had some doubts as to the extent to which the referee has gone; but this is the first time that objection has been made to the referee doing everything in the case, except merely to hand up the record for the judge's approval. Now there is a great deal which may not be done, save by the judge, in cases of composition. The referee may generally be regarded as the bankruptcy court, but not to the full extent in cases of composition. The act * * * it is true, declares that: 'A bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts.' I consider that this 'hearing' may be had before the referee, and that the term 'in open court' refers to the proceeding before the referee. This is determinable from the association of the legislative purpose there, 'noscitur a sociis.' He must be 'examined in open court or at a meeting of his creditors.' Generally a meeting of creditors is held before the referee. Therefore that examination should be had before the referee, and he must have 'filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts.' These schedules the referee ordinarily handles, and up to this point the composition may proceed

properly before the referee. The next clause, however, indicates a change of authority: 'An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.' Now, wherever in the Bankruptcy Act the term 'judge' is used it means the judge of the District Court, and not the referee in bankruptcy. It follows, therefore, that these requisites, essential to composition made by the act, must be presented to the judge, and the costs of the proceeding and the deposit must be designated by the judge, and subject to the order of the judge. The referee, as I understand, has to a liberal extent taken charge of these matters, and has relieved the judge of a great deal of labor: but certain action of his in this respect has apparently exceeded the limits of his powers fixed by the act. * * * And when we turn to the forms we will also perceive that it is the judge who must act. The judge must fix a date for the hearing, and that is a hearing before him. The judge must require the money to be deposited, and designate what sum shall be deposited, and it must be deposited subject to his orders."

§ 2367½. Claims Not Scheduled, nor Filed.

It has been held that there is no power in the bankruptcy court, after confirmation of a composition, to compel the bankrupt to add to the deposit sufficient to cover a claim that was neither scheduled nor filed.

In *re Abrams & Rubins*, 23 A. B. R. 25, 173 Fed. 430 (D. C. N. Y.): "In this case it is quite clear that I cannot grant the relief asked for in the petition, that the bankrupt pay the same proportion of their debt to the petitioners that he has paid to others. No such relief is known, and it would upset all compositions were I to grant it now. The petition, however, may be reformed as a petition to reopen the composition, if the petitioner wishes it to stand as such. To set aside a composition once confirmed, I must find that it was procured by fraud, for that is the only ground allowed by the statute, § 13. There are, in this case, only two possible sources of fraud: First, that the bankrupts omitted the claim in bad faith, knowing that it had some validity, and, second, that they deceived the petitioner into supposing that he need not file his proof of claim until he actually did, and that he would still come into the composition, all the while hurrying through the composition so as to exclude him. If the petitioner wishes an issue on either or both of those issues, I will grant it, and upon proof of either I will set aside the composition, at least to the extent of preventing the bankrupts taking advantage of it as a discharge."

It is doubtless true that the order of confirmation of a composition should in general be treated as an order of discharge; for it has the effect of the discharge, so far as the release of debts is concerned, and it takes the place of a discharge, and should be set aside in general only in the same manner as a discharge. And it is also true that an unscheduled debt is in no worse position in case of a composition than in that of a discharge, the creditor's claim in either event being undischarged, unless

he had timely information of the bankruptcy. Yet, the bankrupt's offer in terms is to "all" his creditors and the court's order for deposit as well as its order of confirmation ought to provide for the deposit for the sufficient payment of the percentage to "all" creditors; in which event, to vacate the order of confirmation afterwards, for the bankrupt's failure to deposit enough to cover an unscheduled debt, would not be perhaps so much a "setting aside" of the composition within the meaning of the statute, as it would be the correction by the court itself of an irregularity in the procedure, as discussed post, § 2399, and analogously to the postponement of discharges for failure to comply with court rule, as discussed post, in § 2480. Furthermore, where the order of the court requiring the deposit, which precedes the order of confirmation, does provide in terms for a sufficient deposit to cover the claims of "all" creditors, then the bankrupt's knowing failure to so provide might be such a "refusal to obey a lawful order of the court" as itself to be at any rate a bar to discharge, under Bankr. Act, § 14 (b) (6). Also the knowing omission to schedule might itself be a sufficient "fraud" under § 2400. However, except in the case of fraud, it is quite clear that one who is not scheduled but who knows of the bankruptcy, takes his own risk of a composition being made and confirmed without himself being included.

At any rate, where he knows he is not scheduled, *In re Abrams & Rubins*, 23 A. B. R. 25, 173 Fed. 430 (D. C. N. Y.).

§ 2369. Whether Consideration Always to Be in Money.

Page 1435. Or part in cash and the remainder in promissory notes.

Instance, *In re Sacharoff & Kleiner*, 20 A. B. R. 814, 163 Fed. 664 (D. C. N. Y.).

Composition Notes Not Paid When Due.—Compare, *In re Sacharoff & Kleiner*, 20 A. B. R. 814, 163 Fed. 664 (D. C. N. Y.).

Page 1435, note 22. See, in addition, *York Mfg. Co. v. Merchants Ref. Co.*, 21 A. B. R. 748, 168 Fed. 108 (D. C. Mo.). In this case one of the creditors refused to accept the bonds and stock of the reorganized company, and claimed mechanics' liens; its request for impounding of the composition securities until its rights as lienholder were determined, was refused.

Page 1435. It is still to be considered a payment in money, though the payment is deferred or made in installments.

§ 2371¼. Bankruptcy Petition Adjourned in Compositions before Adjudication.

It is expressly provided by the Amendment of 1910 to § 12a, authorizing compositions before adjudication, that in such cases the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed.

Bankr. Act, § 12a, as amended in 1910: " * * * In compositions before adjudication * * * action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed."

§ 2371½. Not Always Dismissed on Confirmation.

The petition for adjudication need not be dismissed even upon confirmation of the composition, until the terms of the composition have been actually carried out; at any rate, such was the holding under the law of 1867, although most of the cases cited thereunder were conditioned to be "upon payment."

In *re* Reiman & Friedlander, 11 N. B. Reg. 21, 13 N. B. Reg. 128, 7 Ben. 455, 12 Blatchf. 562; In *re* Hatton, L. R. 7, Ch. App. 723 (Eng.); *Edwards v. Coombe*, L. R. 7, Common Pleas 519; (1867) In *re* McKeon, 11 N. B. Reg. 182; In *re* Bayly & Pond, 19 N. B. Reg. 73.

Page 1436. In *re* Hurst, 13 Nat. Bankr. Reg. 455: "The composition will not be effective to discharge the debtor, unless the amount agreed upon is actually paid."

Compare, In *re* Mickel, 19 Nat. Bankr. Reg. 374: "A final order in composition is not a final disposition of the proceedings in bankruptcy. The case in bankruptcy is still pending, and the power of the court continues to stay the proceedings of creditors in suits pending against the bankrupt so long as the composition is unpaid. In *re* Bayly & Pond, 19 N. B. Reg. 73; *McGee v. Hentz*, 19 N. B. R. 136."

This, at any rate, was the rule where the composition was conditioned "upon payment."

In *re* Leibzinger, 17 N. B. Reg. 264.

It is further to be noted that § 12e provides that "upon the confirmation of a composition the consideration shall be distributed as the judge shall direct, and the case dismissed." The relative position of these various clauses would seem to indicate that the consideration should be distributed before the case is dismissed.

The points above adverted to will be of special importance in carrying out compositions before adjudication, as now authorized by the Amendment of 1910; especially in cases where the consideration is not paid immediately in money, but is effected by way of secured commercial paper or otherwise.

§ 2375. Only Creditors May Oppose Confirmation: Trustee May Not.

Page 1439. But one who has bought a creditors' claim for the very purpose of opposing the confirmation is nevertheless a party in interest competent to oppose it.

In *re* Comstock, 19 A. B. R. 65, 154 Fed. 747 (D. C. N. Y.): "Objection is made to the status of the single objecting creditor, on the ground that the confirmation is opposed, not by an original creditor, but by an assignee, who is said to have bought the claim for the purpose of forcing a settlement or discontinuance of a suit instituted by the trustee against one Peck, through threats of opposition to the confirmation. There is reason to believe that

this may be the fact, and that the objector, in procuring an assignment of a claim and in filing objections, had another motive than the securing of a dividend larger than the amount offered in composition. The assignee of an original claim, however, has all the legal rights of his assignor. *Shropshire, Woodliff & Co. v. Bush*, 204 U. S. 186, 17 Am. B. R. 77. In pursuing his objections to this composition, he is acting within his legal rights. That he had ulterior or improper motives in acquiring the claim, or that he may have contemplated the use of it for extortion, is not improbable; but is this material? By pursuing his objections before the judge, he has put it out of his power to coerce the bankrupt or the trustee by threats of objecting to the composition. He is now exercising the rights of a creditor for a legitimate purpose, and to inform the court that facts exist which deprive this bankrupt of the right to a discharge."

The Amendment of 1910 makes the trustee a "party in interest" for the purpose of opposition to discharge. Whether he would be a "party in interest" in composition matters, is a question.

§ 2376. Court May Refuse Confirmation without Appearance of Any "Party in Interest," Where Procedure Irregular.

Page 1439, note 3. But compare, *Ex rel Adler v. Hammond*, 4 A. B. R. 736, 104 Fed. 62 (C. C. A. Tenn.).

Page 1439. The statute hardly permits the court, of its own motion, to refuse confirmation on the merits, any more than to refuse discharge.

But compare, apparently, *In re Waynesboro Drug Co.*, 19 A. B. R. 487, 157 Fed. 101 (D. C. Ga.).

Otherwise, the judge would put himself virtually in the position of a party litigant; thus, for example on an appeal by the bankrupt from an order of refusal, there might be no one else to defend the refusal.

There are contrary decisions as to the appealability of an order of refusal of confirmation. *Ex rel Adler v. Hammond*, 4 A. B. R. 736, 104 Fed. 62 (C. C. A. Tenn.), holds, in a case where there were adversary parties, that such an order is appealable; whilst *Ross v. Saunders*, 5 A. B. R. 350, 105 Fed. 915 (C. C. A. Mass.), holds, in a case where the judge on his own motion refused confirmation, that it is not appealable.

§ 2382. Statutory Grounds Requisite to Bar Confirmation on Merits.

Page 1441. And the court may, for good cause, delay confirmation without refusing it; for instance, upon his own motion, for the purpose of ascertaining whether opposition to the confirmation has been bought off.

In re Levy, 22 A. B. R. 769, 172 Fed. 780 (D. C. Mass.).

§ 2383. Burden of Proof on Opposing Creditor.

Page 1441, note 12. See, in addition, *In re Waynesboro Drug Co.*, 19 A. B. R. 487, 157 Fed. 101 (D. C. Ga.).

Page 1442. *In re Waynesboro Drug Co.*, 19 A. B. R. 487, 157 Fed. 101 (D. C. Ga.): "While it seems to be the rule in England that the decision of the majority of creditors on the question of 'interest' is final, unless fraud is disclosed * * * the provision just quoted requires that here the judge must be satisfied that the offer is for the best interests of creditors. It is his duty, then, to investigate the facts, independently of any agreement or conclusion they may have made. While this is true, the fact that a majority of the creditors have consented to the composition is *prima facie* evidence that it is for the best interest of all, yet any gross discrepancy between the offer and the amount to be reasonably expected from the sale of the assets will justify a refusal to confirm. * * * It is by no means clear that the balance remaining in the hands of the trustee, or due to him, will amount to more than the sum deposited in support of the composition. When, in addition to this, we consider the large depreciation—often below the estimates of the appraisers—in broken stocks of merchandise of this general character, and the uncertain values of the open accounts on the books of the company, the benefits which might result to creditors by a disapproval of the composition are gravely problematical. Indeed, a close analysis of the figures involved will demonstrate that the stock must bring 60 per cent. of its inventoried value, and the notes and accounts $33\frac{1}{3}$ per cent. of their face value, in order to secure the creditors any appreciable advantage over that offered by the composition. Under all the circumstances, the court is not satisfied that these results could be obtained. Besides, due allowance should be made for the costs of administration, if the matter should proceed as usual in bankruptcy. This might materially deplete the sum to be apportioned among the creditors. When we further consider that the composition will accomplish the ever-meritorious result of avoiding the law's delay, will end the litigation, will discharge the bankrupt company—which has been guilty of no fraud—from its indebtedness, will permit its officials to engage in perhaps more profitable pursuits, and will enable the creditors to recover each an equal and not insignificant share of the sum due them by their unfortunate, but honest debtor, we must conclude that its approval is for the best interests of the creditors, and will also contribute in a wholesome way to the moral and financial status of creditor and debtor alike. Indeed, we believe that for just such cases as this, were compositions authorized by the law."

§ 2386. Creditors' Acceptance of Offer Not to Be Lightly Interfered with.

Page 1442. But it is not always conclusive.

See ante, § 2385.

§ 2387. Second Ground—Commission of Act Barring Discharge, Bars Composition.

Page 1443. *In re Comstock*, 19 A. B. R. 65, 154 Fed. 747 (D. C. N. Y.): "It is clear that, if the bankrupt has been guilty of any of the acts which would be a bar to a discharge, the court is without power to confirm a composition, even if satisfied that it would be for the best interests of the cred-

itors to do so. Since the confirmation of a composition discharges the bankrupt (§ 14c), it is reasonable that the same grounds which prevent a discharge on a direct petition should also prevent a discharge on an application for confirmation of a composition."

Thus, where the bankrupt has obtained property on credit upon a materially false statement in writing made for the purpose of obtaining property on credit, confirmation may be refused.

Instance where urged but not proved, *In re Seligman*, 20 A. B. R. 774, 163 Fed. 549 (D. C. N. Y.).

In compositions before adjudication of bankruptcy, permitted by the Amendment of 1910, manifestly concealment of assets from the trustee cannot be urged as a bar to the composition.

§ 2388. Third Ground—Offer or Acceptance Not in Good Faith or Procured Improperly.

Page 1444, note 19. Also, same subject, *McCormick v. Solinsky*, 18 A. B. R. 540, 152 Fed. 984 (C. C. A. Tex.), where the paying of a bank's debt in full as consideration for its advancing the money to make the composition was declared illegal.

§ 2391. Referee Divested of Jurisdiction by Confirmation of Composition, Except as Otherwise Ordered by Judge.

Page 1445, note 3. See, in addition, *In re Cooper Bros.*, 20 A. B. R. 634, 159 Fed. 956 (D. C. N. Y.).

§ 2393½. Mistake in Amount of Creditor's Claim.

Where a creditor by mistake presented a claim before the composition for a lesser amount than was actually due, and received the percentage thereon after composition, the amount ordered deposited on the composition having been figured on the basis of the lesser amount, the creditor was held not to be entitled to an order setting aside the composition, for there was no fraud; nor to an order on the distributing agent to procure more money, for he had fulfilled the order of distribution; nor to an order on the bankrupts, for the composition operated as a discharge.

In re Cooper Bros., 20 A. B. R. 634, 159 Fed. 956 (D. C. N. Y.).

But it may well be doubted that the error of the creditor released the bankrupts; they knew precisely how much was due; they made an offer of composition whereby they unequivocally offered to pay their creditors a certain percentage on each claim; and it was their order confirming this offer that operated as the discharge. However, it is possible that the remedy lay in the State court, in a suit to enforce the claim, rather than in the bankruptcy court. -

§ 2397. Closing of Case after Distribution Completed.

The case may not be dismissed until the terms of the composition have been carried out. Not only were the decisions under the Bankruptcy Act of 1867 to this effect [see ante, § 2371½] but also the context of § 12e of the present act indicates that the distribution of the consideration is to be accomplished before the dismissal of the case.

When the terms of the composition have not been carried out, it is a question whether the creditor may disregard the composition and sue directly for the debt, or must first appear in the bankruptcy proceedings and have the composition orders annulled.

Compare (1867) *In re Bayly & Pond*, 19 Nat. Bankr. Reg. 73.

§ 2398. Jurisdiction to Determine Ownership of Property in Custody of Court Not Divested.

Page 1450. Thus, where a trustee in bankruptcy had taken over assets from a prior assignee in insolvency, under an order which made the surrender subject, in general terms, to any existing claims and saved the assignee harmless therefrom, the bankruptcy court held that the trustee, having been notified of the particular claim, even though the order itself did not specifically mention it, was personally bound to the adverse claimant for turning back the assets to the bankrupt upon confirmation of a composition, the trustee, in his turn, being relegated merely to whatever rights might exist against the bankrupt.

In re Cadenas & Coe, 24 A. B. R. 135, 178 Fed. 158 (D. C. N. Y.): "Therefore, the trustee, being charged in general with equities upon the fund, put it out of his hands without seeking to protect those equities by reserving any part of the fund or of the consideration. If he did this without knowledge of the existence of the claim, I do not consider that the terms of the order charged him; but, if he had adequate knowledge of the claim, he was in the same position as any other person who with knowledge of existing equities attaching to a res disposes of the res—that is, he became responsible as trustee to the person injured. * * * This correspondence leaves no doubt that the trustee had the fullest notice of the claim before the composition was confirmed and went on without advising the petitioner of the composition till he supposed it was too late. Could there be a more absolute disregard of the petitioner's rights guaranteed him specifically by this court?"

§ 2398½. Confirmation Refused.

Where confirmation of the composition is refused, the estate is to be administered in bankruptcy as in other cases.

Bankr. Act, § 12(e): "Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided."

§ 2399. Court's Power to Set Aside Confirmation for Irregularity.

Page 1451, note 1. Compare ante, § 2367½; compare post, § 2480.

§ 2400. Setting Aside Confirmation on Application of Parties.

Page 1451. Likewise, the secret giving of a greater percentage to some creditors than to the rest, is sufficient ground.

Obiter, In re Sacharoff & Kleiner, 20 A. B. R. 814, 163 Fed. 664 (D. C. N. Y.).

Page 1451, note 4. Compare, ante, § 2367½. See, in addition, In re Abrams & Rubins, 23 A. B. R. 25, 173 Fed. 430 (D. C. N. Y.).

It was ruled under the Bankruptcy Act of 1867 that a secret advantage given to a creditor for his vote would make the composition void.

[1867] In re Sawyer, 14 Nat. Bankr. Reg. 241.

§ 2401. Must Be Applied for within Six Months.

Page 1452, note 5. See, in addition, In re Jersey Island Packing Co., 18 A. B. R. 417, 152 Fed. 839 (D. C. Calif.).

Page 1452. And merely that the applicants pray also for an order setting aside the "discharge" will not operate to extend the time from six months to the "one year" limited for setting aside a discharge; for, whilst the confirmation of a composition is in effect a "discharge," it is so by operation of law and is not a "discharge" proper.

In re Jersey Island Packing Co., 18 A. B. R. 417, 152 Fed. 839 (D. C. Calif.): "The fact that the petitioner also asks that the bankrupt's discharge resulting by operation of law from the confirmation of the composition referred to may also be set aside and annulled does not bring this proceeding within § 15 of the Bankruptcy Act, which provides that a judge may, 'upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it, if upon a trial it shall be made to appear that it was obtained through the fraud of the bankrupt,' etc. This section does not apply in a case such as this, where the discharge of the bankrupt results by operation of law from the confirmation of the bankrupt's offer of composition."

§ 2402. Estoppel of Creditor.

Page 1452. But participation of the creditor in a secret preference whereby he has received a greater percentage than others, will, of course, estop him.

Impliedly, In re Sacharoff & Kleiner, 20 A. B. R. 814, 163 Fed. 664 (D. C. N. Y.).

§ 2410. Appeals of Composition Matters.

Orders confirming compositions are "proceedings in bankruptcy" proper and not "controversies."

Obiter, Morehouse v. (Pacific) Hardware & Steel Co., 24 A. B. R. 178, 177 Fed. 337 (C. C. A. Nev.).

§ 2415. Discharge a Distinct Incident, Not an Essential of Bankruptcy.

Page 1460, note 3. Also, for expressions of the courts as to the purpose and object of the law, compare, § 17.

Page 1460. And perhaps it is not an absolutely essential idea, or part, of bankruptcy law, but merely an incident to it.

Page 1460, note 4. Also, compare, § 17.

This idea of a discharge first became implanted in bankruptcy jurisprudence in the reign of Queen Anne.

Page 1461. *Hardie v. Dry Goods Co.*, 21 A. B. R. 457, 165 Fed. 588 (C. C. A. Tex.): "It is said that the discharge of a bankrupt under the present bankruptcy law is an act of grace, merely incidental to the general purpose, and in fact could be refused entirely; and it is argued from this that the provisions of the law relating to the discharge of bankrupts should be construed against the bankrupt, and all implications and doubts should be resolved against him. Since the days of Queen Anne (4 & 5 Anne, c. 17, § 19) the discharge of the prima facie honest bankrupt and his future estate and effects has been provided for in every bankruptcy law; at first with many restrictions, even requiring the consent of creditors."

Page 1461. And as the business world is now conditioned, the debtor's discharge is most important to a complete and symmetrical system of caring for the rights of all parties in a business failure—creditors, debtor and the general public.

Hardie v. Dry Goods Co., 21 A. B. R. 457, 165 Fed. 588 (C. C. A. Tex.): "Originally, in bankrupt laws, the discharge of the bankrupt may have been incidental, and the main purpose the equal distribution of his goods among creditors; but to say it now, and of the present law, we must shut our eyes to the actual practice in our courts. In nearly all and every voluntary bankruptcy brought under the present law the administration or distribution of the bankrupt's property has been practically concluded before filing petition, and the sole object of the petitioner is to be relieved of his debts, and in number the voluntary cases are about four to one of the involuntary. [See Report, Dept. of Justice, 1907.] And the same may be said of the voluntary cases under the Act of * * * 1867, * * * which was passed mainly to relieve the unfortunate debtors ruined by and through the vicissitudes of the great Civil War. For these considerations, we are disposed to deny that in the present bankruptcy law the discharge of the honest debtor is a mere incident which could have been omitted without impairing its symmetry and efficiency; and, on the contrary, to assert that the release of the honest, unfortunate, and insolvent debtor from the burden of his debts and his restoration to business activity, in the interest of his family and the general public, are the main, if not the most important, objects of the law."

§ 2416. May "Go Into" or Be "Thrown Into" Bankruptcy Repeatedly, Irrespective of Refusal or Granting of Discharge.

Page 1462, note 7. Impliedly, *In re Smith*, 19 A. B. R. 63, 155 Fed. 688 (D. C. N. Y.); impliedly, *In re Kuffler*, 19 A. B. R. 181, 153 Fed. 667 (D. C. N. Y.); compare, post, §§ 2437, 2441, 2579.

§ 2419. Corporations Entitled to Discharge.

Page 1464, note 3. See, in addition, *Firestone Co. v. Agnew*, 21 A. B. R. 292 (N. Y.).

No Discharge of Corporation under Act of 1867.—*Firestone Co. v. Agnew*, 21 A. B. R. 292 (N. Y.). In *re New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 13 Nat. Bankr. Reg. 394.

§ 2423. Discharge Petition to Be Filed after One Month and before End of Year from Adjudication.

Page 1465. It has been held that under § 14a, which provides that a bankrupt may apply for his discharge "within the next twelve months subsequent to being adjudged a bankrupt," when read in connection with the provisions of § 31, relating to computation of time, a bankrupt has a year and a day from adjudication in which to apply for his discharge, unless, for unavoidable delay clearly shown, the court extends the time.

In *re Holmes*, 21 A. B. R. 339, 165 Fed. 225 (D. C. Vt.).

§ 2424. Extension of Time Granted.

Page 1465, note 8. See, in addition, In *re Holmes*, 21 A. B. R. 339, 165 Fed. 225 (D. C. Vt.); In *re Fritz*, 23 A. B. R. 84, 173 Fed. 560 (D. C. N. Y.).

No Notice to Creditors of Application for Extension Required.—In *re Fritz*, 23 A. B. R. 84, 173 Fed. 560 (D. C. N. Y.).

§ 2426. And Only Because "Unavoidably Prevented;" and "Nunc Pro Tunc" Orders to Cover Laches Improper.

The bankrupt must have been "unavoidably prevented" from filing the petition in time.

In *re Holmes*, 21 A. B. R. 339, 165 Fed. 225 (D. C. Vt.).

Page 1465, note 10. Analogously, compare holding in case of court rule limiting time, In *re A. O. Brown*, 23 A. B. R. 93, 175 Fed. 769 (C. C. A. N. Y.).

Page 1466. In *re Glickman & Pisonoff*, 21 A. B. R. 171, 164 Fed. 209 (D. C. Pa.): "In addition to this it does not appear * * * that the petitioners were unavoidably prevented during the whole of the period in which the application for discharge should have been made. The ground alleged therefor is that on the day on which they signed the petition for discharge they were unable to pay the costs of advertising. The petition could have been filed without any payment whatever, and it does not appear from the petition that the bankrupts were unavoidably prevented from paying the costs of advertising on any other than 26th day of October, 1907. Having failed, therefore, to establish the only statutory ground upon which an extension of time can be granted, the recommendation of the referee was fully justified. The petition of the bankrupts is accordingly refused."

§ 2427. No Jurisdiction to Discharge, on Petition Filed after Eighteen Months.

Page 1466, note 11. See, in addition, *In re Von Borries*, 21 A. B. R. 849, 168 Fed. 718 (D. C. Wis.).

§ 2427½. No Vacating of Adjudication of Bankruptcy, to Give Jurisdiction.

Page 1467. Nor may the eighteen months limitation be evaded by reopening the original adjudication of bankruptcy, as to which no limitation of time exists, and readjudicating the bankrupt, for the purpose of enabling him to file his petition for discharge in time.

In re Morse, 21 A. B. R. 709, 168 Fed. 157 (D. C. N. Y.): "The present motion is not based upon allegations of fraud, mistake, or error of law in the adjudication. The bankrupt admits that he not only allowed (and to a certain extent consciously allowed) the default at the time of the entry of the adjudication, but that he neglected to apply for a discharge within the period specified for that purpose; and, further, it now appears from the record that one of the creditors in the bankruptcy proceeding against the corporation, upon whose notes the present individual bankrupt was indorser, has sued him upon that indorsement, that because of his lack of discharge he could present no defense to the suit, that judgment has been obtained, and that upon supplementary proceedings he is shown to have a salary which may be reached, to a certain extent, under the laws of the state of New York. If the only question involved were that of opening a default, the court would feel disposed to grant the motion, as no one's rights would seem to be materially injured by the change of status since the adjudication. But § 14 of the Bankruptcy Act * * *, after providing that 'after the expiration of one month, and within the next twelve months subsequent' to adjudication, a discharge may be applied for, provides specifically: 'If it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.' Congress has thereby limited the period within which, even in the case of unavoidable necessity, an application for discharge can be granted, and while in the present instance great hardship would seem to be involved, it would be much more dangerous to attempt to restore conditions by opening an adjudication, and thus to get around the entire system of proceedings under the bankruptcy law, than the equities of any particular case would justify."

§ 2428½. Nor Issue "Certificate of Conformity."

Nor need the referee issue a "certificate of conformity," as was the practice under the old law. Indeed, such a certificate is wholly unauthorized.

In re Randail, 20 A. B. R. 305, 159 Fed. 298 (D. C. Pa.). But compare, *In re Johnson*, 19 A. B. R. 814, 158 Fed. 342 (D. C. Ark.).

Although of course, if specifications in opposition to discharge be filed, they may be referred to the referee as special master.

See § 2626.

§ 2430½. Judge to Fix Date of Hearing.

It is the duty of the judge to fix the date for the hearing of the discharge petition and to order the issuance of notice thereof; and a local rule leaving such duties to the referee is void.

Official Form 57; also, see *In re Johnson*, 19 A. B. R. 814, 158 Fed. 342 (D. C. Ala.).

§ 2431½. Amendment of 1910—Thirty Days Notice Required.

Page 1470. The Amendment of 1910 to Bankruptcy Act § 58(a) (9) provides that there shall be 30 days notice of all applications for the discharge of bankruptcy. The change from ten days notice to thirty days notice was necessitated by the Amendment of 1910 to § 14b, whereby the trustee was made a competent party to oppose the discharge when authorized so to do at a meeting of creditors, such meeting of creditors itself requiring ten days notice in accordance with the time specified in § 58.

See Report No. 691 of the Senate Judiciary Committee of the Sixty-First Congress, Second Session: 'This section is entirely new, not being in the House bill in any form. It is thought to be necessary by virtue of the amendment of § 14 making the trustee a competent party to oppose the discharge of the bankrupt when authorized by creditors at a meeting called for that purpose. As previously remarked, in regard to amendatory § 6, the fact that the ten days' notice for the entry of appearance in opposition to such application for discharge is likely to bring appearance day on the same day with the meeting of creditors called to authorize the trustee to enter appearance in opposition to discharge (which must also be upon ten days' notice), necessitates the providing of some way in which this meeting of creditors can be held before that appearance day. Your committee has thought such object best accomplished by providing for thirty days' instead of ten days' notice of applications for discharge, thus bringing the day for entry of appearance in opposition to discharge much later than the day for the meeting of creditors to consider whether or not opposition should be entered by the trustee. No harm is done to the bankrupt by the delay, for he is protected until the matter of discharge is finally disposed of. * * * In view of the fact that 'entry of appearance' in opposition to discharge must be made at the return time of the ten days' notice provided by § 58, but that the meeting of creditors for authorizing such opposition also must be upon ten days' notice—thus preventing creditors' meetings being held before the expiration of the time for entering appearance in opposition—it has been found necessary to amend § 58 by providing for thirty days' notice of the filing of discharge applications in the place of the ten days' notice at present prescribed, in this way sufficient time being given for the creditors to hold their meeting.'

§ 2436. Dismissal of or Failure to File Petition for Discharge, in Effect a Judgment Denying a Discharge.

Page 1471, note 22. See, in addition, *In re Bramlett*, 20 A. B. R. 402, 161 Fed. 588 (D. C. Ga.); *In re Silverman*, 19 A. B. R. 460, 157 Fed. 675 (C. C. A.

N. Y.); In re Elby, 19 A. B. R. 734, 157 Fed. 935 (D. C. Iowa); In re Von Borries, 21 A. B. R. 849, 166 Fed. 718 (D. C. Wis.); In re Schnabel, 23 A. B. R. 22, 166 Fed. 383 (D. C. N. Y.); In re Stone, 23 A. B. R. 24, 172 Fed. 947 (D. C. Ore.).

Page 1471. In re Elby, 19 A. B. R. 734, 157 Fed. 935 (D. C. Iowa): "The failure of the bankrupt to apply for a discharge in the first bankruptcy proceedings, and the approval of the record of such proceedings by the court without granting a discharge, are in effect a judgment by default in favor of his then existing creditors that the bankrupt was not entitled to a discharge from their claims, and that judgment is conclusive in favor of such creditors."

In re Pullian, 22 A. B. R. 513, 171 Fed. 595 (D. C. Tenn.): "It is now well settled in the later federal decisions, overruling in some respects the case of In re Claff (D. C.) 7 Am. B. R. 128, 111 Fed. 506, and the cases therein cited, that where, in a bankruptcy proceeding, the bankrupt fails to apply for a discharge within the time limited by the Bankruptcy Act, this has the same effect as a judgment denying his discharge from the debts therein involved, and that in a subsequent bankruptcy proceeding, in which no new assets are being administered, either an actual judgment denying his discharge in the former case, or a constructive judgment by default for failure to make application, will operate as *res adjudicata* against him and prevent his discharge from the same debts in the new proceeding."

In re Schnabel, 23 A. B. R. 22, 166 Fed. 383 (D. C. N. Y.): "While the application of the rule in the present instance is severe, it seems to be impossible to distinguish between a bankrupt who fears to apply for a discharge and one who neglects to do so."

And that the failure came from the neglect of counsel and not from that of the bankrupt, will not obviate the rule.

In re Stone, 23 A. B. R. 24, 172 Fed. 947 (D. C. Ore.).

But the order must be entered, in order to be *res adjudicata*.

In re Elkind & Schwartz, 23 A. B. R. 166, 175 Fed. 64 (C. C. A. N. Y.).

§ 2437. Second Petition Not Maintainable after Refusal of First, Where Debts Identical.

Page 1471, note 23. *A fortiori*, Kuntz v. Young, 12 A. B. R. 505, 131 Fed. 719 (C. C. A. Minn.), quoted at § 2436; In re Bramlett, 20 A. B. R. 402, 161 Fed. 588 (D. C. Ga.); In re Schnabel, 23 A. B. R. 22, 166 Fed. 383 (D. C. N. Y.).

Discharge Refused without Prejudice to Renewal of Application if Pending Litigation Favorable to Bankrupts.—For a peculiar case, not to be taken as a precedent, see In re Olansky, 20 A. B. R. 780, 163 Fed. 428 (D. C. N. Y.), where a discharge was refused for concealment of assets without prejudice to a renewal of the application for discharge within the 18 months, if pending litigation for the recovery of assets should result favorably to the bankrupts!

Page 1473. In re Pullian, 22 A. B. R. 513, 171 Fed. 595 (D. C. Tenn.): "Further, that where the second proceeding is under a voluntary petition

filed by the bankrupt, in which he brings into court no material assets for administration, and the sole purpose is to obtain a discharge from the debts involved in the former proceeding, no ground of relief is presented, and the proceedings should be dismissed as futile. 2 Remington on Bankruptcy, § 2437, p. 1471; * * * *Kuntz v. Young*, supra. Or, at least, that further proceedings in the case should be stayed (*In re Weintraub*, supra), or the bankrupt restrained and enjoined from filing a petition for discharge in the second case (*In re Fiegenbaum*, supra)."

In re Elby, 19 A. B. R. 734, 157 Fed. 935 (D. C. Iowa): "When, therefore, it is made to appear to the court that a bankrupt under the Act of 1898, who has failed to apply for a discharge within the time prescribed by that act, or has been denied a discharge by the court, files a subsequent petition to be discharged from the same debts owing by him at the time of filing the prior petition, and schedules no assets, the proceeding should be dismissed, because by the prior proceedings it is conclusively determined that he is not entitled to a discharge from those debts. * * * There are no assets, and, so far as appears from the record, further proceedings in the matter would only be to determine the right of the bankrupt to a discharge, and he presents with an answer to the petition of the creditors, a petition for discharge which he asks leave to file. Should he be permitted to do this, the creditors may interpose in opposition thereto the prior proceedings as a conclusive adjudication in their favor that he is not entitled to the same. This would entail additional and unnecessary expense upon both the bankrupt and the creditors, which may and should be avoided."

Page 1474, note 25. Compare, also, *In re Kuffler*, 19 A. B. R. 181, 153 Fed. 667 (D. C. N. Y.); the syllabus in the case *In re Silverman*, 19 A. B. R. 460, 157 Fed. 675 (C. C. A. N. Y.), is broader than the opinion, and the case itself is not out of harmony with the correct principle. Compare post, §§ 2666, 2680.

Page 1474. The fact that the creditors appeared in the second bankruptcy, proved their claims and examined the bankrupt will not estop them from opposing the discharge on this ground.

Compare, § 2416.

In re Elby, 19 A. B. R. 734, 157 Fed. 935 (D. C. Iowa): "The fact that the creditors may have proved their claims before the referee in this proceeding, and examined the bankrupt and others at their first meeting, does not estop them from pleading the prior adjudication in their favor that the bankrupt is not entitled to be discharged from those claims. No element of an estoppel is involved in this action of the creditors; for, when the bankrupt filed his second petition in bankruptcy and procured himself to be adjudged bankrupt thereof, he voluntarily subjected himself to be examined by any of his creditors as authorized by the Bankruptcy Act."

And the putting of a debt provable in bankruptcy into judgment after the expiration of the time within which to apply for a discharge, creates no new debt so as to entitle the bankrupt to institute a new bankruptcy proceeding.

See, in addition, *In re Schnabel*, 23 A. B. R. 22, 166 Fed. 383 (D. C. N. Y.).

§ 2438. Quære, Where Debts in Subsequent Bankruptcy Partly Same, Partly New, and Discharge in First Bankruptcy Refused.

Page 1474. Either the old creditor may "bide his time" and urge "res judicata" in reply to the bankrupt's defense of discharge when the old creditor resorts to legal proceedings to enforce his claim against the bankrupt; in which event, however, it might rightly be contended that the debt was "provable" in the second bankruptcy and was not one of those excepted from the operation of discharge, and hence was discharged by the discharge in the second bankruptcy, even if not by the first bankruptcy.

Bluthenthal v. Jones, 19 A. B. R. 288, 208 U. S. 64, quoted post, this same paragraph, § 2438.

Page 1475, note 26. To same effect, *In re Kuffler*, 19 A. B. R. 181, 153 Fed. 667 (D. C. N. Y.); also, *Bluthenthal v. Jones*, 19 A. B. R. 288, 208 U. S. 64, affirming 51 Fla. 396; *In re Kuffler*, 22 A. B. R. 289, 168 Fed. 1021 (C. C. A. N. Y.), affirming *In re Kuffler*, 18 A. B. R. 17, 151 Fed. 12; *In re Pullian*, 22 A. B. R. 513, 171 Fed. 595 (D. C. Tenn.), quoted also, at §§ 2436, 2437.

Page 1476. This same court reaffirms the doctrine in *In re Kuffler*, 22 A. B. R. 289, 168 Fed. 1021.

Page 1476. *In re Von Borries*, 21 A. B. R. 849, 168 Fed. 718 (D. C. Wis.): "As to the debts incurred since the proceedings in the northern district of Illinois, and as to the creditors who were not before that tribunal, the bankrupt is entitled to a discharge; there being no objection which reaches such claims. An order may be entered for a qualified discharge in accordance with this opinion."

And if the creditor takes no steps to have the discharge decree provide for an exception of his claim, he will be bound and the debt be discharged.

Bluthenthal v. Jones, 19 A. B. R. 288, 208 U. S. 64, affirming 51 Fla. 396: "Though *Bluthenthal & Bickart* were notified of the proceedings on the second petition for bankruptcy and their debt was scheduled, they did not prove their claim or participate in any way in those proceedings. They now claim that their debt was not affected by the discharge on account of the adjudication in the previous proceedings. Section 1 of the Bankruptcy Act defines a discharge as "the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this act." Section 14 of the amended act, which was applicable to the second proceedings, provides that after due hearing the court shall discharge the bankrupt, unless he has committed one of the six acts specified in that section. Section 17 of the amended act provides that a discharge in bankruptcy shall release a bankrupt from all of his provable debts, with four specified exceptions, which do not cover this case. The discharge appears to have been regularly granted, and, as the debt due to *Bluthenthal & Bickart* is not one of the debts which, by the terms of the statute, are excepted from its operation, on the face of the statute the bankrupt was discharged from the debt due to them. There is no reason shown in this record why the discharge did not have the effect which it purported to have. Undoubtedly, as in all

other judicial proceedings, an adjudication refusing a discharge in bankruptcy, finally determines, for all time and in all courts, as between those parties or privies to it, the facts upon which the refusal was based. But courts are not bound to search the records of other courts and give effect to their judgments. If there has been a conclusive adjudication of a subject in some other court, it is the duty of him who relies upon it to plead it or in some manner bring it to the attention of the court in which it is sought to be enforced. Plaintiffs in error failed to do this. When an application was made by the bankrupt in the District Court for the Southern District of Florida, the judge of that court was, by the terms of the statute, bound to grant it, unless upon investigation it appeared that the bankrupt had committed one of the six offenses which are specified in § 14 of the Bankruptcy Act as amended. An objecting creditor might have proved upon that application that the bankrupt had committed one of the acts which barred his discharge, either by the production of evidence or by showing that in a previous bankruptcy proceeding it had been conclusively adjudicated, as between him and the bankrupt, that the bankrupt had committed one of such offenses. If that adjudication had been proved, it would have taken the place of other evidence and have been final upon the parties to it. But nothing of this kind took place. Bluthenthal & Bickart intentionally remained away from the court and allowed the discharge to be granted without objection. Since the debt due to the plaintiffs in error was a debt provable in the proceedings before the District Court of Florida, and was not one of the debts exempted by the statute from the operation of the discharge, it was barred by that discharge."

And the mere fact that subsequent to the refusal of the first discharge one of the old debts has been reduced to judgment will not avail—the former refusal still remains *res adjudicata*.

In re Kuffler, 19 A. B. R. 181, 153 Fed. 667 (D. C. N. Y.).

§ 2441. Refusal of Discharge No Bar to Subsequent Bankruptcy Petitions nor Adjudications.

Page 1477, note 28. See ante, § 2416; post, § 2579; impliedly, *In re Smith*, 19 A. B. R. 63, 155 Fed. 688 (D. C. N. Y.).

§ 2446. Staying Discharge to Permit Creditor to Perfect Rights against Surety or Exempt Property, etc.

Page 1478, note 33. See ante, §§ 648, 1102, 1104, 1105, 1524, 1914, 2200, 2712; *In re Maher*, 22 A. B. R. 290, 169 Fed. 997 (D. C. Ga.); rule affirmed but not applied in *In re Maget*, 23 A. B. R. 14, 173 Fed. 232 (D. C. N. Y.).

§ 2447. Opposition to Discharge.

Page 1485. All questions arising upon a bankrupt's application for a discharge are for the judge and are expressly withheld from the referee.

Bankr. Act, §§ 38, 14; also, *In re Johnson*, 19 A. B. R. 814, 158 Fed. 342 (D. C. Ark.).

§ 2448. Entry of Appearance and Filing of Specifications.

Page 1485, note 2. Prosecuting Objections in Forma Pauperis.—In re Guilbert, 18 A. B. R. 830, 154 Fed. 676 (D. C. Pa.).

§ 2449. Entry of Appearance on Time Essential.

Page 1486, note 4. See, in addition, In re Young, 20 A. B. R. 697, 162 Fed. 912 (D. C. Pa.).

§ 2454. Time Extended, but Only for "Good Cause."

Such time may be extended by the judge, for good cause.

Page 1486, note 10. See, in addition, In re Levin, 23 A. B. R. 845, 173 Fed. 119 (C. C. A. Mass.); In re Clothier, 6 A. B. R. 203, 108 Fed. 199 (D. C. Pa.).

And it has been held that such extension may be applied for even after the expiration of the original time, if before the discharge is granted.

Page 1486, note 11. (1867) In re Levin, Fed. Cas. No. 8291, 14 N. B. R. 385; (1867) In re Filley, 2 Cent. Law J. 419. Compare, In re Frice, 2 A. B. R. 674, 96 Fed. 611 (D. C. Iowa), although, in this case, the judge seemed to feel it necessary to make the extension by way of a "nunc pro tunc" order.

In re Levin, 23 A. B. R. 845, 173 Fed. 119 (C. C. A. Mass.): "The motion for an extension of time was here filed more than ten days after the return day. General Order 32 in bankruptcy reads as follows: 'A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.' The petitioner contends that this order limits the entry of the creditor's appearance in opposition to the discharge to the return day itself, without authority in the court to extend the time for any cause whatsoever. The petitioner contends further, and in the alternative, that even if the time of entry may be extended somewhat, yet no extension can be granted unless the creditor's motion for an extension shall have been filed within ten days after the return day. The respondent creditor, on the other hand, contends that to grant an extension of time, both for appearance and for filing specifications, is within the discretion of the court, and that this discretion may be exercised at any time before the discharge is granted. * * * Considering that the grammatical construction of General Order 32 leans no more to the petitioner's contention than to that of the respondent, considering the general convenience of the parties which rules are made to guard and to serve, considering the construction put upon the language by eminent judges, a construction acquiesced in by suitors, and accepted by treatises on bankruptcy, we are of opinion that the authority of the District Court was sufficient, and that the petition to revise should be dismissed, with costs."

And good cause must be shown.

§ 2457. Who May Oppose Discharge—Court Itself, Not.

Page 1487. The court will not grant a discharge until the termination

of contempt proceedings, where such proceedings are pending against the bankrupt.

In re Kretsch, 22 A. B. R. 284, 172 Fed. 523 (D. C. N. Y.).

No "certificate of conformity," however, is required under the present act, as was required under the former act.

But compare the somewhat strained construction adopted in Massachusetts, as to which see In re Levin, 23 A. B. R. 845, 173 Fed. 119 (C. C. A. Mass.): "This is language somewhat unusual, in that it requires the judge to make investigation for himself, as well as to hear the parties in interest. To this end, the referee is required in the Massachusetts district to make investigation and to report to the judge concerning discharge whether objections are entered by a creditor or not. The language above quoted does not precisely cover the point here raised, but it suggests that the independent investigation by the judge may be assisted in his discretion by the omission of creditors to state their objections." It is of questionable propriety for the court to practically descend from the bench and to become an attorney in the case, as would be the logical result of the carrying out of the Massachusetts rule.

§ 2458½. Trustee Competent by Amendment of 1910.

The Amendment of 1910 to the Bankruptcy Act, § 14, specifically makes the trustee a "party in interest" for the purpose of opposing the bankrupt's discharge, though the trustee will not be entitled to do so until authorized at a meeting of creditors for that purpose.

See ante, §§ 565¼, 593½. Bankr. Act, § 14b, as amended in 1910: "The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such times as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate, etc. * * * Provided, That a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose."

§ 2459. Any "Party in Interest," and Only Such, May Oppose.

Page 1488, note 21. Compare, analogously, In re Comstock, 19 A. B. R. 65, 154 Fed. 747 (D. C. N. Y.), quoted at § 2375.

The Amendment of 1910 to § 14 expressly makes the trustee a party in interest sufficient to oppose discharge of bankrupts.

Page 1488, note 21. See Bankr. Act, § 14b, as amended in 1910.

§ 2460. Must Have Pecuniary Interest.

Page 1488, note 26. Compare, obiter, In re Nathanson, 19 A. B. R. 56, 155 Fed. 645 (D. C. N. Y.).

Page 1488. It has been held that a nondischargeable claim is not sufficient.

Page 1488, note 27. *Contra*, In re Lewis, 20 A. B. R. 711, 163 Fed. 137 (D. C. N. Y.).

Releasing the Bankrupt from Claims Founded on False Statement Estopping Creditor from Opposing Discharge.—It has been held, in one case, that where a creditor, for valuable consideration, releases a debtor from all claims raised out of a false statement he had made to the creditor, such creditor thereupon surrendering the statements, the creditor will be estopped from opposing the bankrupt's discharge on that ground. In re Russell, 23 A. B. R. 850, 176 Fed. 253 (C. C. A. N. Y.). But, if such surrender and passing of consideration were made in withholding from opposition to discharge, the whole transaction might be illegal under § 29b, if the other facts warranted.

But such cannot be the right holding, since the Amendment of 1903 has made the obtaining of property on credit on a materially false statement in writing, a ground itself of opposition to discharge.

In re Lewis, 20 A. B. R. 711, 163 Fed. 137 (D. C. N. Y.).

Doubtless, the assignee of a creditor's claim is competent.

Compare, analogously, In re Comstock, 19 A. B. R. 65, 154 Fed. 747 (D. C. N. Y.), quoted at § 2375.

Even though he has purchased for the very purpose of opposition.

Analogously, In re Comstock, 19 A. B. R. 65, 154 Fed. 747 (D. C. N. Y.), quoted at § 2375.

§ 2461. Need Not Have Proved, nor Have "Provable," Claim.

Page 1488, note 28. See, in addition, In re Nathanson, 19 A. B. R. 56, 155 Fed. 645 (D. C. N. Y.).

Page 1488. And perhaps he need not even have a "provable" claim.

Contra, obiter, In re Nathanson, 19 A. B. R. 56, 155 Fed. 645 (D. C. N. Y.).

Page 1488, note 30. Compare, post, § 2809.

§ 2463¼. One Creditor Prosecuting Objections of Another.

One creditor may adopt and prosecute the objections of another creditor, after the latter has declared his unwillingness to go on and his intention to abandon the objections.

In re Guilbert, 18 A. B. R. 830, 154 Fed. 676 (D. C. Pa.); (1867) In re Houghton Fed. Cas. 6730, 2 Law. 328, 10 N. B. R. 337. Compare, In re Wetmore, 6 A. B. R. 703, 102 Fed. 290 (Spec. Master N. Y.).

§ 2463½. Procedure Where Trustee Is to Object.

By the Amendment of 1910, making the trustee a competent party to oppose the discharge of a bankrupt, it is provided that he shall enter such opposition only when authorized at a meeting of creditors so to do.

See Bankr. Act, § 14b; also, see ante, §§ 940¼, 940½, 565¼, 593½.

Such meeting is to be held upon ten days notice.

See ante, § 940½.

And the authorization is to be determined by the usual rule of action by creditors at their meetings.

See ante, § 940½.

In the event that the trustee is authorized to oppose the discharge, the expense of the opposition is chargeable out of the estate, as part of the costs of administration.

See report No. 691 of the Senate Judiciary Committee, Sixty-First Congress, Second Session: "Thereby the expenses of the proceedings in opposition to discharge will be spread over all the creditors and not be borne by a single creditor who might file objections."

§ 2467½. Whether Moral Turpitude Involved.

Page 1491. It is to be observed that of the six grounds for refusing discharge recited in Bankr. Act, § 14b, all except the last two (which stand by themselves on a ground that affects the administration of the law) imply moral turpitude on the part of the bankrupt.

Klein v. Powell, 23 A. B. R. 494, 174 Fed. 640 (C. C. A. Pa.).

§ 2469. Unless Bankrupt Commits One of Acts Prohibited His Discharge "Shall" Be Granted.

Page 1492, note 40. See, in addition, impliedly, In re Wolf, 20 A. B. R. 304, 159 Fed. 299 (D. C. Pa.).

Page 1493. In re McCrea, 20 A. B. R. 412, 161 Fed. 246 (C. C. A. N. Y.): "The bankrupt was entitled to his discharge, as a matter of right, unless debarred upon one of the statutory grounds specified by the creditor."

Page 1493. In re Griffin Bros., 19 A. B. R. 78, 154 Fed. 537 (D. C. Ala.): "It is incumbent upon the creditor opposing a discharge to allege in his specifications and to prove to the court one of the statutory grounds for withholding the discharge. * * * The only grounds of objection to a discharge that can be interposed are those enumerated in §§ 14, 29, Bankr. Act."

Page 1493, note 41. In re Battle, 19 A. B. R. 40, 154 Fed. 741 (D. C. N. Car.).

Page 1493. And a bankrupt will not be refused a discharge because of the fact that, more than a year before the bankruptcy, he committed larceny, or larceny as bailee, against the objecting creditor.

In re Wolf, 20 A. B. R. 304, 159 Fed. 299 (D. C. Pa.).

Nor will the fact that he was reckless, improvident and utterly incompetent to manage his business affairs prevent his discharge.

In re Boner, 22 A. B. R. 151, 169 Fed. 727 (D. C. Va.).

§ 2477. Lack of Sufficient "Residence, Domicile or Principal Place of Business" in District, No Bar.

Page 1495, note 52. See ante, §§ 450, 1777½. Also, compare, *In re Wheeler*, 21 A. B. R. 262, 165 Fed. 188 (C. C. A. Ills.), wherein the court considered the facts and found in favor of the bankrupt but apparently treated the defense as valid in law.

§ 2478. Collateral Attack on Jurisdiction, for Lack of "Residence," etc.

If lack of residence, domicile, etc., appears affirmatively on the face of the record itself and not by mere omission, probably this defect is available on discharge as well as elsewhere, collaterally. Lack of sufficient residence, etc., being a question going to the very jurisdiction of the court over the subject, it would perhaps seem proper to raise it at any time and in any branch of the proceedings.

Compare, *In re Wheeler*, 21 A. B. R. 262, 165 Fed. 188 (C. C. A. Ills.).

Being an attack on the adjudication, however, it should be direct and not collateral, unless the adjudication is void on its face.

But compare, *In re Wheeler*, 21 A. B. R. 262, 165 Fed. 188 (C. C. A. Ills.).

§ 2480. Withholding Discharge or Dismissing Discharge Petition, for Other Causes—Noncompliance with Rules, Want of Prosecution, etc.

Page 1496. Thus, it may withhold the discharge temporarily for non-compliance with the rules of court relative to the discharge; or to await the outcome of contempt proceedings against the bankrupt.

In re Kretsch, 22 A. B. R. 284, 172 Fed. 523 (D. C. N. Y.).

Page 1496, note 56. See ante, § 2457.

Page 1497, note 57. **Withholding Discharge for Bankrupt's Contempt.**—And it has been held permissible to withhold the discharge temporarily to await the outcome of contempt proceedings pending against the bankrupt and, if he be found in contempt, until he shall have purged himself, *In re Kretsch*, 22 A. B. R. 284, 172 Fed. 523 (D. C. N. Y.).

Referee's Failure to Properly Publish Notice of First Meeting of Creditors No Ground.—*Obiter*, *In re Elkind & Schwartz*, 23 A. B. R. 166, 175 Fed. 64 (C. C. A. N. Y.).

§ 2481. Buying Off Opposition to Discharge.

Page 1497, note 58. Also, compare similar ruling in cases of composition, *In re Levy*, 22 A. B. R. 769, 172 Fed. 780 (D. C. Mass.).

§ 2484. Fraudulent Acts of Agents and Partners Not Imputable unless Actual Knowledge Exists, Where Commission of "Offense" Is Ground Urged.

Page 1502, note 64. Compare, *In re Currie*, 23 A. B. R. 539 (Ref. Mich.), quoted at § 2485; compare, a fortiori, *Peck v. Lowenbein*, 24 A. B. R. 138, 178 Fed. 178 (C. C. A. N. Car.), quoted at § 2560. See post, § 2563.

For corresponding proposition, relative to acts of bankruptcy, see ante, § 171.

A man must be presumed to intend the natural consequences of his act. *In re Currie*, 23 A. B. R. 539 (Ref. Mich.).

Custom or Usage Contrary to Law, Not Valid.—No custom or usage is valid which is contrary to law, whether the same be statute law or common law. *Ibid*.

§ 2485. How, Where Ground Charged Is Not Commission of "Offense."

On principle it might seem that perhaps the same rule would not apply where the ground charged is not the commission of a punishable offense; and that perhaps in such cases the act of the partner or other agent might be imputed.

But such are not the holdings with respect to the failure to keep proper books of account, by a bookkeeper or other agent.

Nor by a partner.

Page 1503, note 65. *In re Schultz*, 6 A. B. R. 92, 109 Fed. 264 (D. C. N. Y.); inferentially contra, obiter, *In re Schachter*, 22 A. B. R. 389, 176 Fed. 683 (D. C. N. Y.). Compare, apparently contra, *Peck v. Lowenbein*, 24 A. B. R. 138, 178 Fed. 178 (C. C. A. N. Car.), quoted at § 2560. See post, § 2563.

Nor are such the holdings with respect to obtaining property on a materially false statement in writing, either in cases where such false statements are made by bookkeepers.

Gilpin v. Natl. Bank, 21 A. B. R. 429, 165 Fed. 607 (C. C. A. Pa., reversing *In re Gilpin*, 20 A. B. R. 374), quoted at § 2560.

Or by partners.

Hardie v. Dry Goods Co., 21 A. B. R. 457, 165 Fed. 588 (C. C. A. Tex., reversing *In re Hardie & Co.*, 16 A. B. R. 313, 143 Fed. 421).

Page 1503. Compare, *In re Currie*, 23 A. B. R. 539 (Ref. Mich.): "An active partner must be held responsible for the act of his partner, of which he has no knowledge, unless he has affirmatively shown his innocence or ignorance of the wrong-doing of his fellow."

§ 2486. Whether Act Must Be Committed in Same Capacity in Which Discharge Sought, to Bar.

Page 1503, note 66. And compare, *In re Currie*, 23 A. B. R. 539 (Ref. Mich.), quoted at § 2485.

For corresponding proposition relative to acts of bankruptcy, see ante § 171.

§ 2487. **"Concealment of Assets" as Bar to Discharge.**

Page 1503, note 67. In re James, 23 A. B. R. 703, 175 Fed. 894 (D. C. N. C.).

§ 2488. **"Knowingly and Fraudulently."**

Page 1503, note 68. See, in addition, In re Griffin Bros., 19 A. B. R. 78, 154 Fed. 537 (D. C. Ala.); Klein v. Powell, 23 A. B. R. 494, 174 Fed. 640 (C. C. A. Pa.), quoted at § 2639.

§ 2490. **Honest Mistake, Even Mistake of Law, Excuses.**

Page 1504, note 72. See, in addition, impliedly, In re Alleman, 20 A. B. R. 745, 162 Fed. 693 (D. C. Pa.).

§ 2491. **Advice of Counsel May Negative Intent.**

Page 1504, note 73. See, in addition, In re Alleman, 20 A. B. R. 745, 162 Fed. 693 (D. C. Pa.); In re Kyte, 23 A. B. R. 414, 174 Fed. 867 (D. C. Pa.); Klein v. Powell, 23 A. B. R. 494, 174 Fed. 640 (C. C. A. Pa.).

§ 2492. **But Insufficient, Where Legal Questions Are Matters of Common Knowledge: or Facts Not Fully Laid before Counsel, or Unwarranted Inferences Drawn from Advice.**

Page 1505. In re Remmers (Remmers v. Merchants' Laclede Nat. Bank), 23 A. B. R. 78, 173 Fed. 484 (C. C. A. Mo.): "Finally, it is contended by appellant that his failure to schedule the shares in question and set forth fully and truthfully his interest therein was due to the advice of his counsel. This contention we dismiss from further consideration; for the reason we are not convinced from a reading of the record that appellant fully and frankly disclosed the facts within his knowledge relating to these shares to his counsel at the time or before his schedules were prepared and verified, and received and acted on his opinion as a matter of law, as must be done before the advice of counsel may be pleaded in justification or excuse of the charge made."

§ 2496. **Preference Not Amounting to Fraudulent Concealment, No Bar.**

Page 1505, note 79. See, in addition, In re Battle, 19 A. B. R. 40, 154 Fed. 741 (D. C. N. Car.).

§ 2498. **Continuing Concealments.**

Page 1506, note 80. **Proof of Adjudication of Bankruptcy Requisite.**—It is essential that proof be made of the adjudication of bankruptcy. Gilbertson v. United States, 22 A. B. R. 32, 168 Fed. 672 (C. C. A. Wis.).

No Collateral Attack on Adjudication.—And no collateral attack will be permitted on the order of adjudication. Gilbertson v. United States, 22 A. B. R. 32, 168 Fed. 672 (C. C. A. Wis.); Edelstein v. United States, 17 A. B. R. 649, 149 Fed. 636 (C. C. A. Minn.). See also, ante, § 450.

Page 1506, note 81. See, in addition, *Alkon v. United States*, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.), quoted at § 2320½; *United States v. Young & Holland Co.*, 22 A. B. R. 484, 170 Fed. 110 (D. C. R. I.); *In re McCann Bros.*, 22 A. B. R. 557, 171 Fed. 266 (D. C. Pa.). See also, as to "Crimes," §§ 2328¼, 2320½.

Page 1506. *Cohen v. United States*, 19 A. B. R. 8, 157 Fed. 651 (C. C. A. N. Y., affirming *United States v. Cohen*, 15 A. B. R. 359, 142 Fed. 983): "It is true that it charges the removal and concealment of certain property before the appointment of a trustee, but it further alleges that a trustee was subsequently appointed and that the property was never turned over to him, but was concealed from him by the procurement of defendant Simpson with the knowledge, consent and connivance of the other conspirators. The case presented by the indictment is therefore one of continued concealment, and we are not called upon to consider whether there is an omission in the Bankrupt Law in respect of the disposition of property in contemplation of bankruptcy. If a bankrupt conceal his property before the appointment of a trustee and continue to conceal it after the appointment he violates the Bankrupt Act, and a conspiracy that he shall do so violates the conspiracy statute."

Page 1506. Indeed, concealment is rather a continuing state; and it does not consist of one act.

Johnson v. United States, 20 A. B. R. 724, 163 Fed. 30 (C. C. A. Mass.), quoted at § 2323.

In re James, 23 A. B. R. 703, 175 Fed. 894 (D. C. N. C.): "It is manifest that, if an article be concealed, put in a secret or hiding place, and so remains until it is discovered, it continues until such time in a state of concealment, or is during the entire period concealed. It is insisted by counsel for petitioner that, while this is true, the active agency of the person concealing the property is completed when it is concealed, or placed in concealment. Is the term 'has concealed,' as used in the statute, to be given this restricted meaning? Was it so used by the Legislature? The exact question has not, so far as an investigation has gone, been decided. * * * While not strictly in point, these expressions clearly recognize that the word 'concealed' has sufficient elasticity to comprise a 'continuous concealment.'" This case quoted further at § 2555½.

§ 2500. Concealment before Appointment of Trustee, Insufficient.

Page 1506, note 83. Compare, also, *Cohen v. United States*, 19 A. B. R. 8, 157 Fed. 651 (D. C. N. Y.), quoted *supra*.

Page 1507. *In re Adams*, 22 A. B. R. 613, 171 Fed. 599 (D. C. N. Y.): "Before this offense can be committed there must be a trustee, and nowhere is it made an offense, or a ground of refusing a discharge, not to disclose in the schedules, or even on oath, the existence of property or of a debt owing to the bankrupt. If in the schedules, or in making oath thereto, or on an examination, the bankrupt commits perjury, then he has 'made a false oath' in or in relation to a proceeding in bankruptcy, and the making of such false oath is made a ground of refusing a discharge. Such false oath may consist in giving evidence which in effect amounts to a concealment, etc."

Page 1507. But a concealment begun before the appointment and continued thereafter becomes a concealment from the trustee.

See §§ 2498, 2328¾; also, *Cohen v. United States*, 19 A. B. R. 8, 157 Fed. 651 (C. C. A. N. Y.); also, see *Alkon v. United States*, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.), quoted at § 2320½; *United States v. Young & Holland Co.*, 22 A. B. R. 484, 170 Fed. 110 (D. C. R. I.).

§ 2501. Mere Inability to Account Reasonably for Assets Not Per Se Proof, Though Strong Evidence.

Page 1507, note 86. See, in addition, *Seigel v. Cartel*, 21 A. B. R. 140, 164 Fed. 691 (C. C. A. Iowa). See especially, § 1850. Also, compare, § 2649.

§ 2501½. Presumption of Continued Possession When Property Once Traced and Shortage Unexplained.

If it is proved that the bankrupt recently had possession, then the presumption that he still has it will follow, unless he reasonably accounts for the disposition or disappearance of the assets.

See ante, § 1850.

Page 1507. *Seigel v. Cartel*, 21 A. B. R. 140, 164 Fed. 691 (C. C. A. Iowa): "The evidence clearly enough shows that this merchant, between the 1st day of January, 1904, and August of that year, just preceding the proceeding in bankruptcy, disposed of between eleven and thirteen thousand dollars worth of goods. In other words, he was short that amount of stock at the time of the declared bankruptcy. He was called upon by the referee to account for these goods or their proceeds; the presumption being, as they were not on hand, that he had disposed of them and the proceeds were in his possession. * * * Not having scheduled or surrendered the property to the trustee, the concealment of the proceeds, within the provisions of the statute, is presumed."

§ 2502. Concealment by Purposely Omitting Assets from Schedules.

Page 1507, note 88. See, in addition, *Seigel v. Cartel*, 21 A. B. R. 140, 164 Fed. 691 (C. C. A. Iowa); instance, *In re Guilbert*, 22 A. B. R. 221, 169 Fed. 149 (D. C. Pa.); compare, *In re Adams*, 22 A. B. R. 613, 171 Fed. 599 (D. C. N. Y.), quoted at § 2500.

Page 1507. However, concealment does not, really, consist of any one act, so the failure to schedule is, after all, nothing but evidence tending to show concealment.

Impliedly, *Johnson v. United States*, 20 A. B. R. 724, 163 Fed. 30 (C. C. A. Mass.), quoted at § 2323.

§ 2504. But Omission to Schedule, Not Per Se Concealment.

Page 1508. Indeed, as previously noted (§§ 2498, 2502) concealment is rather a continuing intentional state than a mere act; and omission

to schedule is rather evidence tending to show that state and to show it to be intentional than it is per se concealment.

Compare ante, §§ 2498, 2502.

§ 2507. **Concealment, Even Where Fraudulent Transfer Occurred More than Four Months before Bankruptcy, if Property Still Recoverable.**

Page 1508, note 92. See, in addition, *In re James*, 23 A. B. R. 703, 175 Fed. 894 (D. C. N. C.).

Page 1509, note 92. Compare, analogously and obiter, *In re Boner*, 22 A. B. R. 151, 169 Fed. 727 (D. C. Va.).

§ 2510. **Concealment of Property Held on "Secret" or Resulting Trust, Title Never Having Been in Bankrupt.**

Page 1511. As where the bankrupt, while insolvent, systematically bought real estate and had the title to it placed in his wife's name.

In re Guilbert, 22 A. B. R. 221, 169 Fed. 149 (D. C. Pa.).

§ 2511. **"Secret Trust" in Bankrupt's Favor Generally Requisite to Show Continuing and Intentional Concealment of Fraudulent Transfers.**

Page 1513. And an apparently merely preferential transfer may be shown to be a fraudulent transfer by proof of the existence of a secret trust.

See ante, §§ 1221, 1305.

§ 2515. **Merely Working for Another, Even without Pay, While Insolvent, No Concealment.**

There can be no "concealment," sufficient to bar discharge, by the debtor's merely working for another, with or without pay, while insolvent, unless the proceeds of the labor are concealed.

Impliedly, *In re Adams*, 22 A. B. R. 613, 171 Fed. 599 (D. C. N. Y.).

Page 1514, note 108. Compare, also, to same effect, *In re Hedley*, 19 A. B. R. 409, 156 Fed. 314 (D. C. N. Y.).

§ 2516. **Thus, Beginning New Business as Agent for Another.**

The debtor's mere starting up of a new business, after his own failure, for and in the name of his wife is no ground for barring discharge.

In re Hedley, 19 A. B. R. 409, 156 Fed. 314 (D. C. N. Y.). Compare, to same general effect, *In re Adams*, 22 A. B. R. 613, 171 Fed. 599 (D. C. N. Y.).

§ 2517. Exact Value of Assets Concealed Need Not Be Capable of Ascertainment, if of Value.

Page 1517, note 109. Impliedly, *In re Guilbert*, 22 A. B. R. 221, 169 Fed. 149 (D. C. Pa.).

§ 2518. Even if of Small Value, Intentional Concealment Will Bar.

Page 1517, note 110. Impliedly, as equities in real estate, title being put in wife's name, *In re Guilbert*, 22 A. B. R. 221, 169 Fed. 149 (D. C. Pa.), quoted at § 2541.

§ 2520. Amendment of Schedules after Discovery of Concealed Assets, of No Avail.

Page 1518, note 112. See, in addition, *Kern v. United States*, 22 A. B. R. 223, 169 Fed. 617 (C. C. A. Tenn.).

§ 2520½. Nor Other Aid to Trustee.

The offense of concealment of assets when once committed cannot be retrieved by right and lawful conduct and the doing of things "meet for repentance."

Kern v. United States, 22 A. B. R. 223, 169 Fed. 617 (C. C. A. Tenn.), quoted at § 2543.

§ 2521. Instances Held Sufficient to Bar Discharge for Concealment of Assets.

Page 1519, note 113. See, in addition, *In re Guilbert*, 22 A. B. R. 221, 169 Fed. 149 (D. C. Pa.).

Failing to schedule \$861 in cash and nine head of cattle, whilst stating in schedules that he possessed only \$10 in cash, such cash and cattle being subsequently discovered and brought into the estate by trustee. *In re Napier*, 23 A. B. R. 560 (Spec. Master Ky., affirmed by D. C.).

Page 1523, note 114. 44½. Assigning stock to wife and placing same in box with her other papers, unknown to wife, *In re Hedley*, 19 A. B. R. 409, 156 Fed. 314 (D. C. N. Y.).

49. Even though possible equity given to wife, advice of counsel also existing, *In re Kyte*, 23 A. B. R. 414, 174 Fed. 867 (D. C. Pa.).

53. Acting as agent for wife under unrecorded power of attorney, and assigning corporate stock belonging to her as collateral and placing the same in a box with other papers belonging to her, though the wife had no actual knowledge of the assignment, held insufficient, *In re Hedley*, 19 A. B. R. 409, 156 Fed. 314 (D. C. N. Y.).

54. Bankrupt after involuntary petition filed against him but in ignorance thereof receiving \$110 for goods previously sold but duly entering them on cash book, no bar, though money could not thereafter be traced, *In re Kyte*, 23 A. B. R. 414, 174 Fed. 867 (D. C. Pa.).

55. Bankrupt, paying pressing rent bill with money returned to him after adjudication by insurance company on lapse of tontine policy, on advice of counsel. *Klein v. Powell*, 23 A. B. R. 494, 174 Fed. 640 (C. C. A. Pa.).

§ 2534. Material, Though Subject of Little Value, or Exempt, or Not Recoverable. .

The fact that the things the bankrupt swears falsely about are of little value does not deprive the oath of its materiality.

In re Guilbert, 22 A. B. R. 221, 169 Fed. 149 (D. C. Pa.), quoted at § 2541.

§ 2535. False Oath Must Be "Knowingly and Fraudulently" Made.

Page 1527. "False oath" is, probably, the same as perjury.

Inferentially, Wechsler v. United States, 19 A. B. R. 1, 158 Fed. 579 (C. C. A. N. Y.).

§ 2536. Advice of Counsel Tends to Negative Fraudulent Intent.

Page 1527. But the bankrupt must have fully and frankly disclosed to his counsel the facts within his knowledge, and have acted on his opinion, else advice of counsel will be neither excuse nor justification.

In re Remmers, 23 A. B. R. 78, 173 Fed. 484 (C. C. A. Mo.), quoted at § 2492.

§ 2538. Nor That Its Value Unascertained.

Page 1527, note 133. See, in addition, In re McCrea, 20 A. B. R. 412, 161 Fed. 246 (C. C. A. N. Y.), quoted at § 2539½.

§ 2539½. But Is Evidence Toward Negating Intent.

But that the property involved could not be recovered for creditors, or the bankrupt's rights thereto were dubious, or that it might have been claimed as exempt (if such rights were known to the bankrupt), or that it was of little value, are facts entitled to weight in determining whether the false oath was with fraudulent intent.

In re McCrea, 20 A. B. R. 412, 161 Fed. 246 (C. C. A. N. Y.).

Page 1528. In re McCrea, 20 A. B. R. 412, 161 Fed. 246 (C. C. A. N. Y.): "But if certain interests in the estate of the bankrupt's father should have been included in the schedule of assets, it does not necessarily follow that the bankrupt knowingly and fraudulently made a false oath when he verified the schedule which did not mention them. It was not obvious what interests belonged to the bankrupt or that they were transferable. Moreover, as we have pointed out, the bankrupt claims that he did not own those interests. Informality in the conveyance and its delivery might have rendered it illegal, and still not affect the bankrupt's good faith. That but very little income had ever been received did not affect the character of the interests as property, but did have a bearing upon the bankrupt's fraudulent intent. Taking into consideration all the testimony and all the circumstances, we cannot say that the creditor has clearly shown that the bankrupt fraudulently and know-

ingly made a false oath in not referring in his schedule to his interest in his father's estate."

In re Eaton, 6 A. B. R. 531, 110 Fed. 733 (D. C. N. Y.): "There is nothing to show the value of the stock * * * when the schedules were filed. It may have become utterly worthless at that time. It had been transferred to a trustee who was authorized to sell it to satisfy unpaid assessments. A receiver had been appointed of all the bankrupt's property including the stock. * * * In these circumstances a perfectly honest man might have thought that the stock was of no value and have forgotten to mention it in his schedules."

§ 2541. Swearing to Schedules Containing Misstatements or Omissions, "False Oath."

Page 1529, note 139. 13. Omitting real estate equities placed in wife's name and never in bankrupt's own name, In re Guilbert, 22 A. B. R. 221, 169 Fed. 149 (D. C. Pa.):

14. Omitting concealed merchandise, In re Goodman, 22 A. B. R. 570, 171 Fed. 287 (D. C. Pa.).

15. Omitting to schedule interest in corporate stock, though defending against adjudication on ground that he is not insolvent without mentioning stock, and after adjudication bringing suit to recover stock from pledgee, In re Remmers, 23 A. B. R. 78, 173 Fed. 484 (C. C. A. Mo.).

Page 1531, note 139. 25. Omitting interest, in decedent's estate where the bankrupt's rights therein were doubtful or involved, In re McCrea, 20 A. B. R. 412, 161 Fed. 246 (C. C. A. N. Y.).

26. Failing to schedule \$861 in cash and nine head of cattle, whilst stating in schedules that he possessed only \$10 in cash, such cash and cattle being subsequently discovered and brought into the estate by trustee. In re Napier, 23 A. B. R. 560 (Spec. Master Ky., affirmed by D. C.).

Page 1530. In re Guilbert, 22 A. B. R. 221, 169 Fed. 149 (D. C. Pa.): "And further, the seventh specification charges the bankrupt with having committed an offence punishable by imprisonment in having made a false oath to his schedule of assets in his petition in bankruptcy in not having included his interest in these properties. However small the value of the equities in these properties was at the time of the filing of the petition, if they belonged to the bankrupt, it was his duty to schedule them as an asset. Having failed to do so, he could not truthfully swear that he had included all his property in the schedule, and in making such an affidavit he is guilty of having made an oath to a false statement."

§ 2543. Amendment after Discovery of Omissions.

Page 1532, note 143. See, in addition, Kern v. United States, 22 A. B. R. 223, 169 Fed. 617 (C. C. A. Tenn.): "After he returned from Canada, the bankrupt by leave of the court filed an amended schedule of assets which included those he is charged with having concealed, and counsel argues that this related back to his original schedule, and operated as an atonement which, being made while the proceedings were yet in progress, redeemed his fault, so that in the end nothing was concealed from the trustee. But we are unable to agree that it would have such an effect. The offenses of false swearing and concealment when once committed could not be retrieved by right and lawful conduct and the doing of things 'meet for repentance,' however they might affect the judgment of the court in imposing sentence."

§ 2544. Destruction, Failure to Keep and Concealment of Books of Account as Bar to Discharge.

Page 1532, note 145. See, in addition, *In re Goldich*, 21 A. B. R. 249, 164 Fed. 82 (D. C. Pa.); *In re Hanna*, 21 A. B. R. 843, 168 Fed. 238 (C. C. A. N. Y.).

§ 2545. Intent to Conceal Financial Condition Essential.

Page 1533, note 146. See, in addition, impliedly, *In re Murray*, 20 A. B. R. 700, 162 Fed. 983 (D. C. Conn.); *In re Griffin*, 19 A. B. R. 78, 154 Fed. 537 (D. C. Ala.); *In re Napier*, 23 A. B. R. 560 (Spec. Master Ky., affirmed by D. C.); *In re Currie*, 23 A. B. R. 539 (Ref. Mich.).

Page 1533. *In re Burstein*, 20 A. B. R. 399, 160 Fed. 765 (D. C. Conn.): "He kept no books; but it is impossible from the facts set forth, to draw the inference that his failure to keep them was 'with the intent to conceal his true financial condition.'"

In re Brockman, 21 A. B. R. 251, 168 Fed. 1015 (D. C. Ky.): "The argument of counsel was largely addressed to the failure of the bankrupt to keep books in a proper way, and it seemed to be supposed that the act requires every person who is authorized to petition for a discharge in bankruptcy to keep books and to keep them well. The act does not require anybody to keep books nor fix any standard of bookkeeping. All it does in the premises is to provide that a discharge shall not be granted a bankrupt who has destroyed, concealed or failed to keep books with intent thereby to conceal his financial condition. The intent must be shown to the satisfaction of the court to bring the case within the statute, and it would be a harsh and unjust construction to say that the intent must, as matter of law, be presumed from mere bad bookkeeping or from a mere failure to keep books. If that were the law probably nine out of every ten country people and a very large proportion of plain people everywhere would be refused discharges if applied for, inasmuch as few of them can keep books which are intelligible to anybody except themselves. It is a matter of common knowledge that a large proportion of the people do not keep books at all—for example, farmers, clerks, mechanics, and wage earners generally, but this is either because they see no need for it or else cannot do it satisfactorily. The ways of the people in the country are very different from those of great business concerns in cities and towns of the larger size. At all events, bad intent must be made to appear to the satisfaction of the court, and the testimony in this case does not, in my judgment, meet this requirement. * * * I have frequently had similar questions under consideration, and, among others, in the case of *J. D. Stark, Bankrupt*, in 1905. In an opinion then delivered this language was used: 'It certainly is true that the bankrupt's idea of bookkeeping was about as crude as could possibly be imagined, and one which, while consistent with his habits and notions of business, was about as far as possible from what are correct or tolerable business methods. * * * While common sense and good judgment require a merchant to keep books, yet if he does not do so and fails in business, he is not denied a discharge for merely being a poor or even the poorest possible bookkeeper. Nor would such a provision of law be wise, for the greatest rascals may sometimes have the most perfectly kept books, so far at least as their face appearance may indicate. Under the Bankruptcy Act, therefore, the intent with which bad bookkeeping is done is the material thing. If that intent exist it is immaterial whether, superficially considered, the books are ill-kept or well-kept.'"

It has been held, however, that the concealment intended need not be concealment with intent to defraud creditors.

In *re Hanna*, 21 A. B. R. 843, 168 Fed. 238 (C. C. A. N. Y.): "It makes no difference that he did so for the purpose of preventing his confidential manager from knowing his financial condition and not for the purpose of defrauding his creditors. It remains true that he intentionally kept his books so as to conceal his financial condition, and he is therefore by the express terms of the act, not entitled to a discharge."

Page 1534. It has been held that where the destruction was conceded, but was claimed to have been done rather for the purpose of destroying evidence of criminal transactions than of defrauding creditors, it was none the less for the purpose of concealing his true financial condition.

In *re Wolf*, 19 A. B. R. 70, 156 Fed. 543 (D. C. N. Y.): "Perhaps the first impression which the language 'with intent to conceal his financial condition' gives is an intent to conceal such condition from his creditors, but the act does not say so. In this case, the bankrupt admits that he destroyed his books with intent to conceal the records of his business, which, if exhibited, would show that he had been doing business in violation of a criminal statute; and I think that he therefore destroyed his books with intent to conceal his financial condition. It would be a dangerous precedent to establish in the bankrupt law that a man who wilfully destroyed his books with the intent thereby to conceal evidence of a crime, and defeat a criminal prosecution, could thereby defeat objections to his discharge. Such an act is a wilful destruction of the evidence which the Bankrupt Act contemplates should be preserved for the benefit of creditors. It is an act which, in fact, conceals his financial condition from his creditors. I think that such an act, if actually done with the intent of concealing a crime, and not of injuring the creditors, comes within the language of the act. If such a defense should be held good, it might be falsely set up. In my opinion, upon the whole, the specification of objection to the discharge was proved, and the discharge should be refused."

§ 2546. Intent Inferable from Circumstances.

Page 1534. Or where the bankrupt is a man of business experience but omits debts due to relatives.

In *re Koelle*, 22 A. B. R. 515, 171 Fed. 257 (D. C. Pa.): "It is conceded that there are no entries concerning these loans of money from relatives and friends, and it is therefore beyond dispute that the bankrupt's financial condition could not have been ascertained by an inspection of his books. The sole remaining question is, what was his intent in failing to make the proper entries? The referee has found that the intent was to conceal his financial condition, and after a review of the testimony I agree with this finding. The bankrupt's business experience had been prolonged and reasonably extensive; he is a man of intelligence, as his testimony sufficiently indicates; and it is not credible that he could have failed to know that his books omitted material items of his indebtedness, and were therefore defective."

But where the bankrupt is a mere employee no such presumption would arise.

Impliedly, In *re McCrea*, 20 A. B. R. 412, 161 Fed. 246 (C. C. A. N. Y.).

Stupidity and ignorance of the bankrupt tend to negative fraudulent intent; yet, though he be ignorant yet he may be of sufficient intelligence, and his conduct on the stand may be such as to neutralize the excuse.

In re Goldich, 21 A. B. R. 249, 164 Fed. 82 (D. C. Pa.).

Acts of a similar nature are admissible in proof of the bankrupt's intent.

In re Currie, 23 A. B. R. 539 (Ref. Mich.).

The bankrupt must have presumed to have intended the natural and probable consequences of his act.

In re Currie, 23 A. B. R. 539 (Ref. Mich.).

§ 2549. No Special Manner of Keeping Books Requisite.

Page 1535, note 150. 9. Merchant ignorant but still with sufficient intelligence to know better, keeping defective books but feigning forgetfulness, In re Goldich, 21 A. B. R. 249, 164 Fed. 82 (D. C. Pa.).

10. Partnership books, from which a statement was made by the bookkeeper and furnished to a mercantile agency as a basis for credit, and which contain no entries of loans, particularly of loan from relatives of the partners, etc., *Pomerantz v. Hopkins*, 21 A. B. R. 857, 168 Fed. 444 (D. C. Pa.).

11. Partnership, purchasing a lot of goods not of kind dealt in, no entry thereof being made on the books, nor any reasonable excuse being offered for not making such entry, intent to conceal financial condition presumed, In re Schachter, 22 A. B. R. 389, 170 Fed. 683 (D. C. N. Y.).

12. Debts to relatives omitted because bankrupt thought they would not be pressed. In re Koelle, 22 A. B. R. 515, 171 Fed. 257 (D. C. Pa.).

§ 2549. No Special Manner of Keeping Books Requisite.

Page 1536, note 150. 18. Where the superintendent of a mine is adjudicated a bankrupt, his failure to keep the books of account, not required by his personal business, indicates no fraudulent intent for which he may be denied his discharge. In re McCrea, 20 A. B. R. 412, 161 Fed. 246 (C. C. A. N. Y.).

19. Throwing blame of insufficient bookkeeping on bookkeeper, In re Currie, 23 A. B. R. 539 (Ref. Mich.).

§ 2549½. Omitting Debts to Relatives.

It is no excuse for the omission from account books of debts to relatives that the bankrupt thought they would never be pressed. They either were or were not debts and it is precisely those debts which are sure to be presented in case of the debtor's insolvency that are of the most moment to the creditor.

In re Pomerantz & Hopkins, 21 A. B. R. 857, 168 Fed. 444 (D. C. Pa.); compare, In re Greenberg, 8 A. B. R. 94, 114 Fed. 773 (D. C. Conn.); compare, In re Kamsler, 2 N. B. N. & R. 97 (Ref. N. Y.); compare, In re Feldstein, 8 A. B. R. 160, 115 Fed. 259 (C. C. A. N. Y.).

Page 1536. In re Koelle, 22 A. B. R. 515, 171 Fed. 257 (D. C. Pa.): "His only explanation is that 'I never counted those notes; I thought that because I knew they would not push me, you know, and I thought it was not necessary for these people to know I had money from my wife.' Prima facie at least, a man must be held to intend the natural and probable consequence of his acts, and the inevitable consequence of this omission was to conceal his financial condition. The presumption of such an intent may not be conclusive, but it has not been met by the testimony that was offered before the referee."

§ 2550. Concealment or Destruction of Books, etc., Which Might Have Aided in Ascertainment of Financial Condition.

If the bankrupt, fraudulently and knowingly, has concealed books of account, etc.

Page 1537, note 151. Instances held not to be such concealment of books as to bar discharge. 3. Putting account books in barrel in cellar, on selling out business. In re Murray, 20 A. B. R. 700, 162 Fed. 983 (D. C. Conn.).

Or have destroyed them.

Page 1537, note 152. 4. Putting account books in barrel in cellar on selling out business, In re Murray, 20 A. B. R. 700, 162 Fed. 983 (D. C. Conn.).

§ 2554½. Effect of Failure to Record until within Four Months.

Where the transaction as between the parties took place more than four months before, but the instrument of transfer was not recorded until within the four months, the question arises whether this particular bar to discharge [transfer, removal or concealment within four months] exists.

Compare, In re McKane, 19 A. B. R. 103, 152 Fed. 733 (D. C. N. Y.).

2555½. "Continuing Concealments."

Concealment being essentially a continuing act, it is not necessary, where concealment within four months is urged as bar to discharge, that the initial act of concealment shall have taken place within the four months; it is sufficient if the concealment began before the four months period and continued until within that period.

In re James, 23 A. B. R. 703, 175 Fed. 894 (D. C. N. C.): "It is clear that on October 25, 1907, the petitioner, being insolvent, and in view of committing an act of bankruptcy, fraudulently withdrew from the reach of his creditors a portion of his property, in a manner clearly within the prohibitive language of the law. It is equally clear that he continued to conceal, and thereby continuously withdrew from his creditors, the property until January 5, 1908, and then only disclosed its concealment because it was discovered by another person. He therefore 'concealed' the property at all times up to the day of its discovery. It was by his act kept—continued—'concealed,' thus coming within the language of the act in point of time, four months next preceding the date of the filing of the petition. It may be 'hard lines' on the petitioner to strip him of his property and leave him bound for

the amount remaining due to his creditors; but by his own conduct he has subjected himself to the penalty." This case quoted further at § 2498.

§ 2556. Obtaining Property on Credit on False Statement, in Writing, as Bar to Discharge.

Page 1540, note 158. See, in addition, *In re Darevski*, 22 A. B. R. 571, 171 Fed. 288 (D. C. Pa.), reversed on other grounds, sub nom. *Hardie v. Dry Goods Co.*, 21 A. B. R. 457, 165 Fed. 588 (C. C. A.).

Releasing the Bankrupt from Claims Founded on False Statement Estopping Creditor from Opposing Discharge.—It has been held in one case that where a creditor, for valuable consideration, released a debtor from all claims raised out of a false statement he had made to the creditor, such creditor thereupon surrendering the statements, the creditor will be estopped from opposing the bankrupt's discharge on that ground. *In re Russell*, 23 A. B. R. 850, 176 Fed. 253 (C. C. A. N. Y.). But, if such surrender and passing of consideration were made in withholding from opposition to discharge, the whole transaction might be illegal under § 29b, if the other facts warranted.

Page 1540. *Firestone v. Harvey*, 23 A. B. R. 468, 174 Fed. 574 (C. C. A. Ohio): "This ground for denying a discharge was evidently leveled particularly at the practice of making false statements of one's financial condition by a buyer or borrower for the purpose of obtaining from the person to whom such false statement is made, in writing, the articles or money desired 'on credit.' The false statement in writing which is enough to deny a discharge implies a statement knowingly false, or made recklessly, without an honest belief in its truth, and with a purpose to mislead or deceive, and thereby obtain from the person to whom it is made property upon a credit."

§ 2557. New Ground, Only Available in Bankruptcy Instituted Since Amendment of 1903.

Page 1540, note 159. *Firestone v. Harvey*, 23 A. B. R. 468, 174 Fed. 574 (C. C. A. Ohio).

Page 1540, note 160. *Peck v. Lowenbein*, 24 A. B. R. 138, 178 Fed. 178 (C. C. A. N. Car.).

§ 2559. Whether Other than Particular Creditor Defrauded May Oppose on This Ground.

Page 1541. However, the basis of this bar may be that the moral turpitude of such conduct demonstrates the bankrupt's general unfitness for commercial intercourse.

Compare, *Gilpin v. Natl. Bank*, 21 A. B. R. 429, 165 Fed. 607 (C. C. A. Pa.): "But it is not without significance to inquire why an incorrect statement, innocently made to one creditor, should bar the discharge of the bankrupt as to all his other debts, whatever its effect as to the debt of that particular creditor. In *In re Carton & Co.*, supra, the court says: 'It is the act of issuing a materially false statement and the fraudulent intent of the man who issues it, that the statute seeks to punish by refusing a discharge. It should not depend upon the whim or good nature of any particular creditor to whom the false statement was made, whether the offending bankrupt should be given or refused his discharge. Any party in interest who chooses to bring the wrongful act to the attention of the court, and proves that it

was wrong within the meaning of the statute, is entitled so to do. We fully concur in the meaning thus attributed to the clause in question. The bankrupt who has made to a creditor, for the purpose of obtaining credit, a false statement—that is, one intentionally and knowingly untrue, is unworthy of the privilege of a discharge under the act, and the court will act upon information brought to it of such an act by any party in interest. It will be at once conceded on all hands, that such a bankrupt is unworthy, and should not receive the favor accorded by the law to the honest but unfortunate debtor."

Page 1541, note 164. See, in addition, *In re Shaffer*, 22 A. B. R. 147, 169 Fed. 724 (D. C. W. Va.).

§ 2560. First Element "Materially False Statement in Writing."

Page 1542, note 165. Instance, statement omitting loans by relatives and friends although aggregate of such loans would not materially have curtailed the bankrupt's line of credit, *In re Brener*, 20 A. B. R. 644 (Ref. N. Y.).

Instance, false statements not in writing, *In re Lewis*, 20 A. B. R. 711, 163 Fed. 137 (D. C. N. Y.).

Instance held not material, *In re Seligman*, 20 A. B. R. 774, 163 Fed. 549 (D. C. N. Y.).

Page 1542. "False," in this connection means more than merely "untrue" or "incorrect," it implies guilty knowledge and intentional deceit.

In re Kyte, 23 A. B. R. 414, 174 Fed. 867 (D. C. Pa.); *Hardie v. Dry Goods Co.*, 21 A. B. R. 457, 165 Fed. 588 (C. C. A. Tex.); *In re Collins*, 19 A. B. R. 688, 157 Fed. 120 (D. C. Ark.); *In re Shaffer*, 22 A. B. R. 147, 169 Fed. 724 (D. C. W. Va.).

Gilpin v. National Bank, 21 A. B. R. 429, 165 Fed. 607 (C. C. A. Pa., reversing *In re Gilpin*, 20 A. B. R. 374): "We fail to perceive any sufficient ground for denying to * * * the general characteristic of personal misconduct that attaches to all the others, * * *. It would indeed be a harsh construction, and at variance with the general policy of the Bankruptcy Act, that would make the conduct described in clause 3 an exception in this respect to the whole category of acts which may severally deprive the bankrupt of his privilege of discharge. * * * But apart from the incongruity imported into this section of the Bankruptcy Act by such construction, it seems to us clear that the plain language of this third clause of § 14b requires that the written statement made by the bankrupt, for the purpose of obtaining credit, etc., should be knowingly and intentionally untrue, in order to constitute a bar to the discharge of the bankrupt. In other words, 'false statement' denotes a guilty scienter on the part of the bankrupt. This primary and ordinary meaning of the word 'false' cannot be ignored. It is the primary meaning given in the ordinary lexicons of the English language. Webster gives its primary meaning: 'Uttering falsehood; unvaracious; given to deceit; dishonest.' As an adjective, it is correlative with the noun 'falsehood.' To charge a person with making a false statement, is equivalent to charging him with uttering a falsehood, and imputes moral delinquency to the person so charged. It is true that the word may have a secondary meaning in certain collocations, and be merely equivalent to 'untrue' or 'incorrect.' But this is not the ordinary or usual signification attached to the word. To charge a

person with making false entries in books of account, means something more than that incorrect or untrue entries have been made, and it has been so held by the courts in the consideration of offenses of that character. The last edition of Bouvier's Law Dictionary says of the word 'false,' that when 'applied to the intentional act of a responsible being, it implies a purpose to deceive. In Black's Law Dictionary, under the title 'false,' it is said: 'In law, this word means something more than untrue; it means something designedly untrue and deceitful, and implies an intention to perpetrate some treachery or fraud.' In a recent and well accepted publication called 'Words and Phrases,' the word 'false' is thus defined: 'False means that which is not true, coupled with a lying intent.' *Wood v. The State*, 48 Ga. 192, 297, 15 Am. Rep. 664. 'False' in jurisprudence usually imports something more than the vernacular sense of 'erroneous' or 'untrue.' This and other citations in the petitioner's brief, establish a jurisprudential meaning to the word 'false' at variance with that adopted by the learned judge of the court below. No good reason has been suggested why Congress should have made such an exception to the character of the acts enumerated, as severally barring the discharge of the bankrupt, by using the word 'false' in some other than its primary and obvious meaning."

The false statement in writing which is enough to deny a discharge implies a statement knowingly false or made recklessly, without an honest belief in its truth and with a purpose to mislead or deceive and thereby to obtain from the person to whom it was made, property upon credit.

Firestone v. Harvey, 23 A. B. R. 468, 174 Fed. 574 (C. C. A. Ohio), quoted at § 2557. But compare, *In re Terens*, 22 A. B. R. 895, 172 Fed. 938 (D. C. Wis.): "The clause of the Bankruptcy Act that we are considering does not require that the false property statement shall have been made with any definite intention to defraud, or with any specific intent. *In re Gilpin*, 20 A. B. R. 374, 160 Fed. 171"

Gilpin v. Merchants' National Bank, 21 A. B. R. 429, 165 Fed. 607 (C. C. A.), quoted this same section.

Peck v. Lowenbein, 24 A. B. R. 138, 178 Fed. 178 (C. C. A. N. Car.): "It is the evident purpose of the Bankruptcy Act to protect the unfortunate class of debtors who are unable to pay their debts, by giving them a discharge, thus affording them an opportunity to engage in business again, while, on the other hand, it is manifestly intended to deny a discharge to those whose conduct has been such as to show that they obtained credit by false statements calculated and intended to deceive and thereby defraud their creditors. Construing the act with these ends in view, it would be manifestly unjust to deny a discharge to a debtor when it appears, as it does in this instance, that the statement which he made was not actuated by any fraudulent purpose."

§ 2562. Second Element: Must Be by Bankrupt.

It is an essential element of this bar that the statement must have been made by the bankrupt or by his authority.

In re Shaffer, 22 A. B. R. 147, 169 Fed. 724 (D. C. W. Va.).

§ 2563. But if Made by Agent with Bankrupt's Authority, Sufficient.

A statement made by an agent, with the bankrupt's authority, is sufficient; provided it be known to the bankrupt to be false.

Page 1542, note 167. *Gilpin v. National Bank*, 21 A. B. R. 429, 165 Fed. 607 (C. C. A. Pa., reversing, *In re Gilpin*, 20 A. B. R. 374, 160 Fed. 171), quoted at § 2560; apparently, *In re Terens*, 22 A. B. R. 895, 172 Fed. 938 (D. C. Wis.); Impliedly, obiter, *Frank v. Michigan Paper Co.*, 24 A. B. R. 261, 179 Fed. 776 (C. C. A. Md.), quoted post, § 2563.

Or the bankrupt be guilty of such recklessness and carelessness in regard thereto as to raise the presumption that he connived at the false statement.

Page 1542, note 168. See ante, §§ 2484, 2485.

Page 1543, note 169. See, in addition, *Hardie v. Dry Goods Co.*, 21 A. B. R. 457, 165 Fed. 588 (C. C. A. Tex., reversing *In re Hardie*, 16 A. B. R. 313, 143 Fed. 607). Compare, *Peck v. Lowenbein*, 24 A. B. R. 138, 178 Fed. 178 (C. C. A. N. Car.). See ante, § 2484.

Page 1543. But, clearly, he will be barred of his discharge, if he have such knowledge.

In re Terens, 22 A. B. R. 895, 172 Fed. 938 (D. C. Wis.).

And it has been held that one partner will not be barred of his discharge by false statements made by his co-partner of which he was ignorant and which were not made by his authority.

Frank v. Michigan Paper Co., 24 A. B. R. 261, 179 Fed. 776 (C. C. A. Md.): "Under the existing statute the question of what will bar a discharge has now been passed upon by at least three different Circuit Courts of Appeals, and all of these decisions are in substantial harmony in holding that the bar to a discharge by reason of a false statement in writing, is confined to such person or persons as actually made such statement with the intention to deceive, and to the partnership entity of which such person was a member. In *Hardie v. Swafford Bros. Dry Goods Co.*, * * * in a case in every way similar to the one at bar, held that a materially false statement in writing made by a partner in the ordinary course of business of the partnership for the purpose of obtaining goods on credit, and by means of which they were so obtained by the firm, is not ground for refusing a discharge in bankruptcy under Bankruptcy Act, July 1, 1898. It must be manifest that the intent to deceive can never be imputed to one who not only takes no part in making the written statement, but, as in the case at bar, knows nothing of it. We believe that the view taken by the Circuit Court of Appeals for the Third Circuit of the meaning of the word 'false' as used in this section, is the correct one, and the decision above referred to is in entire harmony with the *Lowenbein* case decided by this court. Taking the view that the right to a discharge is determined by the good faith of the bankrupt, and that the effect of such discharge, is to be determined in accordance with a proper recognition of his civil liability for the acts of partners and other agents, we come to the conclusion that the court below erred in refusing to grant a discharge to the bankrupt."

§ 2564. Third Element: Must Be Made to Person from Whom Property Obtained.

Page 1543, note 170. See, in addition, *In re Napier*, 23 A. B. R. 560 (Spec. Master, Ky., affirmed by D. C.).

It is a further element, necessary to complete this bar to discharge, that the statement shall have been made to the person from whom the property was obtained; or to the agent of such person.

Bankruptcy Act as amended 1910, § 14 (b) (3): "Or, 3, obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person."

§ 2565. Whether, if Made to Mercantile Agencies, or in Answer to General Inquiries, a Bar.

False general statements to mercantile agencies, or in answer to general inquiries, will be insufficient to bar discharge.

In re Russell, 23 A. B. R. 850, 176 Fed. 253 (C. C. A. N. Y.): "The signed statement of January 26th, 1907, was made by Russell to the Bradstreet Company was filed with it and never delivered to the Trust Company, or apparently seen by them before the trial. It is contended, therefore, that this statement is not within the language of the agreement. In considering this suggestion it will be useful to refer to the statute. * * * This provision was incorporated by Amendment in 1903. Its language is precise and evidently chosen to restrict the scope of the provision, so that no loose construction might extend it beyond what Congress intended to enact when it added an objection, the like of which appears in no previous bankruptcy law. This is apparent not only from the choice of words but also from the history of the amendment; as it left the house it contained the clause 'or of being communicated to the trade,' that clause was struck out in the Senate and the House concurred in thus restricting it. * * * It would seem from this that the ordinary statement of financial condition made to a mercantile agency for general circulation among its enquiring subscribers would not be within the statute."

Obiter, *In re Carton & Co.*, 17 A. B. R. 343, 148 Fed. 63 (D. C. N. Y.): "The usual commercial agency report obtained by an agency in order that it may give the new merchant a 'rating' and for general distribution among its customers, cannot be made the basis of successful action by an objecting creditor. * * * But when an agency applies to a merchant for a specially signed report on his condition he must know that such report is for the special purpose of enabling those who vend him goods to decide upon his financial responsibility."

Obiter, *In re Dresser & Co.*, 13 A. B. R. 616, 144 Fed. 318 (Ref. N. Y., affirmed by D. C.): "If the Ray bill had become a law as proposed, the objection of the creditors herein would unquestionably be sustained. It would be sufficient in that event, to show that Dresser & Co. obtained property on credit from some person, and the materially false statement in writing need only to have been made by them to any person for the purpose of obtaining credit, or to any person for the purpose of being communicated to the trade,

or to the person from whom they obtained credit. * * * It will be observed that false statements made to mercantile agencies, or in answer to general inquiries, or for general circulation, are eliminated from among the grounds of objection to discharge."

On the other hand it has been ruled that a false written statement to a commercial agency, made with intent to procure credit, may be sufficient to bar discharge; that the bankrupt need not have intended to deceive any particular person, but that it is sufficient if he intended to deceive any person of a group, whether the person or group were known to him or not.

Compare, to similar effect, *In re Terens*, 22 A. B. R. 895, 172 Fed. 938 (D. C. Wis.), quoted at § 2560, note.

Page 1543. *In re Kyte*, 23 A. B. R. 414, 174 Fed. 867 (D. C. Pa.): "The statement, as made, is thus shown to have been untrue, and the purpose of it being to secure commercial credit, if it was intentionally so and property was in fact obtained on the strength of it, a case is made out within the terms of the statute, and the bankrupt cannot expect a discharge in the face of it. It is of no consequence in this connection that the statement was made to Dun & Company and not to a creditor. The object of the bankrupt was to secure a favorable rating in the reports of the commercial agency, and in that way to reach its subscribers and customers. This he very well understood and acted upon, as is shown by his letters to various parties. And in so doing it was the same in fact, as in legal effect, as if he had made the statement direct to the parties who relied on it. * * * He sent it in to Dun & Company, as the opening sentence shows, to obviate unfavorable reports with regard to his financial standing, which had previously emanated from this agency, and thus took upon himself the consequences."

However, these latter cases, on their facts, will appear either to have been decided in accordance with the leading proposition, or else to have had special circumstances which took them out of the ordinary rule.

These cases distinguished in *In re Russell*, 23 A. B. R. 850, 176 Fed. 253 (C. C. A. N. Y.), quoted *supra*.

In passing the Amendment of 1910, Congress refused to make false general statements to mercantile agencies ground for refusing discharge. The amendment as it originally came from the House of Representatives, read as follows, to-wit:

"Or, (3) obtained money or property on credit upon a materially false statement in writing, made by him to any person for the purpose of obtaining credit or of being communicated to the trade or to the person of whom he obtained such property on credit."

The Senate, however, following much the course it pursued at the time the similar Amendment of 1903 was up for passage, refused to concur in this amendment and substituted the present wording, in which the House finally concurred. The refusal of the senate was based ex-

pressly upon the ground that it would be too harsh to make ground of opposition to discharge mere general statements to a mercantile agency, even though falsely made; and the present wording was adopted as emphasizing this attitude. It is a mistake, however, to consider that the present amendment would protect a bankrupt in making false statements to a mercantile agency, in any and all events; for, where a creditor has specifically asked a mercantile agency to procure a statement from the prospective debtor, as a basis for credit, undoubtedly a false statement made to such mercantile agency by the debtor, whilst not made by him to the creditor himself would, nevertheless, be made to "his representative" and be within the prohibition of the law.

Report No. 691 of Senate Judiciary Committee, 61st Congress: "The third change made by the House bill, that which in effect would make the obtaining of property on false written statements to mercantile agencies ground of opposition to discharge, without the creditor whose property has thus been obtained first asking such mercantile agencies to procure him the written statement, is not concurred in by your committee. Any tendency to make the Bankrupt Act unduly harsh is to be avoided. It is a sufficient ground of opposition to discharge that the bankrupt has obtained property from a creditor by a materially false statement in writing where that statement was specifically asked for by the creditor or by creditor's representative. General statements to mercantile agencies, not specifically asked for by prospective creditors, ought not to be ground of opposition to discharge; it makes the provision too harsh, in the estimation of your committee. Merchants are likely to make careless general statements where they would be very careful were they making statements to creditors from whom they were at the time asking credit. Your committee propose a substitute for the House amendment of this ground of opposition to discharge, which is thought to go as far as is proper."

§ 2566. Fourth Element: Property Must Be Obtained on Credit.

Page 1543, note 173. See, in addition, *Firestone v. Harvey*, 23 A. B. R. 468, 174 Fed. 574 (C. C. A. Ohio), quoted at § 2556.

Page 1543. "Property" includes "money" borrowed on credit.

In re Gilpin, 20 A. B. R. 374, 160 Fed. 171 (D. C. Pa.); In re Pfaffinger, 19 A. B. R. 309, 154 Fed. 328 (C. C. A. Ky.).

§ 2567. Fifth Element: Bankrupt Must Intend to Obtain Property Thereby.

It is also a necessary element to complete the bar that the bankrupt shall have intended to obtain property thereby.

In re Seligman, 20 A. B. R. 77, 163 Fed. 549 (D. C. N. Y.); impliedly, In re Kyte, 23 A. B. R. 414, 174 Fed. 867 (D. C. Pa.).

Firestone v. Harvey, 23 A. B. R. 468, 174 Fed. 574 (C. C. A. Ohio): "This ground for denying a discharge was evidently leveled particularly at the practice of making false statements of one's financial condition by a buyer

or borrower for the purpose of obtaining from the person to whom such false statement is made, in writing, the articles or money desired 'on credit.'"

Page 1544, note 175. Also, Bankr. Act, as amended in 1910, § 14 (b) (3), quoted at § 2564.

§ 2569. Sixth Element: False Statement Must Be Relied on.

Page 1544, note 176. See, in addition, *In re Shaffer*, 22 A. B. R. 147, 169 Fed. 724 (D. C. W. Va.).

§ 2570. "Continuing Representations."

Page 1544, note 177. Instance held continuing, *In re Kyte*, 23 A. B. R. 414, 174 Fed. 867 (D. C. Pa.).

Page 1544. By "continuing representations," however, is not meant representations that the same condition is continuing, but representations continuing, as if reiterated, that a certain previous condition did exist at the previous time.

It is not necessary that the representations be made within the four months period preceding the bankruptcy.

In re Terens, 22 A. B. R. 895, 172 Fed. 938 (D. C. Wis.): "It is contended by the bankrupt that, as the alleged false property statement was not made within the four months period, it therefore furnishes no just ground for objection. This doctrine seems to have been laid down by Mr. Brandenburg in his work on Bankruptcy (§ 370), but no precedent is cited to sustain the text. It will be observed that Congress, in framing the third subdivision of § 14b, has not prescribed any limitation of time. This supposed omission cannot be attributed to oversight, because in the fourth subdivision of the same section such limitation is expressly prescribed. Of course, the court cannot interpolate a condition which Congress saw fit to omit. By a careful reading of the text, however, it would appear that the bar to the discharge is not the making of such false statement, but the obtaining of property on credit based upon such written statement."

Nor is it requisite that the property shall have been obtained within the four months period.

In re Terens, 22 A. B. R. 895, 172 Fed. 938 (D. C. Wis.), is not contra.

§ 2577. Whether "Within Six Years" Measures Time between First and Second Discharge, or between First Discharge and Filing of Second Petition in Bankruptcy.

The expression "within six years," it has been held, measures the time between a first and second discharge, and not between a first discharge and the filing of a second petition in bankruptcy.

Page 1548, note 183. See, in addition, *In re Smith*, 19 A. B. R. 63, 155 Fed. 688 (D. C. N. Y.).

Yet it would seem, on principle, that the rule should be that it measures the time between the granting of the first discharge and the filing of the application for the second discharge; otherwise a bankrupt, by merely delaying the final hearing upon his second application, might overcome that which was a valid bar at the time creditors were required to file specifications of their grounds for barring the discharge. Moreover, the findings of courts ordinarily should revert to the conditions as existing at the time of the instituting of the particular application in controversy.

§ 2579. Jurisdiction to Administer Estate Unimpaired Though Discharge Barred because of Previous Discharge within Six Years.

Page 1548. Similarly, an adjudication will not be vacated and a voluntary petition be dismissed, upon application of the bankrupt, who discovers his discharge is barred by a previous discharge within six years, if creditors object.

In re Smith, 19 A. B. R. 63, 155 Fed. 688 (D. C. N. Y.). Also, see ante, §§ 2437, 2441, 2416.

§ 2581. Refusal to Answer Incriminating Questions.

Page 1549. In re Weinreb, 18 A. B. R. 387, 153 Fed. 363 (C. C. A. N. Y.): "The question related to a payment of \$18,200 in cash which the bankrupts alleged they had made to a person to whom they claim that they were indebted on open account. Manifestly it was material. It was put to Weinreb on examination before the referee on January 27, 1904. No objection was made to it, but he refused to answer, on the ground that it would tend to degrade and incriminate him. The same question was put to Merker on February 17, 1904, under the same circumstances and with the same result. On March 15th each bankrupt was again asked the same question. Objection was interposed on the ground that it was 'incompetent, irrelevant, and immaterial,' but the objection was overruled by the referee and the question allowed. Each bankrupt thereupon refused to answer, on the ground that it might tend to incriminate him. On March 14th specifications in opposition to discharge were filed; one of such specifications being the refusal to answer this question. Thereafter at a hearing before the referee on April 5, 1904, without notice to the objecting creditors, and in the absence of their counsel, the bankrupts signified their willingness to answer said question and gave the name of the person inquired about. Under these circumstances, we concur with the district judge in the conclusion that their original refusal was sufficient ground for denying discharge."

No formal order by the referee to answer the question is requisite; the refusal to answer may be the bankrupt's privilege, but he forfeits his discharge thereby. If the question is objected to on other ground than its tendency to incriminate, and the objection is not well taken and is

overruled, and the bankrupt then refuses because of its tendency to incriminate him, nothing further seems to be necessary.

In *re Weinreb*, 18 A. B. R. 387, 153 Fed. 363 (C. C. A. N. Y.): "We do not assent to the appellant's contention that any more formal action than the overruling of objections (if any are made) and the allowance of the question is required from the referee. Upon hearing on application for discharge, the bankrupt has the opportunity to argue before the judge that the question put to him was not material, and his rights are thus as fully protected as if the referee should certify the objections to the question to the court in the first instance."

§ 2585. But Lack of Verification May Be Waived.

Page 1551, note 194. See, in addition, *In re Randall*, 20 A. B. R. 305, 159 Fed. 298 (D. C. Pa.).

§ 2586. Or Be Supplied by Amendment.

Page 1551, note 196. Inferentially, *Armstrong v. Fernandez*, 19 A. B. R. 746, 208 U. S. 324; *In re Hanna*, 21 A. B. R. 843, 168 Fed. 238 (C. C. A. N. Y.).

Page 1551. The power of the bankruptcy court over amendments is undoubted and rests in the sound discretion of the court.

Armstrong v. Fernandez, 19 A. B. R. 746, 208 U. S. 324.

Even where one of the objecting creditors has failed to sign or verify at all, the omission may be supplied by amendment.

In re Hanna, 21 A. B. R. 843, 168 Fed. 238 (C. C. A. N. Y.).

§ 2590. Verification by Attorneys Permitted.

Page 1551, note 202. See, in addition, *In re Randall*, 20 A. B. R. 305, 159 Fed. 298 (D. C. Pa.).

§ 2591. Forms of Verification.

Page 1552. But the precise wording need not be followed.

In re Nathanson, 19 A. B. R. 56, 155 Fed. 645 (D. C. N. Y.).

§ 2592. Whether Verification Must Be Positive or May Be on Information and Belief.

Page 1552, note 204. Compare, *In re Nathanson*, 19 A. B. R. 56, 155 Fed. 645 (D. C. N. Y.).

§ 2594. Specifications to Show Capacity of Objecting Creditor.

Page 1552. But it has been held sufficient to allege "interested as a creditor."

In re Nathanson, 19 A. B. R. 56, 155 Fed. 645 (D. C. N. Y.).

§ 2601. All Grounds Need Not Be Sustained.

And all the grounds need not be sustained. The discharge will be refused if any one is sustained.

Seigel v. Cartel, 21 A. B. R. 140, 164 Fed. 691 (C. C. A. Iowa).

§ 2603. Must Not Be Indefinite nor General nor Argumentative, but Certain and Positive.

Page 1556, note 219. See, in addition, In re Randall, 20 A. B. R. 305, 159 Fed. 298 (D. C. Pa.); In re McCarthy, 22 A. B. R. 499, 170 Fed. 859 (D. C. N. Y.), quoted at § 2610; impliedly, In re Wittenberg, 20 A. B. R. 398, 160 Fed. 991 (D. C. Pa.).

Page 1556. In re Remmers, 23 A. B. R. 78, 173 Fed. 484 (C. C. A. Mo.). "The rule is, the facts relied on to prevent a discharge must be pleaded with sufficient certainty of detail as to apprise the bankrupt of the charge he has to meet and to enable the court to understand the issue to be examined and determined by it."

§ 2606. Evidence Not to Be Pleaded.

Page 1558. In re Nathanson, 19 A. B. R. 56, 155 Fed. 645 (D. C. N. Y.): " * * * The decision of Judge Coxe in the Matter of Godale, 6 A. B. R. 493, 109 Fed. 783, that 'the facts relied on to prove falsity' should be stated, does not mean that evidence must be set forth."

Page 1558. But, of course, if the ultimate facts are sufficiently pleaded, it will not detract from the validity of the specifications that evidential facts also are added.

In re Remmers, 23 A. B. R. 78, 173 Fed. 484 (C. C. A. Mo.).

§ 2608. Thus, Allegations in Mere Words of Statute Sufficient Only Where Failure to Keep Books, Ground Charged—Elsewhere Insufficient.

Page 1558, note 230. See, in addition, In re Nathanson, 19 A. B. R. 56, 155 Fed. 645 (D. C. N. Y.).

Page 1559. Obiter, In re Lewis, 20 A. B. R. 711, 163 Fed. 137 (D. C. N. Y.): "Objection to discharge is made upon two grounds: First, that the bankrupt is engaged in business and rents a home, but has failed to keep books of account or records from which his true condition might be ascertained, 'with intent to conceal his true financial condition, and in contemplation of bankruptcy.' This form of objection follows the language of the statute, and may be criticised, in that it is impossible to tell whether an utter failure to keep books is intended to be charged, or whether the books that were kept are insufficient to show the true condition of the bankrupt's property. Under ordinary circumstances the objecting creditor should make his objections more specific; but, as the record in the case shows the bankrupt to have testified that he kept no books of account, further amendment is unnecessary, and the objection will be held sufficient to be referred."

Page 1559. In re Nathanson, 19 A. B. R. 56, 155 Fed. 645 (D. C. N. Y.): "The specifications are too indefinite, unless the creditor intends to charge

that there were no books, and if so, that should be alleged as the truth and facts of the situation. As to specification 4, likewise, the creditor should specify that the bankrupt did keep a ledger, if that is the issue to be raised. Specification 5, the creditor should likewise state that the bankrupt did keep a book of expense, if that is the fact upon which the charge of falsity is based. Specification 6, the specification should state that the bankrupt kept not even one book, if that is the particular in which the testimony is alleged to be untrue."

Page 1559, note 232. *Obiter*, In re Remmers, 23 A. B. R. 78, 173 Fed. 484 (C. C. A. Mo.).

§ 2610. Defective Specifications; Rights and Remedies.

Page 1561. In re McCarthy, 22 A. B. R. 499, 170 Fed. 859 (D. C. N. Y.): "There is no express rule in this district by which defects in the form of specifications are waived by the bankrupt's failure to except or demur to them. Still, it is proper in most instances that the special master should disregard all defects in form to which the bankrupt has not excepted. If the specifications in the case at bar had stated anything which, by any construction whatever, would have come within the statute, I should have held that a failure to except, waived any failure of form; but after reading them with a great deal of care, and construing them in the most benign sense possible, I cannot really understand which of the statutory grounds, if any, the creditor means to assert. * * * Therefore there was nothing before the learned referee, and the specifications were, in fact, a mere nullity. I suppose there must be a degree of meaningless verbiage which the bankrupt can afford to disregard altogether, and I do not think that by failing to except he must be ready before the referee to rebut any proof which the creditor may be then ready to adduce under the statute. The specifications in this case seem to me to be meaningless verbiage, and I think they have no weight in any stage of the proceeding."

Page 1562, note 239. *Inferentially*, In re McCarthy, 22 A. B. R. 499, 170 Fed. 859 (D. C. N. Y.), quoted *supra*.

§ 2613. Defective Specifications May Be Amended.

Page 1563, note 245. *Impliedly*, In re Nathanson, 19 A. B. R. 56, 155 Fed. 645 (D. C. N. Y.); instance, In re Wittenberg, 20 A. B. R. 398, 160 Fed. 991 (D. C. Pa.); instance, In re McCann Bros., 22 A. B. R. 557, 171 Fed. 266 (D. C. Pa.).

§ 2621. Amendment May Be Refused.

Page 1565. Or where the amendment tendered fails to state good ground of opposition.

Compare, analogously (petition for recovery of preferences), *Johnson v. Anderson*, 11 A. B. R. 294.

§ 2625. Final Hearing on Discharge to Be before Judge.

Page 1566. And a "certificate of conformity" is wholly unauthorized.

In re Randall, 20 A. B. R. 305, 159 Fed. 298 (D. C. Pa.).

Page 1566, note 266. See, in addition, *In re Johnson*, 19 A. B. R. 814, 153 Fed. 342 (D. C. Ark.). Also see ante, § 2457.

§ **2627. Motions and Demurrers to Be to Judge, Not to Special Master.**

Page 1567, note 269. Compare, on the facts in accord, *In re Brockman*, 21 A. B. R. 251, 168 Fed. 1015 (D. C. Ky.).

§ **2628. Hearings before Special Master.**

Page 1567, note 271. Compare, also, *In re Fritz*, 23 A. B. R. 84, 173 Fed. 560 (D. C. N. Y.). **Findings to Be Based on Evidence Introduced in Opposition, Not on Facts Known Otherwise.**—*In re Walder*, 18 A. B. R. 419, 152 Fed. 489 (D. C. Conn.).

Creditor's Abandonment of Further Opposition.—*In re Walder*, 18 A. B. R. 419, 152 Fed. 489 (D. C. Conn.); *In re Hendrick*, 14 A. B. R. 795, 138 Fed. 473 (D. C. Conn.). Compare, "Buying Off Opposition to Discharge," § 2814.

§ **2629. Whether Special Master to Exclude Improper Evidence.**

Page 1567, note 272. See, in addition, *In re Haskell*, 20 A. B. R. 914, 164 Fed. 301 (D. C. N. Y.); *Natl. Bank v. Abbott*, 21 A. B. R. 436, 165 Fed. 852 (C. C. A. Mo.); *In re Isaacson*, 23 A. B. R. 665, 175 Fed. 202 (D. C. N. Y.).

Page 1568. *Missouri Elec. Co. v. Hamilton-Brown Co.*, 21 A. B. R. 270, 165 Fed. 283 (C. C. A. Mo.): "It is the duty of examiners, masters, referees, and the court, when taking evidence in controversies therein in the absence of a jury, to take, record, and, in case of an appeal, to return to the reviewing court, all the evidence offered by either party, that which they hold to be incompetent or immaterial as well as that which they deem competent and relevant, to the end that, if the appellate court is of the opinion that evidence rejected should have been received, it may consider it, render a final decree, and thus conclude the litigation without remanding the suit to procure the rejected evidence. From this rule evidence plainly privileged, the testimony of privileged witnesses, and evidence which clearly and affirmatively appears to be so incompetent, irrelevant, and immaterial that it would be an abuse of the process or power of the court to compel its production or permit its introduction, are excepted."

Page 1568. But the more practicable rule is that the special master should exclude incompetent and irrelevant evidence, but should permit to be stated, (if desirable, in the words of the witness himself), as part of the exception to the ruling, what the evidence offered would have been if admitted. This method preserves the rights of all parties and subserves the purposes of review quite as well as the first method, and does not carry with it the implication that the special master has no control over the introduction of evidence.

§ **2630. Findings of Fact as Well as Evidence to Be Reported.**

Page 1569, note 274. See, in addition, *Crucible Steel Co. v. Holt*, 23 A. B. R. 302, 174 Fed. 127 (C. C. A. Ky.).

§ 2634. Findings of Fact Not Reversed Except for Clear Error.

Page 1569, note 278. See, in addition, *In re Schwartz*, 23 A. B. R. 37, — Fed. — (D. C. N. Y.); obiter, *In re Remmers*, 23 A. B. R. 78, 173 Fed. 484 (C. C. A. Mo.). Compare, post, §§ 2861, 3009.

§ 2635. Burden of Proof on Opposing Creditor.

Page 1571, note 279. See, in addition, *In re Brockman*, 21 A. B. R. 251, 168 Fed. 1015 (D. C. Ky.).

§ 2636. But Presumptions of Fact May Shift against Bankrupt and Compel Rebuttal.

Page 1571, note 281. See, in addition, *Seigel v. Cartel*, 21 A. B. R. 140, 164 Fed. 691 (C. C. A. Iowa).

Page 1571, note 282. See, in addition, *Seigel v. Cartel*, 21 A. B. R. 140, 164 Fed. 691 (C. C. A. Iowa), quoted at § 2501½.

Page 1571. Or where an omission to make entries on the books of payments to relatives is explained by the negligence of the bookkeeper, the bankrupt is under the further duty of explaining how and under what circumstances the bankrupt notified the bookkeeper of such payments, and the bookkeeper himself should be produced as a witness, if accessible, in the absence of which the claim that the omission occurred through mere negligence in bookkeeping may be rejected.

In re Haskell, 20 A. B. R. 914, 164 Fed. 301 (D. C. N. Y.).

§ 2637½. Proof Aided by Presumptions.

Proof may be aided by presumptions. Thus, the bankrupt will be presumed to have intended the natural and probable consequences of his acts.

In re Nelson, 23 A. B. R. 37, 179 Fed. 320 (D. C. N. Y.); also compare similar proposition as to commission of acts of bankruptcy, ante, §§ 112, 132.

§ 2638. Evidence Need Not Be beyond Reasonable Doubt.

Page 1572. *In re Delmour*, 20 A. B. R. 405, 161 Fed. 589 (D. C. N. Y.): "With the cases holding, or seeming to hold, that anything more than a fair preponderance of creditable testimony is necessary to require the court to deny a discharge, I do not agree. In my judgment the law is properly stated in *Re Leslie*, 9 Am. B. R. 561, 119 Fed. 406, viz, that it is not necessary to establish concealment of assets beyond a reasonable doubt, but by a fair preponderance of creditable testimony only. Viewed in this light, the referee's report is entirely satisfactory. The testimony against the bankrupt was clear and direct. It may be admitted that it came from interested witnesses; but there are no more interested witnesses than the bankrupt and his wife. Their testimony in opposition is both shuffling and evasive, and that of the bankrupt can even from the printed page be seen to have been contemptuous."

In re Remmers, 23 A. B. R. 78, 173 Fed. 484 (C. C. A. Mo.): "The contention made by appellant that the same high degree of proof is here required to sustain the objection to his discharge on the ground of making a false oath to his schedules, that would be required to support a conviction against him on a charge of perjury for such false swearing is not sound. The hearing of the bankrupt's application for a discharge from his unpaid liabilities, on objection made thereto, was in no sense a criminal proceeding, to be followed in the event of his conviction by a forfeiture of either his liberty or property by way of punishment. The sole injurious consequence resulting to the bankrupt on sustaining such objections was to deny him a discharge from further liability of his just debts dischargeable by the law. True, the disclosures made by the proofs on such hearing might reflect injuriously on the conduct of the bankrupt. So might the evidence taken in the trial of any cause or proceeding. The presumption is that men are honest; that their acts were prompted by an honest purpose. He who charges to the contrary, in order to prevail, must offer such clear and convincing proofs as will overcome this presumption and the proofs offered to refute the charge made, and thus satisfy reasonable minds of the truth of the charge."

Page 1572. Thus, as to concealment of assets.

In re Delmour, 20 A. B. R. 405, 161 Fed. 589 (D. C. N. Y.).

Thus, as to false oath.

In re Remmers, 23 A. B. R. 78, 173 Fed. 484 (C. C. A. Mo.).

§ 2639. But Where "Offense" Is Charged, Evidence to Be "Clear," "Satisfying" or "Convincing."

Page 1572, note 287. That mere preponderance of credible evidence sufficient even in such cases, In re Leslie, 9 A. B. R. 561, 119 Fed. 406 (D. C. N. Y.); In re Delmour, 20 A. B. R. 405, 161 Fed. 589 (D. C. N. Y.); In re Remmers, 23 A. B. R. 78, 173 Fed. 484 (C. C. A. Mo.), quoted at § 2638.

But compare, Klein v. Powell, 23 A. B. R. 494, 174 Fed. 640 (C. C. A. Pa.): "Conceding that not every concealment which is sufficient to bar a discharge will result in an indictment and conviction, it is nevertheless true, that the words 'knowingly' and 'fraudulently' must have their natural significance given to them, when considering a charge of concealment made in opposition to a discharge. It must at least appear, by a clear preponderance of testimony, that the concealment charged was practiced knowingly and fraudulently."

§ 2641. "General Examination" of Bankrupt Admissible.

Page 1573. But such general examination is not to be considered as in evidence unless actually introduced or stipulated in.

In re Murray, 20 A. B. R. 700, 162 Fed. 983 (D. C. Conn.); In re Walder, 18 A. B. R. 419, 152 Fed. 489 (D. C. Conn.).

§ 2646. Failure to Produce Material Witnesses Who Are Accessible.

Page 1574, note 295. Compare, to same effect as to adverse claims, In re Mayer, 19 A. B. R. 480, 156 Fed. 432, 157 Fed. 836 (D. C. Pa.), quoted at § 554½.

Page 1574. As, for instance, failure to produce the bookkeeper, where the bankrupt explains the omission of entries of payments to relatives as being due to the bookkeeper's negligence.

Instance, *In re Haskell*, 20 A. B. R. 914, 164 Fed. 301 (D. C. N. Y.).

§ 2647½. Whether Fraudulent Transfer Decree Binding.

As to whether a decree in a fraudulent transfer suit involving the same transaction is binding on discharge, see post, "Res Judicata and Estoppel," § 2655.

§ 2648. Evasive Testimony: Credibility.

Page 1575, note 299. Compare, ante, §§ 1568, 2331.

Page 1575. Likewise, as to other witnesses.

Block, trustee, v. Rice, trustee, 21 A. B. R. 691, 167 Fed. 693 (D. C. Pa.).

§ 2649. Contradictory Statements and Incredible Explanations.

Page 1575, note 300. See, in addition, *In re Freidman*, 21 A. B. R. 213, 164 Fed. 131 (D. C. Wis.). To same effect, ante, § 852.

Page 1575. *Seigel v. Cartel*, 21 A. B. R. 140, 164 Fed. 691 (C. C. A. Iowa): "The only tangible explanation of this shortage of funds by the petitioner is that he lost the money in gambling at poker. His evidence was that he had long indulged this habit of gambling, and estimated that he had probably at different times lost an aggregate of \$100,000. As he seems to have been a most unlucky gambler, to say the least, it was not honest for him to thus take the proceeds of the goods he had purchased on credit to indulge his passion at the expense of his confiding creditors. While the statute does not deny the benefit of the Bankrupt Act * * * to such a derelict, in administering the beneficent spirit of the act, the court, to prevent it becoming a covert to the delinquent undeserver, should see to it that his accounting is clear and free from reasonable doubt. He kept no book account of the withdrawal of this money or its disbursement. He did not introduce any evidence corroborative of the losses at gaming. He failed on close inquiry to give the name of one person with whom he played or the name of the proprietor of the establishment where he played, save one was out of the State and last heard of at the St. Louis World's Exposition, thus making it quite impracticable, if not impossible, for the objecting creditors to contradict him. He could give no particular dates or particular sums lost at 'the sittings.' The credibility and reasonableness of his story were addressed to the judicial discretion of the district judge."

§ 2650. Impeachment of Witness by Inherent Improbability of Own Testimony.

Page 1575, note 301. See, in addition, *In re Rome*, 19 A. B. R. 820, 162 Fed. 971 (D. C. N. J.); to similar effect, ante, § 852.

Page 1576. *Obiter*, *In re Friedman*, 18 A. B. R. 712, 153 Fed. 939 (D. C. N. Y.): "The story of Celia Friedman is inherently preposterous, as well as demonstrably false."

Page 1576. And merely that the witness is uncontradicted does not require the acceptance of his testimony.

In re Friedman, 21 A. B. R. 213, 164 Fed. 131 (D. C. Wis.), quoted at § 852.

§ 2652. Likewise Mere Evasive Testimony and Inability to Account Reasonably for Assets Not Per Se Proof.

Page 1576. In re Fanning, 19 A. B. R. 55, 155 Fed. 701 (D. C. N. Y.): "The bankrupt apparently gave evasive and disrespectful answers, but there is nothing to show that he wilfully concealed testimony, preventing the creditors from obtaining the property, and it does not seem that his conduct was such as to merit punishment by refusing to grant him a discharge, inasmuch as the referee apparently did not consider the conduct of the bankrupt when a witness to be worthy of any discipline. The purpose of the penalties of the bankruptcy statute is to prevent bankrupts from concealing their property and defrauding their creditors. Ordinary questions of contumacy or contempt of court can be disposed of directly and of themselves are not to be corrected by the withholding of a discharge."

Page 1577, note 306. But compare, analogously and inferentially, McDonald v. Clearwater Ry. Co., 21 A. B. R. 182, 164 Fed. 1007 (U. S. C. C. Idaho).

§ 2655. Res Judicata and Estoppel.

Page 1577. In re Winchester, 19 A. B. R. 227, 155 Fed. 505 (D. C. Pa.): "In view of this plenary action before a court of competent jurisdiction, the record of which was introduced into this case upon the argument on the exceptions to the report of the special master, there seems to be no reason now for the conclusion arrived at by him upon the less complete and partial hearing had before him, but that the decree in the equity proceedings should control. That decree virtually determines that the bankrupt had no interest in the real estate of his wife subject to the claim of his creditors, and consequently in failing to disclose the expenditures he had made in making these improvements he cannot be guilty of a concealment of assets."

Page 1578, note 308. In re Tiffany, 17 A. B. R. 298, 147 Fed. 314 (D. C. N. Y.). Compare, to same effect on revocation of discharge, abandonment of previous fraudulent transfer suit; In re Mauzy, 21 A. B. R. 59, 163 Fed. 900 (D. C. W. Va.).

§ 2656. Discharge Hearing Not Postponed to Await Outcome of Fraudulent Conveyance Suit.

Page 1578, note 310. But see In re Olansky, 20 A. B. R. 780, 163 Fed. 428 (D. C. N. Y.), wherein the court refused the discharge for concealment of assets but without prejudice to a renewal of the application for a discharge in case pending litigation concerning the same transaction result favorably to the bankrupts!

§ 2660. Referee Allowed Compensation as Special Master on Discharge.

Page 1578, note 314. See § 2011; also, see contra, In re Wilcox, 19 A. B. R. 241, 156 Fed. 685 (D. C. Mich.).

§ 2661. Awarding Costs against Creditors.

Page 1579, note 315. Compare, also, *In re Fritz*, 23 A. B. R. 84, 173 Fed. 560 (D. C. N. Y.).

Page 1579. Costs of appeal by creditors upon an unsuccessful opposition to discharge have sometimes been awarded against the bankrupt, notwithstanding he has prevailed in the litigation.

Page 1579, note 316. *In re McCrea*, 20 A. B. R. 412, 161 Fed. 246 (C. C. A. N. Y.).

§ 2662. Right to Discharge and Effect of Discharge Distinct Matters.

Page 1585. *Frank v. Michigan Paper Co.*, 24 A. B. R. 261, 179 Fed. 776 (C. C. A. Md.): "In this connection it becomes important to distinguish between the right to a discharge and the effect of a discharge in bankruptcy. With regard to the latter, we think it clear from the language quoted from § 17 of the present Bankruptcy Act as amended in 1903, that a false representation by one partner, by means of which property was obtained by the partnership, will in law be imputed to the other partners to the extent of holding them civilly liable for the debt and their discharge in bankruptcy will not discharge their liability as to such debt. * * * As applied to partnership debts these questions ought to be considered in connection with the fact that under the present Bankruptcy Act a partnership is a 'legal entity,' consequently a materially false statement made in writing by one of the partners (without the knowledge of the others) for the purpose of obtaining credit on behalf of the partnership, and by means of which such credit is obtained, is (1) the act of the individual partner making it, and (2) the act of the legal entity called the 'partnership,' and, hence, both the partner making such statement and the legal entity called the 'partnership' are chargeable with having done one of the acts, the doing of which will, upon objection being properly made, prevent the granting of a discharge under § 14b Bankruptcy Act, 1898, as amended in 1903; and it follows that any 'party in interest' can successfully oppose the discharge of the acting partner and of the 'partnership.' Taking the view that the right to a discharge is determined by the good faith of the bankrupt, and that the effect of such discharge, is to be determined in accordance with a proper recognition of his civil liability for the acts of partners and other agents, we come to the conclusion that the court below erred in refusing to grant a discharge to the bankrupt." Quoted further at § 2563.

§ 2663. Effect of Discharge on Particular Debt to Be Determined When Enforcement of Debt Attempted.

Page 1585, note 2. In New York the Surrogate's Court in settling the final account of an administrator, can disallow claims against the estate on judgments subsequently discharged in bankruptcy, which, however, have not been "canceled" of record in accordance with the special statute on the subject. *In re Peterson*, 24 A. B. R. 270 (Sup. Ct. App. Div. N. Y., affirming 22 A. B. R. 549). See also, ante, § 2707.

Page 1585. *Hellman v. Goldstone*, 20 A. B. R. 539, 161 Fed. 193 (C. C. A. N. J.): "We are of opinion the court below was right. The question whether a judgment against one who is hereafter adjudged bankrupt is thereby discharged is properly raised by pleading the discharge in a pro-

ceeding to enforce the judgment. In *re Wright*, 2 Ben. 509, Fed. Cas. No. 18,065. Presumably the court in which such discharge is thus pleaded will accord it due legal effect, and if it does not the bankrupt's remedy lies in a review of such action by the proper appellate tribunal, or ultimately in the Federal court for denial to him of a right under a law of the United States. *Dimock v. Revere Copper Company*, 117 U. S. 565."

Page 1586. And injunction will be refused.

Hellman v. Goldstone, 20 A. B. R. 539, 161 Fed. 193* (C. C. A. N. J.).

Consequently, it is generally in the State Court that the question arises; thus, a surrogate may determine whether a judgment was released by a testator's discharge in bankruptcy.

In *re William's Estate*, 23 A. B. R. 394, 118 N. Y. Supp. 562.

§ 2666. Except Where Former Discharge Refused.

Nevertheless, where it is not the effect of a discharge on a particular debt that is involved, but rather the right itself to a discharge, and where such right exists as to some creditors and not as to others, as in cases of former denial of discharge, the court undoubtedly may give effect to the *res adjudicata* by excepting debts provable under the former bankruptcy.

See *ante*, § 2437. And see In *re Elby*, 19 A. B. R. 734, 157 Fed. 935 (D. C. Iowa); In *re Kuffler*, 22 A. B. R. 289, 168 Fed. 1021 (C. C. A. N. Y., affirming In *re Kuffler*, 19 A. B. R. 181, 153 Fed. 667).

In *re Kuffler*, 19 A. B. R. 181, 153 Fed. 667 (D. C. N. Y.): "The cases cited by the bankrupt, and referred to, *supra*, hold simply that if a debt is not provable (that is, not such a debt as can be discharged) that fact is to be determined when the discharge is set up as a defense to their enforcement, and not upon the application for the discharge itself. But these cases are not authority for the proposition that provable debts, not intended to be discharged, should not be specifically excepted from the order of discharge."

Impliedly, *Bluthenthal v. Jones*, 19 A. B. R. 288, 208 U. S. 64: "There is no reason shown in this record why the discharge did not have the effect which it purported to have. Undoubtedly, as in all other judicial proceedings, an adjudication refusing a discharge in bankruptcy, finally determines, for all time and in all courts, as between those parties or privies to it, the facts upon which the refusal was based. But courts are not bound to search the records of other courts and give effect to their judgments. If there has been a conclusive adjudication of a subject in some other court, it is the duty of him who relies upon it to plead it or in some manner bring it to the attention of the court in which it is sought to be enforced. * * * An objecting creditor might have proved upon that application (for discharge) that the bankrupt had committed one of the acts which barred his discharge, either by the production of evidence or by showing that in a previous bankruptcy proceeding it had been conclusively adjudicated, as between him and the bankrupt, that the bankrupt had committed one of such offenses. If that adjudication had been proved, it would have taken the place of other evidence and have been final upon the parties to it." Quoted further at § 2438.

Page 1587, note 7. See *ante*, §§ 2437, 2438; *post*, § 2680; *Bluthenthal v. Jones*, 19 A. B. R. 288, 208 U. S. 64, quoted at § 2438; impliedly, In *re Kuffler*, 19 A. B. R. 17, 151 Fed. 12 (C. C. A. N. Y.). And compare, In *re*

Bramlett, 20 A. B. R. 402, 161 Fed. 588 (D. C. Ga.), where the subsequent discharge was refused in toto, although it might be inferred that all the debts were the same.

§ 2668. Discharge Bars Debts, Not Enforcement of Liens or Title to Property.

Page 1588, note 9. See, in addition, (1867) impliedly, *Upshur v. Briscoe*, 138 U. S. 378; *Citizens Loan Ass'n v. Boston & Me. R. R.*, 19 A. B. R. 650, 196 Mass. 528, quoted at § 451. Compare, ante, § 451; post, § 2673.

Page 1589. Thus, the debtor's discharge is personal and not in rem and is no bar to the enforcement of a creditor's suit to set aside a fraudulent transfer where such suit is started more than four months before the filing of the bankruptcy petition.

Flint v. Chaloupka, 18 A. B. R. 293, 78 Neb. 594: "Cases directly in point are few, but the weight of authority, we believe, and the rule more in harmony with justice, will not permit a fraudulent grantee to plead the subsequent discharge of his grantor as a defense in a creditor's suit brought more than four months prior to the institution of the bankruptcy proceeding. * * * In *Lowry v. Morrison*, 11 Paige, 327, it is held: 'Where a judgment creditor's suit is commenced before a decree in bankruptcy against the defendant therein, so as to obtain a lien upon his property, and the defendant subsequently obtains his discharge under the Bankruptcy Act, he cannot plead such discharge in bar of the suit generally, as the discharge is only a bar to a personal decree against the bankrupt.'"

§ 2672. Debt Not Extinguished, but Its Enforcement Barred.

Page 1589. *Citizens Loan Ass'n v. Boston & Maine R. R.*, 19 A. B. R. 650, 196 Mass. 528: "A debt is not extinguished by a discharge in bankruptcy. The remedy upon the debt, and the legal, but not the moral, obligation to pay, is at an end. The obligation itself is not canceled. *Champion v. Buckingham*, 165 Mass. 76, 42 N. E. 498; *Heather v. Webb*, 19 Eng. Rep. 277, 2 Com. Pl. Div. 1."

§ 2673. Valid Liens Not Cast Off nor Their Enforcement Prevented.

Page 1590, note 12. See ante, §§ 451, 2668; also, *Flint v. Chaloupka*, 18 A. B. R. 293, 78 Neb. 594, quoted at §§ 766, 2668. Thus, there will be no stay of foreclosure suits, to permit interposition of discharge. *Sample v. Beasley*, 20 A. B. R. 164, 158 Fed. 606 (C. C. A. La.).

§ 2678. Thus, Assignments of Unearned Wages.

Page 1592, note 15. Compare post, § 2736½.

Assignee of Wages, Also Employer, Adverse Claimants, Not to Be Proceeded against Summarily.—See ante, §§ 451, 1678, 1683.

Page 1593. But where it is held, by the state law, that the lien is a lien upon the contract of employment, the wages simply being incident thereto and arising therefrom, then the lien, being in existence before the bankruptcy is not affected by the discharge.

Page 1593, note 16. Impliedly, *In re Driggs*, 22 A. B. R. 621, 171 Fed. 897 (D. C. N. Y.). Compare, collaterally, *In re Sims*, 23 A. B. R. 899, 176 Fed. 645 (D. C. N. Y.).

Page 1593. *Citizens Loan Ass'n v. Boston & Maine R. R.*, 19 A. B. R. 650, 196 Mass. 528: "The single question presented by this appeal is whether an assignment of wages to be earned in an existing employment, given before bankruptcy, without fraud, and upon sufficient consideration, to secure a valid subsisting debt, and duly recorded, can be enforced, after the discharge in bankruptcy of the assignor, as to wages earned in the course of the original employment, by the creditor, who has not proved his debt in bankruptcy. A debt is not extinguished by a discharge in bankruptcy. The remedy upon the debt, and the legal, but not the moral, obligation to pay, is at an end. The obligation itself is not canceled. *Champion v. Buckingham*, 165 Mass. 76, 42 N. E. 498; *Heather v. Webb*, 19 Eng. Rep. 277, 2 Com. Pl. Div. 1. An assignment of future earnings, which may accrue under an existing employment, is a valid contract and creates rights, which may be enforced both at law and in equity, whichever may in a particular case be the appropriate forum. *Tripp v. Brownell*, 12 Cush. 376; *Weed v. Jewett*, 2 Metc. 608, 37 Am. Dec. 115; *Brackets v. Blake*, 7 Metc. 335, 41 Am. Dec. 442; *Hartey v. Tapley*, 2 Gray, 565; *Gardner v. Hoeg*, 18 Pick. 168; *Taylor v. Lynch*, 5 Gray, 49; *Lannan v. Smith*, 7 Gray, 150; *St. Johns v. Charles*, 105 Mass. 262; *Lazarus v. Swan*, 147 Mass. 330, 333, 17 N. E. 665; *James v. Newton*, 142 Mass. 366, 8 N. E. 122, 56 Am. Rep. 692. These cases proceed upon the theory that the worker under contract for service, though indefinite as to time and compensation and terminable at will has an actual and real interest in wages to be earned in the future by virtue of his contract. He may recover for an unjustifiable interference with such an employment, as for an injury to any other vested property right. *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289; *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899, 108 Am. St. Rep. 499. It is plain that one may sell wool to be grown upon his own sheep, or a crop to be produced upon his own land, but not that to be grown or produced upon the sheep or land of another. No more can one assign wages, where there is no contract for service. *Jones v. Richardson*, 10 Metc. 481; *Low v. Pew*, 108 Mass. 347, 11 Am. Rep. 357. But profitable employment is a reality. Wages to be earned by virtue of an existing employment are no more shadowy or insubstantial than the fleece of next spring or the crop of the following autumn. Money to accrue from such service is not a bare expectancy or mere possibility, but a substance capable of grasp and delivery. It constitutes a present, existing, right of property, which may be sold or assigned as any other property. Although not in the manual possession of the assignor, it is in his potential possession. The transfer of this potential possession creates the assignee a lienor upon the property right. The holder of such an assignment stands upon a firmer plane than the mortgagee of future acquired property, who has only the right by contract to act betimes in the future for his protection. *Wasserman v. McDonnell*, 190 Mass. 326, 76 N. E. 959. The assignee of wages to be earned under an existing contract gets a present right, perfect in itself, requiring no future action on his part. Contracts for personal service are of such a character that their breach is in appropriate cases enjoined. *Lumby v. Wagner*, 1 De G., M. & G. 604; *Duff v. Russell*, 133 N. Y. 678, 31 N. E. 622; *Whitwood Chemical Co. v. Hardman* [1891], 2 Ch. 416. See *Phila. Base Ball Club v. Lajoie*, 202 Pa. 210, 51 Atl. 973, 58 L. R. A. 227, 90 Am. St. Rep. 627. It may be taken for granted that the right to

future wages to be earned under such a contract does not pass to the trustee in bankruptcy. Nor are we dealing here with a contract as to labor in terms or spirit contrary to public policy, as in *Parsons v. Trask*, 7 Gray, 473, 66 Am. Dec. 502. But on the contrary, assignments of wages are recognized as valid by statute. Rev. Laws, c. 189, §§ 32, 33, 34; Id. c. 102, §§ 51, 57 to 67, both inclusive; Id. c. 106, § 63. The present case is not affected by St. 1905, p. 224, c. 308, or St. 1906, p. 366, c. 390. Specific performance of contracts to labor like that in question will not be enforced. *Arthur v. Oakes*, 63 Fed. 310-318, 11 C. C. A. 209, 25 L. R. A. 414; *Robertson v. Baldwin*, 165 U. S. 275, 17 Sup. Ct. 326, 41 L. Ed. 715. It is only where labor has been voluntarily performed that the question now presented can arise. It is possible that an agreement to execute an assignment, falling short of the creation of a lien, is, when the wages have been actually earned, enforceable in equity, even after a subsequent bankruptcy or insolvency. We do not decide this, however. *Edwards v. Peterson*, 80 Me. 367, 14 Atl. 936, 6 Am. St. Rep. 207; *Stott v. Franey*, 20 Or. 410, 26 Pac. 271, 23 Am. St. Rep. 132. At lowest the assignment in question became 'a specific equitable lien on the fund' (*Triste v. Child*, 21 Wall. 441, 22 L. Ed. 623), or was 'an independent collateral agreement given by way of guaranty or other security' for the main debt, and there is no reason why such an agreement should not outlive the remedy upon the debt, to secure which it was given (*Shaw v. Silloway*, 145 Mass. 503, 507, 14 N. E. 783). In either event, it was not dissolved by the bankruptcy. We have considered the contrary authorities of *In re West* (D. C.), 11 Am. B. R. 782, 128 Fed. 205; *In re Home Discount Co.* (D. C.), 17 Am. B. R. 168, 147 Fed. 538, and *Leitch v. Northern Pacific Ry. Co.*, 14 Am. B. R. 409, 95 Minn. 35, 103 N. W. 704, with the deference to which they are entitled. They proceed upon considerations as to the effect of an assignment of wages and the rights vesting thereunder in the assignee, as well as public policy pointed out in the latter case, which are inconsistent with what we conceive to be sound reasoning, and opposed to the numerous decisions of this court above cited concerning rights required under assignments of wages. In the absence of a decision to the same effect by the Supreme Court of the United States, we cannot accede to them as authoritative. Nor do we perceive anything inconsistent with the conclusion we have reached, in *Clark v. Clark*, 17 How. 315, 15 L. Ed. 77; *East Lewisbury v. Marsh*, 91 Pa. 96; *Christian & Craft Grocery Co. v. Michael Lyons*, 121 Ala. 84-87, 25 South. 571, 77 Am. St. Rep. 30; *Williams v. Chambers*, Q. B. 337, and *Hanover Nat. Bank v. Moyses*, 186 U. S. 192, 8 Am. B. R. 1, 22 Sup. Ct. 857, 46 L. Ed. 1113, which are cited as generally supporting authorities in *Re Home Discount Co.*, *ubi supra*. The assignment to the plaintiff is a lien which was preserved by § 67d of the Bankruptcy Act."

§ 2678½. Subsequently Earned Wages Coming under Prior Levy.

However, it has been held that an execution, under the New York Code, by virtue of which the creditor is entitled to collect from the bankrupt's employer, without exemption, ten per cent. of the debtor's salary until the debt is paid, does not constitute such a lien on the contract of employment as to carry with it the wages earned subsequently to adjudication.

In re Sims, 23 A. B. R. 899, 176 Fed. 645 (D. C. N. Y.): "The remaining question is as to proceeding under the levy to recover 10 per cent of that

portion of his salary which the bankrupt has earned and shall earn after petition filed. In *re Driggs*, Ex parte Raymond, supra, I said that there was no difference between exempt wages and wages earned after petition filed. The case involved only exempt wages and the statement was clearly obiter. It was inadvertent, and I think it is wrong. In cases of garnishment, where the obligation garnisheed is unconditional and due in installments, it may be that installments which fall due after petition filed will be covered by the lien. Even if the obligation be conditional, the same thing may be true, if the condition does not involve the performance of services by the bankrupt or his transfer of property. In this case, however, all the salary which the creditors can get after December 20th, 1909, will be part of what the bankrupt has earned and will earn after petition filed. The situation is wholly unlike the case of a merely future obligation, or of a conditional obligation when performance does not depend upon the bankrupt. Should I allow the creditors to levy on wages in fact earned in the future, they would recover upon a past debt from property earned subsequently. This contradicts the whole purpose of a discharge, and I cannot permit it without violating the act. It is not enough that in form the levy may be upon a single chose in action, consisting of the contract of employment. I concede that this is so, but the obligation is quite valueless till the bankrupt performs the condition of service to his employer. Therefore, for the purpose of this act, I shall decide that the wages, which arise from services rendered after petition filed, is covered by the discharge and that the stay should continue as to that."

See, § 1035, note.

§ 2680. Former Refusal of Discharge Res Adjudicata as to All Claims Then Provable.

The refusal of a discharge is res adjudicata as to all provable claims under the bankruptcy; and subsequent new proceedings in bankruptcy do not affect them.

Page 1594, note 18. See, in addition, *Bluthenthal v. Jones*, 19 A. B. R. 288, 208 U. S. 64, quoted at § 2438; impliedly, *In re Silverman*, 19 A. B. R. 460, 157 Fed. 675 (C. C. A. N. Y.); also, compare, analogously, to same effect, §§ 2416, 2437.

Page 1594, note 19. See ante, §§ 2437; 2438, 2666, et seq. Also, see *In re Kuffler*, 18 A. B. R. 16, 151 Fed. 12 (C. C. A. N. Y.); *In re Kuffler*, 19 A. B. R. 181, 153 Fed. 667 (D. C. N. Y.); *Bluthenthal v. Jones*, 19 A. B. R. 288, 208 U. S. 64, quoted at § 2438.

§ 2682. Discharge to Be Set Up as Defense, Else Waived.

Page 1595, note 24. But it appears that by special statute in New York, a judgment thus obtained may be canceled, *Walker v. Muir*, 21 A. B. R. 278, 127 App. Div. 163, 111 N. Y. Sup. 465; also, see post, § 2707, and cases there cited.

§ 2685. Interposition of Discharge Throws Burden on Plaintiff to Show Debt Excepted.

Page 1595, note 28. See, in addition, *In re Peterson*, 22 A. B. R. 549, (Surrogate Ct. N. Y.); apparently contra, *Weidenfeld v. Tillinghast*, 18 A. B. R. 531 (N. Y. City Court).

§ 2687. Erroneous Judgment Notwithstanding Discharge Duly Plead and Proved, Res Judicata, until Reversed.

Page 1596. And it has been held in some cases that code provisions permitting the cancellation of judgments discharged by bankruptcy, or rendered upon debts discharged thereby, can only refer to judgments rendered before the granting of the discharge in bankruptcy, as any other holding would conflict with the doctrine of *res adjudicata*; but in other cases a contrary holding obtains.

See post, § 2707; also, see *Walker v. Muir*, 21 A. B. R. 278, 127 App. Div. 163, 111 N. Y. Sup. 465.

§ 2690. Stay under § 11 for Bankrupt's Benefit, to Permit Interposition of Discharge.

Page 1597. *Coal Land Co. v. Ruffner Bros.*, 21 A. B. R. 474, 165 Fed. 881 (C. C. A. W. Va.): "Thus far what we have said applies more particularly to cases in which an injunction is sought to stay proceedings in a State court, to the end that the bankrupt himself may have the benefit of the stay, where a personal judgment is sought against him, so that if the suit in the State court is based upon a provable claim and one against which the discharge in bankruptcy would operate, an opportunity, as before stated, would be afforded the bankrupt after his discharge to go into the State court and set it up as a defense in the action. The right of the court of bankruptcy to enjoin proceedings in a State court in order to administer the estate of the bankrupt through the instrumentalities of the general bankruptcy law, is founded upon a different reason."

§ 2691. Debt Dischargeable, Else No Stay.

Page 1597, note 36. See, in addition, *Nat'l Surety Co. v. Medlock*, 19 A. B. R. 654, 2 Ga. App. 665.

Habeas Corpus.—The remedy of habeas corpus is also available to protect the bankrupt from arrest on civil process on dischargeable debts, see ante, § 472; but is not available where the debt is not dischargeable, *Thompson v. Judy*, 22 A. B. R. 154, 169 Fed. 553 (C. C. A. Ky.).

Page 1597. Thus, stay will not be granted in an action for obtaining money or goods by false pretenses.

Page 1597, note 37. See, in addition, *In re Lawrence*, 20 A. B. R. 698, 163 Fed. 131 (D. C. Ala.).

Nor will a supplementary proceeding for alimony be stayed.

Nor will a supplementary proceeding on a judgment for false imprisonment be stayed.

Johnson v. Bruckheimer, 22 A. B. R. 88, 63 Misc. 248.

Nor will an order punishing the bankrupt for contempt of the State

court in procuring, by perjury and deceit, a stay of proceedings upon a judgment, be stayed.

In *re* Koonsky, 21 A. B. R. 851, 170 Fed. 719 (C. C. A. N. Y.), referred to in *In re* Hall, 22 A. B. R. 498, 170 Fed. 721 (D. C. N. Y.).

Page 1598, note 41. See, in addition, *In re* Hale, 20 A. B. R. 633, 161 Fed. 387 (D. C. Conn.).

§ 2692. But Proceedings on Nondischargeable Debts Stayable Where Creditor's Rights Involved.

Page 1598. But legal proceedings upon even nondischargeable debts may be stayed, or restrained, on behalf of creditors, where creditors' rights are involved.

Impliedly, *Coal Land Co. v. Ruffner Bros.*, 21 A. B. R. 474, 165 Fed. 881 (C. C. A. W. Va.).

§ 2693. Error in Holding Claim Dischargeable No Warrant for Disobedience.

Page 1598. In *re* Mustin, 21 A. B. R. 147, 165 Fed. 506 (D. C. Ala.): "Instead of obeying the order of the bankrupt court, W. C. McCarty proceeded to judgment on the theory that the bankrupt court had no jurisdiction to make such order. It was clearly the duty of W. C. McCarty to either review the order of the referee in the proper way or to obey the same. Disobedience is not the proper method of contesting the validity of the order of the bankrupt court. Jurisdiction is lawfully given to the bankruptcy court to stay proceedings pending bankruptcy upon claims which are provable. As jurisdiction is thus given to the bankruptcy court when application is made to it for a restraining order, under this power to determine whether the claim is thus provable an erroneous decision does not make void the judgment of the court. The court, in passing upon applications under this section of the bankruptcy law, is given the right to determine the question of the provability of debts. This is necessarily so in the execution of the power conferred by the statute. In the administration of justice the courts of the United States by all proper means should endeavor to avoid conflict of jurisdiction with the State courts, and a similar obligation rests upon the latter in reference to matters committed by law to the jurisdiction of the former. In the enforcement of the powers conferred by the laws in bankruptcy matters, so long as the bankruptcy court acts in the matter within its powers, its jurisdiction is exclusive and supreme."

§ 2694. Proceedings Other than "Suits" Stayed.

Page 1598. Thus, "supplementary proceedings," in aid of execution may be stayed.

See post, § 2702. And compare ante, § 2691.

§ 2695. Ipso Facto Stayed Till Adjudication or Dismissal of Petition.

Page 1598, note 45. In addition, compare *Cruchet v. Red Rover Min. Co.*, 18 A. B. R. 814, 155 Fed. 486 (D. C. Mass.).

Page 1599. Obiter and inferentially, *Board of Comrs. Kans. v. Hurley*, 22 A. B. R. 209, 169 Fed. 92 (C. C. A. Kans.): "Every suit against him upon a provable claim is stayed from the date of the filing of the petition." Quoted further at §§ 629, 1519, 1521.

§ 2696. Thereafter, Further Stayed, on Application, until Discharge Heard.

Page 1599. And it is the right of the bankrupt to have the suit stayed.

In re *Burke*, 19 A. B. R. 51, 168 Fed. 994 (D. C. N. Y.).

Page 1599. Such further stay must be applied for; for the adjudication does not itself operate as a further stay.

Maas v. Kuhn, 22 A. B. R. 91 (N. Y. Sup. Ct. App. Div.), quoted at § 2704.

§ 2697. Not Only Pending Suits but Also Subsequent Suits Stayed.

Not only suits pending at the time of the filing of the bankruptcy petition may be so stayed, but those filed afterward and before discharge is granted.

In re *Mustin*, 21 A. B. R. 147, 165 Fed. 506 (D. C. Ala.).

§ 2698. Further Stay Discretionary.

The further stay is discretionary.

Coal Land Co. v. Ruffner Bros., 21 A. B. R. 474, 165 Fed. 881 (C. C. A. W. Va.).

But unless assets of the estate are involved, it is improper to grant a stay on application of the trustee.

Compare, In re *Mercedes Import Co.*, 21 A. B. R. 590, 166 Fed. 427 (C. C. A. N. Y., reversing In re *Mercedes Import Co.*, 20 A. B. R. 648): "The district judge was not obliged to grant the stay under § 11 of the Bankruptcy Act, but did so because he thought that the creditor had no better equity against the surety than he had against the bankrupt. As the trustee in bankruptcy has no interest whatever in the claim against the surety we think the creditor's rights and equities are questions to be disposed of by the State court."

§ 2698½. Court of Bankruptcy Has Exclusive Jurisdiction.

And the court of bankruptcy has exclusive power to determine whether a suit pending in a State court should be stayed or not, and the exercise of this power rests in the discretion of the judge, the exercise of which will not be interfered with by an appellate court unless it appears that it has been abused.

Coal Land Co. v. Ruffner Bros., 21 A. B. R. 474, 165 Fed. 881 (C. C. A. W. Va.).

§ 2699. Comity Requires Request for Stay First in Court Where Action Pending.

Page 1600, note 47. See, in addition, inferentially, *Maas v. Kuhn*, 22 A. B. R. 91 (N. Y. Sup. Ct. App. Div.).

§ 2700. But Bankruptcy Court May Enjoin if Necessary.

Page 1601, note 48. See, in addition, *In re Mustin*, 21 A. B. R. 147, 165 Fed. 506 (D. C. Ala.).

§ 2700½. Referee May Issue Stay.

The referee may issue the stay.

Impliedly, *In re Mustin*, 21 A. B. R. 147, 165 Fed. 506 (D. C. Ala.); *In re Lawrence*, 20 A. B. R. 698, 163 Fed. 131 (D. C. Ala.).

And it is the referee's duty, upon an application for a stay, to inquire whether the claim of nondischargeability is real and in good faith, or is merely colorable.

In re Lawrence, 20 A. B. R. 698, 163 Fed. 131 (D. C. Ala.): "When it is sought to stay a suit pending in the State court, it is the duty of the referee, when the matter is before him and he has jurisdiction, to inquire into the nature of the cause of action pending in the State court, and to satisfy his conscience that the plaintiff in the State court is proceeding upon a claim which he asserts bona fide is not dischargeable. If the referee comes to the conclusion, from his investigation, that such claim is not merely colorable, but is bona fide, he has no jurisdiction to try the merits of the suit, but must remand the parties to the State court, and permit that court to pass upon the merits of the contention as to whether it is barred by the discharge in bankruptcy."

§ 2702. Stay Applies to All Incidents of Proceedings in State Courts.

Page 1601, note 54. See, in addition, *In re Burke*, 19 A. B. R. 51, 155 Fed. 703 (D. C. N. Y.); instance, *Maas v. Kuhn*, 22 A. B. R. 91 (N. Y. Sup. Ct. App. Div.).

§ 2704. If Stay Not Applied for, Judgment and Orders of State Court Valid.

Page 1603. Impliedly, *Maas v. Kuhn*, 22 A. B. R. 91 (N. Y. Sup. Ct. App. Div.): "Until such stay is obtained, however, parties have the right to prosecute action or enforce collection of judgments. * * * Until a stay of collection is obtained, the plaintiff has a right to the continuance of his execution and the appropriation on his judgment of ten per cent of the defendant's salary."

§ 2707. Statutory Cancellation of Subsequently—Rendered Judgments.

Page 1603, note 65. See, in addition, *Walker v. Muir*, 21 A. B. R. 278, 127 App. Div. 163, 111 N. Y. Supp. 465; *Walker v. Muir*, 21 A. B. R. 593, 194 N. Y. 420.

Page 1604, note 67. Likewise where a bankrupt has been refused a discharge upon the opposition of a judgment creditor who had no personal knowledge of a second bankruptcy proceedings in which his judgment was scheduled and his address, though appearing in the city directory, was misstated, or of the bankrupt's application for a discharge which was granted, the judgment creditors' default on a subsequent motion to discharge the judgment under § 1268 of the Code of Civil Procedure, will be opened, it appearing that notice of such motion was served upon one of the original attorneys of record, who to the knowledge of the bankrupt, did not represent the creditor after the entry of the final judgment. *In re Quackenbush*, 19 A. B. R. 647, 122 App. Div. 456, 106 N. Y. Sup. 773.

Page 1604. And cancellation will be vacated on application of a creditor whose address was not "duly scheduled" and who did not have actual notice of the petition for discharge.

Murphy v. Blumenech, 19 A. B. R. 910, 123 App. Div. 910, 123 App. Div. (N. Y.) 645.

Cancellation of a judgment on a partnership debt where one partner alone is served—judgment being solely against him—will not be canceled where the other partner is in bankruptcy individually, *In re Gruber*, 21 A. B. R. 467 (N. Y. Sup. Ct. App. Div.).

But the debt may be discharged even though the judgment be not canceled of record, and the creditor may not share in the estate of a deceased bankrupt because of such failure to have the judgment cancelled.

In re Peterson, 22 A. B. R. 549 (N. Y. Surrogate Ct.).

In New York the Surrogate's Court has jurisdiction to disallow claims on judgments discharged by subsequent bankruptcy, even though such claims have not been "cancelled" of record in accordance with the statutory provisions, such cancellation not being an exclusive remedy, but being merely for the purpose of removing a cloud upon the title.

In re Peterson, 24 A. B. R. 270 (Sup. Ct. App. Div. N. Y., affirming 22 A. B. R. 549).

§ 2709. Stay Only Protects Bankrupt from Judgment in Personam—Judgments in Rem as to Property Unaffected.

Page 1604, note 70. Instance, foreclosure of mortgage (though here it is additionally said that the foreclosure was instituted before the four months period—an immaterial consideration), *Sample v. Beasley*, 20 A. B. R. 164, 158 Fed. 606 (C. C. A. La.).

Staying Garnishment of Wages.—Compare, *In re Driggs*, 22 A. B. R. 621, 171 Fed. 897 (D. C. N. Y.); also, compare ante, §§ 1678, 1683, 451, 1100, 2678.

Page 1604. Of course, however, if the proceedings in rem against the property are dependent on obtaining a judgment in personam

against the bankrupt, the obtaining of the discharge may frustrate the proceedings in rem.

See ante, § 1104; also, see *Bowen & Thomas v. Keller*, 22 A. B. R. 727, 130 Ga. 31.

§ 2711. Qualified Stay Where Levy Sought on Exempt Property Not Exempt as to Levy Sought.

Page 1605, note 72. Compare, inferentially, *Maas v. Kuhn*, 22 A. B. R. 91 (N. Y. Sup. Ct. App. Div.), quoted at § 1102.

Page 1605. But the obtaining of such stay is necessary; for, if the creditor permit the debtor to obtain his discharge before the right in rem has become fastened upon the exempt property, such subjecting of the exempt property will be frustrated.

§ 2712. And Where Judgment Necessary to Perfect Rights against Surety, or Property.

Likewise, where a creditor's rights against a surety are dependent upon his getting judgment against the bankrupt principal, it would seem a proper exercise of discretion to permit proceedings to be instituted, or pending proceedings to be prosecuted to judgment, for the purpose of fixing the surety's liability.

Page 1605, note 73. See, in addition, *King v. Block Amusement Co.*, 20 A. B. R. 784, 126 App. Div. 48, 111 N. Y. Supp. 102; *In re Mercedes Import Co.*, 21 A. B. R. 590, 166 Fed. 427 (C. C. A. N. Y., reversing 20 A. B. R. 648), quoted at § 2693; *In re Maher*, 22 A. B. R. 290, 169 Fed. 997 (D. C. Ga.); *In re Maaget*, 23 A. B. R. 14, 173 Fed. 232 (D. C. N. Y.), wherein the rule is affirmed but not applied; *Kendrick & Roberts v. Warren Bros.*, 110 Md. 47, 72 Md. 461; but compare qualifications of rule in *Crook-Horner Co. v. Gilpin*, 23 A. B. R. 350 (Md. Ct. App.).

Page 1605. *In re Ennis & Stoppani*, 22 A. B. R. 679, 171 Fed. 755 (D. C. N. Y.): "Though I cannot wholly vacate the stay, I can, however, permit the petitioner to enter his judgment against the bankrupts, and to do so much else as may be necessary to perfect any rights he may have under the undertaking, if any. * * * If the petitioner can enforce the undertaking, I will aid him to do so."

Page 1605, note 74. Instance to perfect rights against property left with sureties on redelivery bond in garnishment proceedings, *In re Maher*, 22 A. B. R. 290, 169 Fed. 997 (D. C. Ga.).

But the question might still remain whether the State law would permit the State court to render a judgment qualified in such manner.

Compare *Kendrick & Roberts v. Warren Bros.*, 110 Md. 47, 72 Md. 461; also, compare, *Crook-Horner Co. v. Gilpin*, 23 A. B. R. 350 (Md. Ct. App.).

§ 2712½. **Amendment of Answer to Set Up Discharge in Behalf of Surety Whether Allowed.**

Amendment of an answer to set up a discharge in behalf of a surety or in order to protect him from liability on his undertaking, has been refused.

Obiter, *King v. Block Amusement Co.*, 20 A. B. R. 784, 126 App. Div. 48, 111 N. Y. Supp. 102, quoted at § 1447.

§ 2713½. **Contempt for Disobedience of Stay.**

Disobedience of the stay is punishable as a contempt.

In re Mustin, 21 A. B. R. 147, 165 Fed. 506 (D. C. Ala.).

And this is so of a stay issued by a referee.

In re Mustin, 21 A. B. R. 147, 165 Fed. 506 (D. C. Ala.).

§ 2730. **Relation of Landlord and Tenant Not Severed.**

Page 1610, note 96. Compare, *Shapiro v. Thompson*, 24 A. B. R. 1, — Ala. —.

§ 2731. **All "Provable" Debts Discharged, Save Those Excepted: If Not "Provable," Not Discharged.**

Page 1611. Obiter, *Ruhl-Koblegard Co. v. Gillespie*, 22 A. B. R. 643, 61 W. Va. 554, 56 S. E. 898: "A discharge in bankruptcy releases the bankrupt from all debts and claims which are made provable against his estate and which existed on the day the petition was filed, except such debts as are by the Bankruptcy Act of 1898 excepted from a discharge in bankruptcy."

Page 1612. Thus, a promise to buy stock at a future day which day happens to fall on a date after the seller's adjudication of bankruptcy later occurs, has been held not to have given rise to a provable debt as of the date of the filing of the bankruptcy petition, and that therefore such contract was not discharged by the bankrupt's discharge.

Phoenix Nat'l Bk. v. Waterbury, 23 A. B. R. 250, N. Y. Court of Appeals, affirming *Phoenix Nat'l Bk. v. Waterbury*, 20 A. B. R. 140, 108 N. Y. Supp. 391: "By this provision of the Bankruptcy Act, it is evident that two things must concur, in order that a debt of the bankrupt shall be provable. There must be a fixed liability, as evidenced by a judgment, or a written instrument, and it must be absolutely owing at the time of the filing of the petition in bankruptcy; however the time of payment may be deferred. Looking at the contract in question in the light of the provision, we find that there was neither a present sale, nor a present purchase, of the stock by the parties, when making it, and if that be so, how could there arise any 'liability,' 'absolutely owing,' until, by efflux of time, or an exercise of the defendants' option, the contract matured? The agreement of each party was one which had relation, exclusively, to the future, whether as to obligation, or as to payment. The defendants promised to purchase the stock in 1900 (reserving an option to do so at an earlier date), at a price measured by the sum of \$25,000 and the amount of interest, at the rate of six per cent, which would

have accrued on that sum from April 2nd, 1894. The plaintiff promised to sell the stock to the defendants in 1900 (or at an earlier date, if the defendants exercised their option). The agreement provided for a future transaction and, meanwhile, if the stock described was then held in plaintiff's possession, its property in it remained unaffected. Until May 1st, 1900, the plaintiff undertook to be ready to sell and deliver such an amount of stock, if called for, and could have no claim against the defendants, prior thereto, or to such a call. The defendants were under no obligation to purchase the stock from the plaintiff before May 1st, 1900, unless they chose to do so. When, therefore, as the result of the filing of the petition in bankruptcy, the defendants were adjudicated bankrupts, in 1899, the situation under the contract was that, as yet, no liability had arisen, which, within the very precise definition of the Bankruptcy Act, could be said to be one 'absolutely owing' by them. Ordinarily, the insolvency of a party to an executory contract of sale is not equivalent, to a breach. *Pardee v. Kanady*, 100 N. Y. 121; *Vandegrift v. Cowles Engineering Co.*, 161 Id. 435, 444. If, however, the adjudication in bankruptcy could have been treated by the plaintiff as a breach, or renunciation, of the contract, from the impossibility of performance created by the bankrupts before performance was due, then the plaintiff's claim would have been for the damages. But, as that was an optional matter, it was not obliged to present such a claim and could abide its time, and, unless called upon previously by the trustee in bankruptcy, or the defendants, make tender of the stock at the date fixed for its purchase and delivery. I do not think that the bankruptcy of the defendants was, necessarily, to be considered as equivalent to a renunciation by them of the contract, or to a repudiation of their ability to perform. It was susceptible of being regarded as one holding out a possible promise of future profit. If it had been then profitable, it was within the power of the trustee in bankruptcy to adopt it and to have exercised the reserved option, by calling upon the plaintiff for the stock. Short of such action, there was no way by which any obligation, represented by the contract, could have been altered from a purely contingent liability to one 'absolutely owing' by the defendants. There could be no inception of an absolute indebtedness prior to the day in May, 1900; unless, prior to that time, there was a demand for the stock, followed by its delivery. Assuming that the plaintiff could have elected to prove a claim for damages as for a breach of the contract, if the trustee in bankruptcy did not elect to keep it, within the cases of *In re Pettingill* (C. C. A.), 14 Am. B. R. 757, 137 Fed. 143, and of *In re Neff* (C. C. A.), 19 Am. B. R. 23, 157 Fed. 57, how can that affect the question, whether any 'liability' was 'absolutely owing' by the bankrupts? It was a matter of election on the part of the plaintiff, purely."

However, the reasoning of this case is not to be wholly approved. It would seem that the liability was "absolutely owing" at the date of the filing of the bankruptcy petition, though the time of performance was in the future—each side was bound, the seller being bound to deliver either the stock or its money equivalent, certainly a liability sufficiently "fixed" it would seem.

Debts not comprehended within § 63, which enumerates the debts that are provable, are not discharged.

Compare, ante, as to what debts are "provable," § 625, et seq.

§ 2732. If Capable of Being "Proved," Debt Discharged Whether Actually Proved or Not.

Page 1612, note 102. Obiter, *In re Kuffler*, 18 A. B. R. 587, 153 Fed. 667, 155 Fed. 1018 (D. C. N. Y.); inferentially, *Grant Shoe Co. v. Laird*, 21 A. B. R. 484, 212 U. S. 445.

§ 2733. Tort Claims Discharged, if Tort Might Be Waived and Claim Be Presented ex Contractu.

Page 1613, note 103. See, in addition, *In re Hale*, 20 A. B. R. 633, 161 Fed. 387 (D. C. Conn.).

Page 1613, note 104. Apparently contra, *In re Ennis v. Stoppani*, 22 A. B. R. 679, 171 Fed. 755 (D. C. N. Y.).

§ 2733½. Claim ex Contractu Discharged Though Also Presentable in Tort.

Conversely, claims ex contractu are dischargeable though they may also be presentable in tort; as, for example, a claim for breach of warranty on a sale, even though actual fraud also existed sufficient for an action of deceit.

Obiter *Grant Shoe Co. v. Laird Co.*, 21 A. B. R. 484, 212 U. S. 445.

§ 2734. Also Unliquidated Claims, if Capable on Liquidation of Being Presented ex Contractu.

Page 1613, note 106. See, in addition, *Grant Shoe Co. v. Laird*, 21 A. B. R. 484, 212 U. S. 445.

§ 2735. Only Debts Existing at Date of Filing Petitions, Discharged.

Page 1613, note 107. Obiter, *Ruhl-Koblegard Co. v. Gillespie*, 22 A. B. R. 643, 61 W. Va. 554.

Thus, where a bankrupt partner, at the date of his individual adjudication, was indebted neither to the firm nor to the other partner, the claim of the solvent partner, upon liquidation of the firm affairs out of the bankruptcy court, is not a provable debt in the individual bankruptcy, since it was not owing at the date of adjudication.

Obiter, *In re Walker*, 23 A. B. R. 805, 176 Fed. 455 (D. C. Ala.).

§ 2736. Contingent Claims Not Provable, Not Discharged.

Page 1614. Similarly, a solvent partner who has undertaken the liquidation of the firm affairs upon the individual bankruptcy of the other partner, has no provable claim against the individual partner, arising out of the liquidation, where the bankrupt partner was not indebted to the firm nor to himself at the date of adjudication; the part-

nership relation by which the bankrupt partner becomes bound by way of contribution to the solvent partner under such circumstances being a purely contingent liability.

In re Walker, 23 A. B. R. 805, 176 Fed. 455 (D. C. Ala.).

§ 2736½. Subsequently Earned Salary.

Subsequently earned salary, under a previously existing employment, may not be garnisheed.

In re Ludeke, 22 A. B. R. 460, 171 Fed. 292 (D. C. N. Y.).

However, as to the effect of the discharge on such salary where an assignment of it has been made, see ante, "Effect of Adjudication on the Rights of Parties," §§ 451, 1118, 2678.

§ 2740. Judgments for Torts Discharged, Though Liability on Which Founded, Not.

Page 1615. At any rate, a judgment for tort is discharged so long as it is not for a wilful or malicious injury to person or property, or for some other non-dischargeable liability. But a judgment based upon a liability expressly exempted from the operation of discharge is not discharged—the creditor does not lose his position of advantage simply because a court has decided formally that his claim is just and reduced it to a form where it has become a "provable debt."

Tomkins as Administratrix v. Williams, 23 A. B. R. 886 (Sup. Ct. N. Y. App. Div.).

Peters v. United States ex rel. Kelly, 24 A. B. R. 206, 177 Fed. 885 (C. C. A. Ill.): "The character of the 'liability,' as that word is used in amended § 17 (2) of the Bankruptcy Act, is not changed by the fact that the liability was reduced to judgment. *Tinker v. Colwell*, 193 U. S. 473, 11 Am. B. R. 568; *Boynton v. Ball*, 121 U. S. 457, 466; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 292."

§ 2741. Claims of Sureties and Endorsers against Bankrupt Principal Discharged.

Thus, the bankrupt's accommodation endorsement is discharged, even though the note does not fall due until after bankruptcy.

Cohen v. Pecharsky, 23 A. B. R. 754 (N. Y. Sup. Ct. App. Div.).

§ 2746. Second Exception—"Liabilities for Obtaining Property by False Pretenses or False Representations," Not Discharged.

Liabilities for obtaining property by false pretenses or false representations are excepted from the operation of discharge.

Standard Sew. Mach. Co. v. Kattell, 22 A. B. R. 376, 132 App. Div. 539, 117 N. Y. Supp. 32; *Nichols v. Doak*, 22 A. B. R. 737, 48 Wash. 457 (although the

case seems to recite the statute as it stood before the Amendment of 1903). Instance, false statement that check already mailed to buyer by customer which buyer would turn over to seller on receipt. *Rowell v. Ricker*, 18 A. B. R. 651, 79 Vt. 552

Withdrawal of Objections to Discharge Based on Same Fraud, Not Res Judicata.—*Standard Sew. Mach. Co. v. Kattell*, 22 A. B. R. 376, 132 App. Div. 539, 117 N. Y. Supp. 32.

§ 2748. Judgment Not Requisite.

Page 1617, note 124. See, in addition, *In re Lawrence*, 20 A. B. R. 698, 163 Fed. 131 (D. C. Ala.); obiter, *Maxwell v. Martin*, 22 A. B. R. 93 (N. Y. Sup. Ct. App. Div.). But compare, *In re Benoit*, 20 A. B. R. 270, 108 N. Y. Supp. 889.

Page 1617. And the decision in *Tindle v. Birkett*, 205 U. S. 183, 18 A. B. R. 121, no longer is applicable.

In re Lawrence, 20 A. B. R. 698, 163 Fed. 131 (D. C. Ala.).

§ 2749. Judgment Not Such Merger as Prevents Inquiry into Original Liability.

Page 1618, note 125. Analogously, *Thompson v. Judy*, 22 A. B. R. 154, 169 Fed. 553 (C. C. A. Ky.). Compare, ante, § 2740; post, §§ 2756½, 2790. But compare, *In re Benoit*, 20 A. B. R. 270, 108 N. Y. Supp. 889; compare, *Strauch v. Flynn*, 22 A. B. R. 246, 122 N. W. (Minn.) 320; compare, *Nichols v. Doak*, 22 A. B. R. 737, 48 Wash. 457.

Page 1618. Whilst it is true that a judgment does not effect such a merger as to prevent inquiry into the original character of the liability so as to bring it within the class of those liabilities which are not discharged, yet judgment may operate as *res adjudicata* upon the nature of the obligation.

Peters v. United States ex rel. Kelly, 24 A. B. R. 206, 177 Fed. 885 (C. C. A. Ill., reversing *United States ex rel. Kelly v. Peters*, 22 A. B. R. 177, 166 Fed. 613).

§ 2750. How, Where Tort Waived and Judgment on Quasi Contract.

Whether the form of the action—as, where the tort is waived and suit brought *ex contractu*—prevents inquiry into the original character of the liability, is not fully settled.

Page 1618, note 126. Compare, *Strauch v. Flynn*, 22 A. B. R. 246, 122 N. W. 320, 108 Minn. 313; also compare, *In re Benoit*, 20 A. B. R. 270, 108 N. Y. Supp. 889. Also compare, *In re Ennis & Stoppani*, 22 A. B. R. 679, 171 Fed. 755 (D. C. N. Y.); compare, *Mackel v. Rochester*, 14 A. B. R. 429, 135 Fed. 904 (D. C. Mont.).

It appears, at any rate, that laches in asserting the fraudulent origin of the debt may be considered in determining the nature of it.

§ 2750½. Proving Claim in Bankruptcy Not Waiver of Exception.

Proving the claim in bankruptcy as a debt for sharing in the dividends is not a waiver of the creditor's right to urge that the debt is not dischargeable.

Standard Sewing Mach. Co. *v.* Kattell, 22 A. B. R. 376, 132 App. Div. 539, 117 N. Y. Supp. 32: "It cannot be claimed that plaintiff has elected to waive the fraud and rely upon the contract indebtedness. Being a claim upon account, it was by the statute one which was provable in bankruptcy under § 63 of the Bankruptcy Act. By § 17 of that act the discharge in bankruptcy does not relieve a defendant from all his provable debts, nor does it relieve him from a liability 'for obtaining property by false pretenses or false representations.' Attention is called to the provisions of § 33 of the Bankruptcy Act of 1867, which provided that no debt created by fraud of the bankrupt should be discharged, 'but the debt may be proved and the dividend thereon shall be a payment on account of said debt.' This provision was left out of the present Bankruptcy Act. Notwithstanding that fact, however, it has been held that under, the present Bankruptcy Act, the proof of a debt in bankruptcy proceedings is not such an election as waives the right to proceed to recover the same debt as created by fraud and not discharged by the Bankruptcy Act. Frey *v.* Torrey, 8 Am. B. R. 196, 70 App. Div. 166, 75 N. Y. Supp. 40, affirmed in 175 N. Y. 501. While this case was overruled as to a construction of one part of the statute in Crawford *v.* Burke, 195 U. S. 186, 12 Am. B. R. 659, this authority has never been questioned upon the proposition to which it is here cited, and by the amendment of the Bankruptcy Act in 1903 the holding in Crawford *v.* Burke has been made immaterial."

§ 2751. False Representations Not Necessarily in Writing.

The false representations need not necessarily have been made in writing in order to except the debt from the discharge.

Instance, Rowell *v.* Ricker, 18 A. B. R. 651, 79 Vt. 552.

§ 2754. Third Exception—Liabilities for Wilful and Malicious Injuries to Person or Property.

Liabilities for wilful and malicious injuries to the person or property of another constitute the third exception. They are not discharged.

Page 1619, note 130. See, in addition, Johnson *v.* Bruckheimer, 22 A. B. R. 88, 63 Misc. (N. Y.) 248; Thompson *v.* Judy, 22 A. B. R. 154, 169 Fed. 553 (C. C. A. Ky.).

Even though in judgment.

Obiter, Peters *v.* United States ex rel. Kelly, 24 A. B. R. 206, 177 Fed. 885 (C. C. A. Ills., reversing ex rel. Kelly *v.* Peters, 22 A. B. R. 177, 166 Fed. 613 D. C.): "The character of the 'liability' as that word is used in amended § 17 (2) of the Bankruptcy Act, is not changed by the fact that the liability was reduced to judgment." Thompson *v.* Judy, 22 A. B. R. 154, 169 Fed. 553 (C. C. A. Ky.). See ante, § 2740.

Page 1620. Thus, in general, judgments for assault and battery are not released; and, in one instance where judgment had been recovered against a school teacher for assault, the reviewing court reversed the lower court, which had held it had the right to determine whether the assault was "wilful and malicious," and it declared the judgment of the State court to be binding as to the nature of the liability, where such nature has been explicitly put in issue or been necessarily involved.

Peters v. United States ex rel. Kelley, 24 A. B. R. 206, 177 Fed. 885 (C. C. A. Ills., reversing *United States ex rel. Kelly v. Peters*, 22 A. B. R. 177, 166 Fed. 613).

Again, judgments for criminal conversation are not released.

Page 1620. It has been held that the wilful and wanton selling of a customer's stock by a bankrupt stockbroker may come under this section.

Kavanaugh v. McIntyre, 21 A. B. R. 327, 128 App. Div. 722, 112 N. Y. Supp. 987.

But the contrary has also been held.

In re *Ennis & Stoppani*, 22 A. B. R. 679, 171 Fed. 755 (D. C. N. Y.).

Judgments for libel are not released.

Page 1620, note 137. See, in addition, *Nat'l Surety Co. v. Medlock*, 19 A. B. R. 654, 58 S. E. 1131, 2 Ga. App. 665; *Thompson v. Judy*, 22 A. B. R. 154, 169 Fed. 553 (C. C. A. Ky.).

But the liability must have been for wilful and malicious injury; and the "malice" must be actual.

Flanders v. Mullin, 18 A. B. R. 708, 80 Vt. 124. But compare, *Kavanaugh v. McIntyre*, 21 A. B. R. 327, 128 App. Div. 722, 112 N. Y. Supp. 987.

Likewise, a judgment for false imprisonment is released, there being no allegation in the complaint that it was malicious, and malice not being essential.

Johnson v. Bruckheimer, 22 A. B. R. 242 (N. Y. Sup. Ct. App. Div., reversing same case, 22 A. B. R. 88).

The exception is based upon the "liability," and the actual facts will govern, though the pleadings may be only for the negligent performance of work, as in the case of a surgeon.

Flanders v. Mullin, 18 A. B. R. 708, 80 Vt. 124.

Or though the liability be "merged" in a judgment.

Thompson v. Judy, 22 A. B. R. 154, 169 Fed. 553 (C. C. A. Ky.). Obiter, *Peters v. United States ex rel. Kelly*, 24 A. B. R. 206, 177 Fed. 885 (C. C. A. Ills.).

It has been held, though by a divided court, that a judgment against a saloonkeeper in favor of the administratrix of a man to whom the saloonkeeper had sold whiskey in excess and had then given chloral to quiet him, and had thus killed him, was not a wilful nor malicious injury within the exception from the discharge in bankruptcy.

Tomkins as Administratrix v. Williams, 23 A. B. R. 886 (Sup. Ct. N. Y. App. Div.).

A State court judgment for a school teacher's assault upon a pupil has been held to be for a "wilful and malicious injury" not dischargeable in bankruptcy.

Peters v. United States ex rel. Kelly, 24 A. B. R. 206, 177 Fed. 885 (C. C. A. Ill., reversing *United States ex rel. Kelly v. Peters*, 22 A. B. R. 177).

Full faith and credit to be given to a judgment of a State court as to whether a liability is "for wilful or malicious injury to person or property."

Peters v. United States ex rel. Kelly, 24 A. B. R. 206, 177 Fed. 885 (C. C. A. Ill., reversing *United States ex rel. Kelly v. Peters*, 22 A. B. R. 177).

§ 2754½. Whether Judgment Merger.

It has been held that a judgment may be *res adjudicata* as to whether or not the liability was one for "wilful or malicious injury to person or property;" and that the State court's ruling on the nature of the liability, as established by the judgment, will be adopted.

Peters v. United States ex rel. Kelley, 24 A. B. R. 206, 177 Fed. 885 (C. C. A. Ills., reversing *United States ex rel. Kelley v. Peters*, 22 A. B. R. 177).

From the trend of the decisions it would seem that the original nature of the liability is only a subject of outside proof where the record of the judgment is ambiguous or silent, or where such nature of liability is not necessarily involved in the issues.

§ 2755. Fourth Exception—Liabilities for Alimony.

Page 1620, note 139. See, in addition, *Craine v. Craine*, 19 A. B. R. 76.

§ 2756½. New Judgment in One State on Alimony Decree of Another State.

It has been held, however, though by doubtful reasoning, that a new judgment recovered in one State on a former decree of alimony obtained in another State is discharged, the resort to a new judgment having reduced it from a decree of alimony to a mere money judgment.

In re Williams Estate, 23 A. B. R. 394, 118 N. Y. Supp. 562; compare, also, ante, § 2749; post, § 2790.

Yet it would seem that such ruling would be to subject substance to form and to make the inherent nature of the obligation subservient to the mere remedy.

§ 2763. Thus, Initials Instead of Full Given Names.

Page 1624, note 148. "Louis" Cohen instead of "Max" Cohen, not "due scheduling," obiter, *Cohen v. Pinkus*, 20 A. B. R. 787, 126 App. Div. 792, 111 N. Y. Supp. 82.

§ 2772½. Office Address Instead of Residence.

Where it is proved that no notice was actually received, the giving of an office address instead of the residence has been held not "due scheduling."

Weidenfeld v. Tillinghast, 18 A. B. R. 534 (City Court of New York).

§ 2775. Reasonable Diligence in Ascertaining Correct Address Requisite.

Page 1627, note 160. See, in addition, *Feldmark v. Weinstein*, 45 Misc. 329; obiter, *Weidenfeld v. Tillinghast*, 18 A. B. R. 533 (N. Y. City Ct.).

Page 1627. Thus, failure to look in the city directory of a great city, both creditor and bankrupt being residents, is not due scheduling.

In re *Quackenbush*, 19 A. B. R. 647, 122 App. Div. 456, 106 N. Y. Supp. 773; *Murphy v. Blumenreich*, 19 A. B. R. 910, 123 App. Div. (N. Y.) 645.

§ 2777. Actual Knowledge by Creditor Cures Defective Scheduling.

Page 1627, note 162. See, in addition, *Morrison v. Vaughan*, 18 A. B. R. 704, 119 App. Div. 184, 104 N. Y. Supp. 169, quoted at § 2780; *Cohen v. Pinkus*, 20 A. B. R. 787, 126 App. Div. 792, 111 N. Y. Supp. 82; obiter, *Weidenfeld v. Tillinghast*, 18 A. B. R. 531 (City Court of N. Y.).

§ 2778. No Particular Form of Notice Requisite.

Thus, of course, direct statement by the bankrupt or his attorney to the creditor is sufficient.

Cohen v. Pinkus, 20 A. B. R. 787, 126 App. Div. 792, 111 N. Y. Supp. 82.

Again, if the creditor had no written notice of the bankruptcy proceedings, yet if he received notice derived from reading the newspapers or from a verbal communication from the defendant which gave him actual knowledge of the proceedings in bankruptcy within a short time after the filing of the petition, with an opportunity to file and prove his own claim, to participate in the meetings of the creditors, to join in the examination of the bankrupt, and to participate in the first and subsequent dividends declared and paid, the debt was discharged by the discharge in bankruptcy.

Morrison v. Vaughan, 18 A. B. R. 704, 119 App. Div. 184, quoted at § 2780.

§ 2780. Knowledge Not Sufficient unless in Time for Creditor to Avail Himself of Benefits of Law.

Page 1628. It has been held that even if the notice were not in time

to enable the creditor to participate in the election of a trustee, it is sufficient if it be in time for him to file his claim, participate in other meetings of creditors, to examine the bankrupt and to get his share of dividends.

Morrison v. Vaughan, 18 A. B. R. 704, 119 App. Div. 184, 104 N. Y. Supp. 169: "While the plaintiff had no written notice of the bankruptcy proceedings he had notice derived from reading the newspapers and from the verbal communication of the defendant and his clerk, which gave him actual knowledge of the proceedings in bankruptcy, within a short time after the filing of the petition, with opportunity to have filed and proved his own claim, to have participated in the meetings of the creditors, to have joined in the examination of the bankrupt and his father, and also to have participated in the first and subsequent dividends declared and paid; in short, to have participated in all the proceedings taken, with the exception of the choice of the trustee. In consideration of the relative value of plaintiff's claim as against the \$224,000 of scheduled claims, the representatives of which exercised that choice, this cannot be considered to have been a very material deprivation of any of his rights. That is, he received notice and actual knowledge in time to have participated in all of the material proceedings and to have secured his proportional share of the bankrupt's assets. Laughlin, J., dissenting: There was no evidence tending to show that the respondent, an unscheduled creditor of the bankrupt, had notice of the bankruptcy proceedings on or before November 24, 1899, on which day the creditors met and appointed a trustee. Participation in the appointment of a trustee is one of the rights conferred upon creditors. (Bankruptcy Act of 1898 * * * § 44.) I am of the opinion that it should not be held that an unscheduled creditor has had 'notice or actual knowledge of the proceedings in bankruptcy' (Bankruptcy Act of 1898 * * * § 17, subd. 3), unless he has had notice or actual knowledge in time to exercise all of the rights of a creditor, as if he had been duly scheduled, for in no other way is he given an equal opportunity with other creditors to participate in the administration of the estate and to protect his rights."

Page 1628. Such actual knowledge must have been acquired in time to have enabled the creditor to avail himself of the benefits of the law, else it will not suffice to obviate the lack of due scheduling.

Birkett v. Weinstein, 15 A. B. R. 693, 195 U. S. 345: "Actual knowledge of the proceedings contemplated by the section is a knowledge in time to avail a creditor of the benefits of the law—in time to give him an equal opportunity with other creditors—not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate or to deprive him of dividends (§ 65). The provisions of the law relied upon by plaintiff in error are for the benefit of creditors, not of the debtor."

Compare ante, § 494.

§ 2782. After Discharge Too Late to Amend Schedules to Include Omitted Creditors.

Page 1628, note 167. See, in addition, *In re Spicer*, 16 A. B. R. 802, 145 Fed. 431 (D. C. N. Y.); compare, *In re McKee*, 21 A. B. R. 306, 165 Fed. 269 (D. C. N. Y.).

§ 2785. **"Fiduciary Capacity" Refers to Express Trusts and Excludes Conversions by Agents, etc., Also Fraudulent Transfers.**

Page 1630, note 170. See, in addition, *In re Hale*, 20 A. B. R. 633, 161 Fed. 387 (D. C. Conn.); *obiter*, *Flanders v. Mullin*, 18 A. B. R. 708, 80 Vt. 124; *obiter*, *Mathieu v. Goldberg*, 19 A. B. R. 191, 156 Fed. 541 (D. C. N. Y.); *Maxwell v. Martin*, 22 A. B. R. 93 (N. Y. Sup. Ct. App. Div.); *In re Ennis & Stoppani*, 22 A. B. R. 679, 171 Fed. 755 (D. C. N. Y.).

Whether the relation between the stockbroker and his customer in the purchase of stock is that of debtor and creditor, or of agent and principal, or of pledgor and pledgee, etc., see ante, § 1313; also, see *Miller v. Acid & Fertilizer Co.*, 21 A. B. R. 416, 211 U. S. 496 (affirming 117 La. 821).

Page 1631. But there may exist such fiduciary relation even in cases of conversions by commission men, agents, brokers, partners, etc., the line of distinction being well expressed in *Haggerty v. Bodkin*, 18 A. B. R. 302, 72 N. J. Ch. 473: "I have already referred to the reasoning by which the courts have held that the ordinary relation between factor and principal was not fiduciary within the meaning of that word here involved. It is that those transactions are mercantile transactions in which the principal must have known that his factor would, in the ordinary course of business, mingle the money received from the sale of his goods with his own, and that the ordinary relation of debtor and creditor arose out of those transactions, and that it was not the duty of the factor to earmark or segregate the proceeds of the sale of his principal's goods and remit at once. In fact, the ordinary course of business in such cases renders such restrictive dealing impracticable. The principal often obtains from the factor money in advance upon his goods, and the goods are not sold ordinarily in a lump, nor is the payment received in a single lump. The principal relies upon the personal responsibility of his factor. The courts held that it was and is contrary to public policy, as manifested in the bankrupt law, to except such a large class of unfortunate creditors from its benefits. This consideration covers the case in 2 How. (U. S.) 202, 11 L. Ed. 236, cited hereinbefore, and all cases of that character."

And in that case the court held in substance that a discharge in bankruptcy was no defense to an action brought by an administrator to recover money which had been deposited by the intestate with the defendant for his share of the capital of a proposed partnership, the intestate being taken sick within a few days after making such deposit, and which money the defendant had placed in a bank and converted to his own use after the death of the intestate; on the ground that the death of the intestate dissolved the partnership and the defendant held the money in a fiduciary capacity within the meaning of § 17 (4).

And the conduct of the factor may be such as to amount to actual fraud, if not embezzlement.

Mathieu v. Goldberg, 19 A. B. R. 191, 156 Fed. 541 (D. C. N. Y.).

But it has been held that a naked bailee of money, under an express agreement to keep safely and pay over on request, is not acting in a "fiduciary capacity" within the meaning of the act.

Lewis v. Shaw, 19 A. B. R. 866, 122 App. Div. 99, 106 N. Y. Supp. 1012.

It has been held, indeed, that wilful and wanton conversion of a customer's stock by a bankrupt stockbroker comes within the other exception of "wilful and malicious injuries to the property of another."

Kavanaugh v. McIntyre, 21 A. B. R. 327, 128 App. Div. 722, 112 N. Y. Supp. 987.

But this holding seems to be a strained construction. .

In re Ennis & Stoppani, 22 A. B. R. 679, 177 Fed. 765 (D. C. N. Y.). .

§ **2788. "Fraud" Means Moral Turpitude or Intentional Wrong.**

Page 1632, note 174. See, in addition, *Haggerty v. Badkin*, 18 A. B. R. 302 (N. J. Ch.).

§ **2790. Judgment Not Such Merger as Prevents Inquiry into Character of Fraud.**

Page 1633, note 176. Compare, ante, §§ 2749, 2756½.

§ **2792. No Individual Discharge of Member unless Individually Adjudged Bankrupt.**

Page 1633. *In re Bertenshaw*, 19 A. B. R. 577, 157 Fed. 363 (C. C. A.): "Moreover, since the property of the unadjudicated partners does not vest in and may not be administered by the trustee of the bankrupt partnership, the discharge of the partnership discharges that entity only from its debts, and leaves the partners still subject to their liability to pay the unpaid balance of the claims of the partnership creditors."

But it is possible that the court, though arriving at the correct conclusion in this case, bases it upon an improper ground, as to which compare ante, §§ 65, 477½, 2232.

§ **2793. Act of One Bars Firm Discharge, if Done within Scope of Partnership Business.**

Page 1634. Thus, a partnership may be barred of discharge by a false statement in writing to obtain credit made by one of the partners within the scope of the partnership business, although not a bar to the individual discharge of another partner who is innocent.

Frank v. Michigan Paper Co., 24 A. B. R. 261, 776 Fed. 179 (C. C. A. Md.), quoted at § 2563.

§ **2794. Discharge of Firm Debts in Individual Bankruptcy of Member.**

Page 1634, note 179. **No Cancellation of Judgment against Partnership Where Individual Partner Alone in Bankruptcy.**—*In re Gruber*, 21 A. B. R. 467 (N. Y. Sup. Ct. App. Div.).

§ **2808. Includes Creditor Who Has Failed to Prove Claim within Year.**

Page 1645, note 3. **Creditor Not Scheduled nor Notified.**—In one case it

was held that it was not sufficient ground for opening up a discharge that one of the creditors did not receive notice, *In re Fritz*, 23 A. B. R. 84, 173 Fed. 560 (D. C. N. Y.).

§ 2812. Whether Bankrupt May Move to Vacate Discharge.

Page 1646. But it was held in one case that the bankrupts might have the discharge set aside in order to amend their schedules to include an omitted creditor where the bankrupts were claiming a counterclaim or offset to exist which in fact constituted their only asset.

In re McKee, 21 A. B. R. 306, 165 Fed. 269 (D. C. N. Y.).

§ 2813. Fraud in Procuring Discharge, Accompanied by Grounds for Barring It, Sole Ground.

Page 1646, note 9. Instance held insufficient, creditor not notified but no fraud, *In re Fritz*, 23 A. B. R. 84, 173 Fed. 560 (D. C. N. Y.).

§ 2814. Buying Off Opposition, Sufficient.

Page 1647, note 11. Compare, § 2628, note.

§ 2815. Applicant's Knowledge of Fraud at Time Discharge Granted, or Laches, Fatal to Revocation.

Page 1647, note 12. See, in addition, *In re Mauzy*, 21 A. B. R. 59, 163 Fed. 900 (D. C. W. Va.); impliedly, *In re Griffin Bros.*, 19 A. B. R. 78, 154 Fed. 537 (D. C. Ala.); instance, *Thompson v. Mauzy*, 23 A. B. R. 489, 174 Fed. 611 (C. C. A. W. Va.).

Page 1648. Thus, also, where creditors, before bankruptcy, had abandoned a suit to set aside the same fraudulent transfer now urged, and, during the bankruptcy, did not seek an examination of the bankrupt, nor oppose his discharge, they will be denied revocation.

In re Mauzy, 21 A. B. R. 59, 163 Fed. 900 (D. C. W. Va.).

§ 2816. Ground for Barring Discharge Itself, Must Also Exist.

Page 1648, note 15. See, in addition, *In re Griffin Bros.*, 19 A. B. R. 78, 154 Fed. 537 (D. C. Ala.).

§ 2818. Vacating for Irregularities Not Going to Merits.

Page 1649, note 18. And the court refused to vacate a discharge decree in one case where a creditor averred he had not received notice, and was not scheduled, there being no fraud shown. *In re Fritz*, 23 A. B. R. 84, 173 Fed. 560 (D. C. N. Y.).

§ 2824½. Whether Appeal Lies.

Questions arising as to revocation of discharge are proceedings in bankruptcy and not "controversies arising in bankruptcy proceedings," within the meaning of §§ 23, 24, 25.

Thompson v. Mauzy, 23 A. B. R. 489, 174 Fed. 611 (C. C. A. W. Va.); also, compare, post, § 2865½.

But it has not been authoritatively determined whether they are appealable or not.

See *Thompson v. Mauzy*, 23 A. B. R. 489, 174 Fed. 611 (C. C. A. W. Va.). Also, compare, post, § 2897½.

§ 2827. Must Be in Trustee's Name, if in Behalf of Estate and after Election of Trustee.

Page 1654. At any rate, such is the better practice.

Ohio Valley Bank Co. v. Mack, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio): "This appeal is by a creditor who was, upon application, allowed to appeal, the trustee refusing to appeal though requested to do so. This practice seems admissible in the sound discretion of the district judge when the trustee refuses to appeal, though the better practice would be to order the trustee to appeal or to allow the dissatisfied creditor to appeal in his name, being indemnified in either case against costs by such creditors."

§ 2830. Trustee Refusing May Be Ordered, or Creditor Be Authorized to Use Trustee's Name.

Page 1655, note 7. *Obiter*, *Ohio Valley Bank Co. v. Mack*, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio), quoted at § 2827.

§ 2831. Court May Require Creditor to Indemnify Trustee.

Page 1655, note 8. See, in addition, *Ohio Valley Bank Co. v. Mack*, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio), quoted at § 2827.

§ 2834. Appeal by One Party Does Not Necessarily 'Bring Up Case as to All.

Page 1656. Similarly, on a creditor's petition for review of an order distributing property claimed as exempt between certain classes of creditors to the exclusion of the class to which the complainant belongs, the bankrupt will not be heard, where he has filed no petition for review, in review of the order refusing him the exemptions altogether.

In re Cohn, 22 A. B. R. 761, 171 Fed. 568 (D. C. Dak.). See, also, ante, § 1111½.

§ 2839. Review of Referee's Orders—Jurisdiction.

Page 1659. And the orders or findings of the referee are reviewable only on petition for review filed as so provided by General Order No. 27.

In re Clark Coal & Coke Co., 23 A. B. R. 273, 173 Fed. 658, 176 Fed. 955 (D. C. Pa.).

Page 1659, note 2. See, in addition, *In re Greek Mfg. Co.*, 21 A. B. R. 111, 164 Fed. 211 (D. C. Pa.). Litigants to be notified of referee's decision to be given opportunity for review, *In re Nichols*, 22 A. B. R. 216, 166 Fed. 603 (D. C. N. Y.).

§ 2840. Order Must Be Made.

Page 1659, note 3. *Craddock-Terry Co. v. Kaufman*, 23 A. B. R. 724, 175 Fed. 303 (D. C. Tex.).

Page 1660. There can be no review of a question certified in advance, no review of a hypothetical question actually or likely to arise but not already arisen.

Craddock-Terry Co. v. Kaufman, 23 A. B. R. 724, 175 Fed. 303 (D. C. Tex.).

§ 2841. Order Must Be Final, Not Interlocutory; Case Not to Be Reviewed Piecemeal.

Page 1661. A mere "order to show cause" is in the nature of process, being a method prescribed for bringing a respondent into court; it is interlocutory and not in and of itself appealable nor reviewable.

Morehouse v. Hardware Co., 24 A. B. R. 178, 177 Fed. 337 (C. C. A. Nev.).

§ 2845. But No Formal "Exceptions" Need Be "Filed."

Page 1662. In *re People's Department Store*, 20 A. B. R. 244, 159 Fed. 286 (D. C. N. Y.): "Counsel for the trustee contend that, as no formal exceptions were filed to the decision and ruling of the referee, his findings of fact should not be disturbed. In the absence of a rule or order of this court requiring exceptions to be filed, such filing was not essential. The petition for review sufficiently indicates the single disputed question which is assigned for error."

§ 2846. Petition for Review Must Be Filed.

Page 1662, note 13. **Not to Be Conditioned on Payment of Costs.**—The right to carry up the case for review of the referee's order may not be conditioned on the payment of costs, *obiter*, *West v. McLaughlin Co.*, 20 A. B. R. 654, 162 Fed. 124 (C. C. A. Mich.).

Defective certificate of referee not to be treated as petition for review. *Craddock-Terry Co. v. Kaufman*, 23 A. B. R. 724, 175 Fed. 303 (D. C. Tex.).

Page 1662. In *re Greek Mfg. Co.*, 21 A. B. R. 111, 164 Fed. 211 (D. C. Pa.): "This method of reviewing an order (Gen. Ord. No. 27) is exclusive."

§ 2850. Petition to Be Filed with Referee.

Page 1663, note 17. Impliedly, In *re Greek Mfg. Co.*, 20 A. B. R. 111, 164 Fed. 211 (D. C. Pa.).

Whether Referee May Vacate or Modify Order.—Doubtless the referee has jurisdiction to grant a rehearing or to vacate or modify his own order. But compare, In *re Greek Mfg. Co.*, 21 A. B. R. 111, 164 Fed. 211 (D. C. Pa.).

Referee May Not Review Own Orders on Exceptions Thereto.—In *re Marks*, 22 A. B. R. 568, 171 Fed. 281 (D. C. Pa.).

§ 2851. Time Limited for Filing Petition for Review.

Page 1663, note 18. See, in addition, In *re Maloney*, 21 A. B. R. 502 (D. C. Sup. Ct.).

Page 1664. In re Greek Mfg. Co., 21 A. B. R. 111, 164 Fed. 211 (D. C. Pa.): "It will be observed that no time is fixed within which the petition must be filed with the referee. How long the time shall be is therefore left to be regulated by the courts as they may think proper, and they have agreed that unless a rule upon this subject has been adopted a reasonable time is sufficient."

Page 1664, note 19. In re Greek Mfg. Co., 21 A. B. R. 111, 164 Fed. 211 (D. C. Pa.); inferentially, In re Maloney, 21 A. B. R. 502 (D. C. Sup. Ct.). Thus, it is fixed at 10 days in the Eastern District of Pennsylvania, In re Marks, 22 A. B. R. 568, 171 Fed. 281 (D. C. Pa.).

Page 1664, note 20. See, in addition, In re Rome, 19 A. B. R. 820, 162 Fed. 971 (D. C. N. J.): Thirty days held not unreasonable; In re Maloney, 21 A. B. R. 502 (Sup. Ct. D. C.): Limit fixed at 20 days "by analogy."

Page 1664, note 21. In re Rome, 19 A. B. R. 820, 162 Fed. 971 (D. C. N. J.): Wherein 30 days were held not laches; In re Maloney, 21 A. B. R. 502 (Sup. Ct. D. C.): Wherein 4 months apparently held laches.

Page 1664. In re Nichols, 22 A. B. R. 216, 166 Fed. 603 (D. C. N. Y.): "There is no rule in the Northern district of New York fixing the time within which an application to review an order of the referee shall be made. It follows that such an application should be made within a reasonable time. Parties litigant should not sleep upon their rights. Here the creditors were informed of the pendency of Wheeler's claim, and they made no objection to its allowance as one entitled to priority of payment. I cannot on the evidence before me, and on the papers in the case, reverse the finding of the referee that Bonnefond was guilty of laches. Bonnefond's attorney was guilty of laches after receiving a copy of the order from the referee. The application for a review came too late. * * * I am inclined to the opinion that petitions for review, which are in their nature appeals from the order, should be filed within the time fixed for an appeal from the same class of orders, and that this should be regarded as a reasonable time. * * * In this case Bonnefond allowed more than six months to elapse after notice of the order before he took action, and the application for review must be, and is, denied, and the proceeding for review is dismissed."

§ 2854. Record on Review to Show Certificate.

Page 1665. Landry v. San Antonio Brew. Ass'n, 20 A. B. R. 226, 159 Fed. 700: "We find in the transcript neither an agreed statement of facts, a finding of facts by the judge, nor even a summary of the evidence. Petitions to this court for superintendence and revision are restricted to questions of law. Therefore this petition is denied."

§ 2855. Not Entire Evidence but Only "Summary" to Be Certified.

Page 1667. This rule must be taken with the qualification of the other rule requiring the referee to take and report to the reviewing court all the evidence offered, except privileged evidence, etc., as laid down by other decision.

See ante, §§ 552, 1554; Missouri Elec. Ry. Supply Co. v. Hamilton-Brown

Co., 21 A. B. R. 270, 165 Fed. 283 (C. C. A. Mo.); *Bank v. Johnson*, 16 A. B. R. 208, 143 Fed. 463 (C. C. A. W. Va.).

National Bank v. Abbott, 21 A. B. R. 436, 165 Fed. 852 (C. C. A. Mo.): "A proceeding in bankruptcy is a proceeding in equity, and the taking of testimony therein and the review by appeals of hearings therein are governed by the same practice as they are in suits in equity, except where otherwise specified. A referee or the District Court taking testimony in a controversy or hearing in bankruptcy is required by that practice to take, record, and, in case of an appeal, to return to the appellate court, all the evidence offered by either party to the controversy, that which is held by them to be incompetent, irrelevant, or immaterial as well as that which they deem admissible, to the end that, if the appellate court is of the opinion that evidence rejected should have been received, it may consider it, render a final decree, and conclude the litigation without remanding the suit to procure the excluded evidence. From the general rule that all evidence offered should be received, the evidence of a privileged witness, privileged evidence, and evidence which clearly and affirmatively appears to be so incompetent, irrelevant, or immaterial that it would be an abuse of the process or power of the court to compel its production or permit its introduction, are excepted."

Page 1668. Rulings of a referee or District Court excluding evidence, where the evidence has not been incorporated in the record are not reviewable in the Circuit Court of Appeals. The remedy for a refusal of a referee to take such evidence is by way of an application to the District Court, and, failing there, to the Circuit Court of Appeals, for an order that it be taken and preserved.

Nat'l Bk. v. Abbott, 21 A. B. R. 436, 165 Fed. 852 (C. C. A. Mo.).

§ 2857. Referee Also to Certify Findings of Fact.

Page 1668, note 31. See, in addition, *Schuler v. Hassinger*, 24 A. B. R. 184, 177 Fed. 119 (C. C. A. Ala.).

§ 2858. Precise Question for Review to Be Stated Clearly and Distinctly.

Page 1669, note 32. Compare, *Craddock-Terry Co. v. Kaufman*, 23 A. B. R. 724, 175 Fed. 303 (D. C. Tex.), where an attempt was made to treat a "certificate" of the referee, where the bankrupt had refused to testify before adjudication of bankruptcy, as a "petition for review."

§ 2860. Stay of Execution of Order.

But if other parties file the petition, it has been held that a stay bond may be required.

Compare post, § 2979½.

Page 1670. However, if exception be taken to the order, the order should not be executed by the trustee until opportunity be given the defeated party to appeal or to file his petition for review.

In *re Nichols*, 22 A. B. R. 216, 166 Fed. 603 (D. C. N. Y.): "Where there is an appearance and a contest, referees should always see to it that the liti-

gating parties are notified of his decisions. In such cases trustees should not execute orders for the payment of money until opportunity for appeal or review has been given. Application can be made to the referee or to the court for a stay of proceedings. Where creditors do not appear, or where they appear and their appearance is not noted, no such duty rests upon the referee. This is especially true where claims are presented and no objection is made thereto."

§ 2861. Referee's Order and Finding Presumed Correct, until Manifest Error Shown.

Page 1670, note 34. See, in addition, *In re Hatem*, 20 A. B. R. 470, 161 Fed. 895 (D. C. N. Car.); *In re Kenyon*, 19 A. B. R. 194, 156 Fed. 863 (D. C. Ohio); *In re Crenshaw*, 19 A. B. R. 502, 156 Fed. 638 (D. C. Ala.); *McNulty v. Wiesen*, 19 A. B. R. 783, 158 Fed. 221 (D. C. Pa.); impliedly, *In re Wheeler*, 21 A. B. R. 262, 165 Fed. 188 (C. C. A. Ills.); *In re Hoffman*, 23 A. B. R. 19, 173 Fed. 234 (D. C. Wis.); *In re MacKissic*, 22 A. B. R. 817, 171 Fed. 259 (D. C. Pa.); (Special Master) *Fouche v. Shearer*, 22 A. B. R. 828, 172 Fed. 592 (D. C. Ga.); *In re Landsberger*, 24 A. B. R. 107, 177 Fed. 443 (D. C. Ga.); analogously (master on discharge), *In re Remmers*, 23 A. B. R. 78, 173 Fed. 484 (C. C. A. Mo.). Compare, post, § 3009.

Page 1671. *In re Littman*, 20 A. B. R. 300, 159 Fed. 233 (D. C. Pa.): "This case illustrates admirably the value of the rule, that findings of fact made by a tribunal before whom the parties and the witnesses have appeared and been examined are not to be lightly set aside. From the record now before the court, which I have read attentively from beginning to end, it is very difficult, if not impossible, to ascertain with even a fair degree of certainty what really occurred during the three or four weeks under investigation. Both Littman and Zaretsky are of foreign extraction, apparently more at home in some other tongue than English, and the stenographer's notes seem frequently to indicate either that the questions of counsel were not accurately understood, or that the witness could not command sufficient English words to express his answers with clearness. Under such circumstances, experience has shown abundantly that it is almost essential that the witness should be seen and heard in order that one may feel a reasonable confidence that the answers have been understood in the sense intended by the speaker. Without the aid of sight and hearing, a mere transcript of his words may be nearly, if not quite, unintelligible, and at the best is likely to be confusing. In the present case, however, I have been able to see with sufficient distinctness, that there is a substantial conflict of testimony upon the vital point whether there was an oral agreement of partnership between Littman and Zaretsky that should affect the distribution of the fund arising from the receiver's sale, but I have found it impossible to conclude that the referee was clearly wrong in finding that the fact of such partnership had not been established."

In re Braselton, 22 A. B. R. 419, 169 Fed. 960 (D. C. Ga.): "It is well understood that the findings of referees in bankruptcy upon questions of fact are not to be disturbed unless clearly erroneous."

In re Schwartz, 23 A. B. R. 37, 179 Fed. 767 (D. C. N. Y.): "It is perfectly clear that such contradictions can be satisfactorily resolved only by the tribunal which sees the witness. Other explanations are possible than that

of perjury, and when a competent master has concluded that the true explanation is not perjury, a judge should not upset his finding simply upon the basis of the written words. They constitute but a small part of the evidence, the bearing of the witness, his appearance, his general intelligence, and deportment, counting as much as the words he uses. Nothing is more certain than that great weight should be given to the finding of the tribunal which had before it all this evidence in its entirety. It is true in this case that with some of the master's findings I disagree, as, for example, on the value of the licenses, of the insurance policy and of the jewelry, but that does not militate against the correctness of his finding as to this issue, for in all of those matters my difference from him does not turn upon the credibility of a witness."

Page 1672. *Ohio Valley Bank Co. v. Mack*, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio): "No arbitrary rule can be laid down for determining the weight which should be attached to a finding of fact by a bankrupt referee. His position and duties are analogous, however, to those of a special master directed to take evidence and report his conclusions, and the rule applicable to a review of a referee's finding of fact must be substantially that applicable to a master's report. * * * Much in both cases must depend upon the character of the finding. If it be a deduction from established fact, the finding would not carry any great weight, for the judge, having the same facts, may as well draw inferences or deduce a conclusion as the referee. But if the finding is based upon conflicting evidence involving questions of credibility and the referee has heard the witnesses, much greater weight naturally attaches to his conclusion and the weight of authority is, that the district judge, while scrutinizing with care his conclusions upon a review, should not disturb his finding unless there is most cogent evidence of a mistake and miscarriage of justice."

In re *McCann Bros. Ice Co.*, 22 A. B. R. 555, 171 Fed. 265 (D. C. Pa.): " * * * the case presents the familiar situation of a conflict of evidence—much of it from the mouths of witnesses who appeared before the referee—which has been settled by the findings of fact. The courts have often said that such a finding should not be disturbed except for plain mistake."

Compare, In re *Schulman*, 23 A. B. R. 809, 177 Fed. 191 (C. C. A. N. Y.): "Unless convinced that manifest error has been committed, this court should refrain from meddling with the administration of the estate which can safely be intrusted to the officers of the bankruptcy court who are familiar with the local environment and the character and conduct of the parties. In the case at bar we know nothing of the bankrupt, Schulman, except as he is portrayed in the printed record. The referee, on the contrary, had an opportunity to see and hear the bankrupt and observe his manner while testifying, which is an inestimable advantage in cases of this character. The testimony of a witness may sound plausible when read afterwards from a printed book and yet his conduct on the stand may have been such that no one who heard him testify believed that he was telling the truth. The referee certified that after having taken the oath the bankrupt refused to be examined according to law and deliberately withheld facts within his knowledge as to the disposition of the property of the bankrupt's firm. Again, he certifies that the bankrupt withheld from the trustee and the court, with the deliberate intention of concealing his condition, the true facts relating to the conduct of his business, his dealings with his creditors and the amount and

whereabouts of his property. The referee says: 'The manner of the bankrupt, his recollection when he desired to exercise it, convinced me as I watched him that where he desired to give the facts he could do so.' Disingenuous and evasive as his testimony appears when read, it is obvious, that the opportunity to 'watch' the bankrupt gave the referee a very marked advantage in determining whether he was acting honestly. His answers, 'I don't remember,' and 'What do you mean?' so often given, might in some instances have been the result of a defective memory or an honest inability to understand. An appellate court may be unable to detect, under such conditions, the false from the true, the honest from the fraudulent, but any intelligent person, after observing the witness for hours on the stand, could not be deceived as to his purpose."

Page 1672, note 35. See, in addition, *Ohio Valley Bank Co. v. Mack*, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio), quoted supra.

Page 1672. And where the evidence is not in serious conflict, and the conclusions drawn by the referee are deduced from a peculiar state of facts but are not sufficiently supported by the evidence, the reviewing court will not be bound by his conclusions, simply because the witnesses appeared before him and he could note their demeanor.

In re *People's Department Store*, 20 A. B. R. 244, 159 Fed. 286 (D. C. N. Y.).

And if it be a deduction from established facts the referee's finding would not carry as much weight as where there is a serious conflict in the evidence, for the judge having the same facts, is in an equal position for the drawing of conclusions.

Ohio Valley Bank v. Mack, 20 A. B. R. 40, 163 Fed. 155 (C. C. A. Ohio); In re *McCrary Bros.*, 22 A. B. R. 161, 169 Fed. 485 (D. C. Ala.).

Where the record upon a petition to revise does not contain the evidence taken before the referee, it will be presumed that the facts were sufficient to sustain his finding and order, and only matters of law, apparent upon the face of the record, may be considered.

In re *Baum*, 22 A. B. R. 295, 169 Fed. 410 (C. C. A. Ark.).

§ 2861½. Decision Below on One Ground, Nevertheless Other Grounds Available to Respondent on Review.

The respondent, upon review of an order affirming the findings of a referee, may rely on any ground disclosed by the record, even though it be not the ground upon which the decision was made.

Davis v. Crompton, 20 A. B. R. 53, 158 Fed. 735 (C. C. A. Pa.): "In maintaining the decision of the referee, as affirmed by the District Court, the appellees may rely upon any ground disclosed by the record upon which that decision might be thought to be maintainable, even though it be not the ground upon which that decision was made."

§ 2862. Points Not Discussed Below Nevertheless Considered if Sufficiently Appearing in Record.

Page 1672. However, it has been held that if the point is not pressed before the referee, it will be held to be waived by the District Judge.

In re Rome, 19 A. B. R. 820, 162 Fed. 971 (D. C. N. J.).

Thus, objections to evidence received by a referee may not be raised for the first time on review of an order made by him.

In re McCann Bros. Ice Co., 22 A. B. R. 555, 171 Fed. 265 (D. C. Pa.).

Introducing New Evidence before District Judge.—It was held in an obiter that new evidence might be considered by the District Judge on review of a referee's order, In re Leech, 22 A. B. R. 599, 171 Fed. 622 (C. C. A. Ky.). Such a rule, however, is subversive of due order, if not directly contrary to bankruptcy rules.

§ 2864. Fundamental Distinction between Steps "in Bankruptcy Proceedings" Proper and Incidental "Controversies."

Page 1678. *Thomas v. Woods*, 23 A. B. R. 132, 173 Fed. 585 (C. C. A. Kans.): "At the outset we are confronted with the question which has become a part of nearly every bankruptcy cause in an appellate court, namely: Should the review have been sought by appeal or petition? The confusion existing on this subject has been frequently confessed by the courts. In re McMahon (C. C. A.), 17 Am. B. R. 530, 147 Fed. 684; *Coder v. Arts*, 213 U. S. 223, 232, 22 Am. B. R. 1, 29 Sup. Ct. 436, 54 L. Ed. —. The classification of matters in bankruptcy as 'proceedings in bankruptcy' and 'controversies arising in bankruptcy proceedings' is vague and in actual application has bewildered the courts and the legal profession. It is quite manifest that, when the decision of a trial court in a 'bankruptcy proceeding' is brought under review in an appellate court, it presents a 'controversy,' and of necessity this is also a 'controversy arising in a bankruptcy proceeding.' The phrases, therefore, upon which this classification is based are tautological. Again, the Bankruptcy Act * * * itself uses the phrase 'proceedings in bankruptcy' in a double sense. Section 23 provides as follows: 'The United States Circuit Court shall have jurisdiction of all controversies at law and in equity as distinguished from proceedings in bankruptcy between trustees as such, and adverse claimants, concerning the property acquired or claimed by the trustees,' etc. Here the term 'proceedings in bankruptcy' embraces 'controversies arising in bankruptcy proceedings,' as well as 'bankruptcy proceedings proper,' and sets them both over against plenary suits between trustees and adverse claimants (instituted by bill or complaint, with subpoena or summons), touching rights or property not in the custody of the court. In § 24b, however, the term 'proceedings in bankruptcy,' as construed by the courts, has been given a narrower meaning, and has been set over against 'controversies arising in bankruptcy proceedings,' as used in § 24a. Here it has been thought to mean any of the administrative acts intervening between the filing of the petition and the granting of the discharge, as distinguished from those 'controversies arising in bankruptcy proceedings' on petition, which would have been the subject of plenary suits if the estate had not been in the custody of a court of bankruptcy. The confusion that has resulted from the attempt of the courts to apply this classi-

fication to actual litigation affords strong support for the decisions of this court that the methods of review provided by the Bankruptcy Act are not mutually exclusive, but cumulative. In *re McKenzie* (C. C. A.), 15 Am. B. R. 679, 142 Fed. 383; *Dodge v. Norlin* (C. C. A.), 13 Am. B. R. 176, 133 Fed. 363; In *re Holmes* (C. C. A.), 15 Am. B. R. 689, 142 Fed. 391."

Page 1678. However, there is a fundamental distinction taken between questions arising in bankruptcy proceedings that, if kept in mind, will tend to clear up many difficulties.

Page 1679, note 4. Compare, In *re Farrell*, 23 A. B. R. 826, 176 Fed. 505 (C. C. A. Ohio).

Page 1679, note 5. *Schuler v. Hassinger*, 24 A. B. R. 184, 177 Fed. 119 (C. A. Ala.), quoted at § 2876.

Page 1681. *Morehouse v. (Pacific) Hardware & Steel Co. et al.*, 24 A. B. R. 178, 177 Fed. 337 (C. C. A. Nev.): "It is conceivable that the line of demarcation between 'proceedings in bankruptcy' and controversies at law and in equity, arising 'in the course of bankruptcy proceedings,' may in some cases be obscure; but, generally speaking, the former include all questions arising in the administration of the bankrupt's estate, such as the appointment of receivers and trustees, orders requiring the bankrupt to surrender property of the estate in bankruptcy, orders requiring the bankrupt's voluntary assignee to surrender property of the estate, orders giving priority to the claim of a creditor, orders directing a set-off of mutual debts, and orders confirming a composition. These are questions which, with a view to the prompt administration and distribution of the assets of the bankrupt, the law permits to be summarily disposed of by revision. The latter include all controversies and questions arising between the trustee and adverse claimants of property as property of the estate, whether the property be in his possession or theirs. The order which is sought to be reviewed in the present case is one made in a proceeding for contempt. It was not made with a view to obtain possession of property of the bankrupt, or to enforce a prior order of the court, but it is a criminal proceeding to punish by fine or imprisonment those who have been guilty of violating an injunction of the court. Such a proceeding has nothing to do with the estate in bankruptcy. It is the exercise of the court's power to preserve order in its judicial proceedings and enforce its own orders. It is a proceeding prosecuted for the benefit of the government, the courts, and the public. Section 2 (13) of the Bankruptcy Act gives the court of bankruptcy power to enforce obedience, by its officers and other persons, to all lawful orders, by fine or imprisonment, or both. But the power of a court of bankruptcy to punish for a contempt does not rest alone upon the statute."

Page 1682. *Thompson v. Mauzy*, 23 A. B. R. 489, 174 Fed. 611 (C. C. A. W. Va.): "While the Supreme Court of the United States has not, so far as we are aware, directly decided what proceeding, if any, is appropriate to review the decision of a District Court declining to revoke a discharge, there have been numerous decisions by District Courts, Circuit Courts of Appeal and the Supreme Court of the United States, construing the several sections above quoted, and from the general trend of these decisions we make the following statement of conclusions: That there is a clear distinction between 'controversies arising in bankruptcy proceedings,' as mentioned in § 24a, and the 'proceedings in bankruptcy,' which, by § 24b, the Circuit

Courts of Appeal are given jurisdiction to superintend and revise 'in matter of law;' the former being generally held to embrace questions between the trustee, representing the bankrupt and his creditors, on the one side, and adverse claimants, on the other, and not directly affecting those administrative orders and judgments ordinarily known as 'proceedings in bankruptcy,' and the latter being confined to those questions arising between the bankrupt and his creditors which are the very subject of such administrative orders and judgments, from the petition for adjudication to the discharge, and including the intermediate administrative steps, and such controversies as arise between parties to the bankruptcy proceedings as are involved in the allowance of claims, fixing their priorities, sales, allowances, and other matters to be disposed of summarily."

§ 2865½. Likewise, Discharge.

Questions arising as to the right of the bankrupt to his discharge are not "controversies arising in bankruptcy proceedings" but are "proceedings in bankruptcy" themselves.

Thompson v. Mauzy, 23 A. B. R. 489, 174 Fed. 611 (C. C. A. W. Va.): "Clearly this is not one of the controversies arising in proceedings in bankruptcy provided for in § 24a, as to which the appellate courts are invested with appellate jurisdiction as in other cases, for the latter by judicial definition are limited to cases of the class referred to in § 23, Bankruptcy Act, as amended. Hence it becomes apparent that the appeal to the Circuit Court of Appeals provided by said § 24a is not appropriate from an order dismissing a petition to revoke a discharge granted to the bankrupt."

§ 2866. Likewise, Allowance or Refusal of Exemptions.

Page 1682, note 8. Compare post, §§ 2906, 2930. In *re Youngstrom*, 18 A. B. R. 572, 153 Fed. 97 (C. C. A. Colo.).

Bankrupt not heard as to refusal of exemptions altogether on review brought by creditor as to other matters relating to exemptions, see *In re Cohn*, 22 A. B. R. 761, 171 Fed. 568 (D. C. N. Dak.); also, see ante, § 1111½.

§ 2868. Exceptions to Trustee's Reports and Allowance or Disallowance of Costs and Expenses of Administration—Such as Attorneys' Fees.

So, likewise, are orders sustaining or overruling exceptions to trustee's reports.

Bank of Clinton v. Kondert, 20 A. B. R. 178, 159 Fed. 703 (C. C. A. La.). Compare, post, § 2932.

So, likewise, is the reimbursement of creditors for attorneys' fees and other expenses incurred in recovering assets for the benefit of the estate under § 64 (b).

Ohio Valley Bank Co. v. Switzer, 18 A. B. R. 689, 153 Fed. 362 (C. C. A. Ohio).

§ 2869. Even Validity and Priority of Lien May Be, if Incident to Allowance or Rejection of Creditor's Claim for Share in Dividends.

And thus, even the validity, extent and priority of a lien on the bankrupt's property may be a question arising in the course of bankruptcy proceedings proper, and hence determinable upon appeal, under § 25 (a), if the lien is incident to a debt owing by the bankrupt which is in controversy.

Page 1683, note 12. The Case of Bank *v.* Title and Trust Co., 14 A. B. R. 102, 198 U. S. 280, is not contra, see Coder *v.* Arts, 22 A. B. R. 1, 213 U. S. 223.

Page 1684. Thus, where a secured creditor voluntarily presents a proof of debt, asserting his lien on property in the custody of the bankruptcy court, and the trustee objects to the same on the ground that the security was acquired by a fraudulent transfer.

Page 1684. Coder *v.* Arts, 22 A. B. R. 1, 213 U. S. 223: "The answer to this question depends upon an examination of the manner in which the jurisdiction of the bankruptcy court was invoked for the determination of the rights involved. The record discloses that Arts filed in due form a claim upon the promissory notes, setting them forth in detail, asking that they be allowed as a proper claim against the assets in the hands of the trustees to be administered, described the mortgage as being the only security held by him for the payment of the debt, and concluded his claims with this statement: 'The deponent, in filing his claim herein against the bankrupt, does so with the express understanding that he makes no waiver of any portion of his security, and expressly reserves said security and every portion thereof to the amount of said claim, including the costs, if any, of collecting payment thereof out of said property held as security.' He thus in effect presented to the trustee in bankruptcy a claim upon his notes, joined with the statement that he had security upon the estate which it was his purpose to maintain, and upon which he was entitled to priority in the distribution of the assets. He did not, as was the case in *Hewit v. Berlin Mach. Works*, supra; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 15 Am. B. R. 633, * * * *Security Warehousing Co. v. Hand*, 206 U. S. 415, 19 Am. B. R. 291, * * * intervene in the bankruptcy proceedings for the purpose of asserting an independent and superior title to the property held by the trustees, claiming the right to recover the property and to remove it from the jurisdiction of the bankruptcy court as a part of the estate to be administered. Arts appeared in the bankruptcy court, recognizing the title and possession of the trustee in bankruptcy, asserted his claim upon the notes, and his right to have the assets so administered and paid as to recognize the validity of the lien for the security for his claim. We are of opinion that he thus instituted a proceeding in bankruptcy as distinguished from a controversy arising in the course of bankruptcy proceedings. This being the character of the proceeding, its subsequent disposition and the appropriate appellate jurisdiction are to be determined by the provisions of the Bankruptcy Act governing bankruptcy proceedings. It is true that Arts asserted both a debt and a lien to secure the same. In such cases the procedure as to the debt or claim

governs, with incidental right to consider and determine the validity and priority of the lien asserted upon the property in the hands of the bankrupt's trustee. This method of procedure was recognized in *Hutchinson v. Otis*, 190 U. S. 552."

§ 2870. But if Sole Controversy Is about Lien or Priority, None about Debt, Not a Question "in Bankruptcy Proceedings" Proper.

Schuler v. Hassinger, 24 A. B. R. 184, 177 Fed. 119 (C. C. A. Ala.): "It is true that in the order of sale the referee recognizes and adjudicates the validity and amount due on the several mortgages upon the property of the Southern Steel Company as incidental to the necessary sale of the property free and clear of all incumbrances; but it is doubtful if such recognition was such an allowance of a claim as would entitle any party not adversely affected to appeal therefrom. * * * And it may be said, further, that, if any one of the appeals now before us could be maintained on the ground that it was taken from an order allowing a claim, then only the validity of the claim allowed could be considered, and there is no evidence in the record attacking the validity of the claims adjudicated by the referee, but all tends to establish them. It follows that the appeals in this case must be dismissed."

Page 1684, note 13. See, in addition, *In re Doran* (*Moorman v. Beard*), 18 A. B. R. 760, 154 Fed. 467 (C. C. A. Ky.); *In re Blanchard Shingle Co.*, 21 A. B. R. 142, 164 Fed. 311 (C. C. A. Wash.); also, compare, *Coder v. Arts*, 22 A. B. R. 1, 213 U. S. 223.

Yet the character of the proceedings in this regard must be determined by the nature of the claim set up against the trustee in bankruptcy and not by the mere incident of the questions controverted or conceded in argument.

Coder v. Arts, 22 A. B. R. 1, 213 U. S. 223.

§ 2873. But Trustee's Petitions for Summary Surrender of Property, Not Bankruptcy Proceedings Proper.

Page 1685, note 16. See, in addition, *In re Walsh Bros.*, 21 A. B. R. 14, 163 Fed. 352 (D. C. Iowa); *In re Hecox*, 21 A. B. R. 314, 164 Fed. 823 (C. C. A. Colo.). But compare, *In re Farrell*, 23 A. B. R. 326, 176 Fed. 505 (C. C. A. Ohio). Contra, obiter, *Morehouse v. (Pacific) Hardware & Steel Co.*, 24 A. B. R. 178, 177 Fed. 337 (C. C. A. Nev.), quoted at § 2879½.

§ 2874. Neither Are Trustee's Plenary Suits in United States District Court to Recover Property Fraudulently or Preferentially Transferred.

Page 1687. *Westall v. Avery*, 22 A. B. R. 673, 171 Fed. 626 (C. C. A. N. Car.): " * * * It is also well settled that a proceeding instituted by a bankrupt's trustee to set aside fraudulent conveyances or illegal preferences is not a proceeding in bankruptcy."

§ 2875. Nor Are Intervening Petitions Claiming Property in Custody of Bankruptcy Court or Liens Thereon.

Page 1687. *Loeser v. Bank & Trust Co.*, 20 A. B. R. 845, 163 Fed. 212 (C. C. A. Ohio): "But we made no mistake in treating the case as properly here by an appeal under the general appellate jurisdiction of this court. The case presented a 'controversy' arising in bankruptcy. It involved the claim of the bank under a chattel mortgage to assets in the possession of the bankrupt's trustee. The bankrupt court, under the broad powers conferred by § 2 of the Bankruptcy Act, had the power to determine controversies relating to the estate of the bankrupt in its possession, whether the controversy related to the title or to liens thereon or rights therein. The property here involved had been surrendered by the bank to the trustee, the bank reserving its rights against the proceeds of sale. Having the actual possession, it mattered nothing whether the trustee instituted a proceeding to bring the bank in for the determination of the controversy, or whether the bank had intervened by petition to assert its rights."

Page 1687, note 21. Claiming lien on property, *In re Doran*, 18 A. B. R. 760, 154 Fed. 467 (C. C. A. Ky.); instance (but point not adverted to) *Franklin v. Stoughton Wagon Co.*, 22 A. B. R. 63, 168 Fed. 857 (C. C. A. Okla.); *Thomas v. Woods*, 23 A. B. R. 132, 173 Fed. 585 (C. C. A. Kans.).

§ 2876. But Orders of Sale and Controversies Incident Thereto, Proceedings in Bankruptcy Proper and Not "Controversies."

Page 1688. *Schuler v. Hassinger*, 24 A. B. R. 184, 177 Fed. 119 (C. C. A. Ala.): "The proceedings in the District Court in the bankruptcy of the Southern Steel Company, which are attacked in the several appeals, to wit, the sale and disposition of the bankrupt's effects, are regular steps or proceedings in bankruptcy, and no appeal lies from orders or decrees in such proceedings. See *Remington on Bankruptcy*, 1678, § 2864, for a full discussion."

§ 2877. Unless Real Controversy Not about Order of Sale nor Claim but about Lien or Title Itself.

Page 1689, note 25. See, in addition, *In re Doran* (*Moorman v. Beard*) 18 A. B. R. 760, 154 Fed. 467 (C. C. A. Ky.); *Thomas v. Woods*, 23 A. B. R. 132, 173 Fed. 585 (C. C. A. Kans.).

§ 2878. Thus, Trustee's Petition to Marshal Liens on Property in His Custody and to Enjoin Interference Not "Proceedings in Bankruptcy," but "Controversy."

Thus, a petition by the trustee to marshal liens upon property in his custody which is about to be sold, is not a "proceedings in bankruptcy" but is a "controversy."

See, in addition, *Loeser v. Bank & Trust Co.*, 20 A. B. R. 845, 163 Fed. 212 (C. C. A. Ohio), quoted at § 2875; *Thomas v. Woods*, 23 A. B. R. 132, 173 Fed. 585 (C. C. A. Kans.).

Page 1689, note 26. **Orders to Show Cause.**—An order to show cause is but the means prescribed by law for bringing the defendant into court to

answer the plaintiff's demands. It is in the nature of process, and, even in jurisdictions where interlocutory orders are made appealable if they affect substantial rights, it is held that an order to show cause is not of that nature. *Morehouse v. (Pacific) Hardware & Steel Co.*, 24 A. B. R. 178, 177 Fed. 337 (C. C. A. Nev.).

§ 2879¼. Contempt Proceedings.

Contempt proceedings are not "proceedings in bankruptcy" proper, but are "controversies arising," etc.

Morehouse v. (Pacific) Hardware & Steel Co. et al., 24 A. B. R. 178, 177 Fed. 337 (C. C. A. Nev.): "But, conceding the order to show cause to be a judgment of the court affecting a substantial right, we are of the opinion that a proceeding to punish for contempt one who has committed an act in violation of an injunction of a court of bankruptcy in a collateral matter, as in this case, is not a 'proceeding in bankruptcy' which is subject to review in this court on original petition."

§ 2879½. Confirmation of Composition.

Questions arising on the confirmation of compositions are "proceedings in bankruptcy" proper, and not "controversies."

Obiter, *Morehouse v. Hardware & Steel Co.*, 24 A. B. R. 178, 177 Fed. 337 (C. C. A. Nev.), quoted, on other points, at § 2879¼.

§ 2881. Distinction between Writ of Error and Appeal, Preserved.

Page 1690, note 31. Mandamus improper to review erroneous adjudication of corporation not subject to bankruptcy, *In re Riggs*, 214 U. S. 9, 22 A. B. R. 720.

Citation Signed by Judge Is the Notice Required in Proceedings on Writ of Error.—The citation signed by the judge of the court to which the writ is addressed, or any judge or justice of the appellate court, is the notice required by § 998 of the Revised Statute for the removal of any cause to the appellate court. (*Exploration*) *Mercantile Co. v. Hardware & Steel Co.*, 24 A. B. R. 216, 177 Fed. 825 (C. C. A. Nev.).

Page 1691. Where an adjudication of bankruptcy rests upon the verdict of a jury, it is reviewable only upon writ of error, as in an action at common law.

Lennox v. Allen Lane Co., 21 A. B. R. 648, 167 Fed. 114 (C. C. A. Mass.).

§ 2881½. Also between Writ of Error and Petition to Revise.

Also, there is a distinction between a writ of error and a petition for revision.

Impliedly, *In re Cole*, 20 A. B. R. 761, 163 Fed. 180 (C. C. A. Mo.), quoted at § 1859½.

Whether Joint Writ in Conspiracy Cases.—*Alkon v. United States*, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.).

§ 2882. Distinctions between § 24 (b) and §§ 24 (a) and 25 (a).

Page 1691, note 33. See, in addition, *Thompson v. Mauzy*, 23 A. B. R. 489, 174 Fed. 611 (C. C. A. W. Va.).

Page 1692. But the true rule is that § 24 (b) is available, where only questions of law are presented, both to review "proceedings in bankruptcy" proper, and also to review questions of law in all "controversies arising in bankruptcy proceedings."

But compare, apparently contra; *In re Doran*, 18 A. B. R. 760, 154 Fed. 467 (C. C. A. Ky.).

§ 2884. Thus, in "Controversies."

A litigant in a proper case has the option for review of an order in controversies arising out of bankruptcy proceedings, to proceed either by appeal, or by petition for revision.

In re Hecox, 21 A. B. R. 314, 164 Fed. 823 (C. C. A. Colo.); instance, *Ross v. Stroh*, 21 A. B. R. 644, 165 Fed. 628 (C. C. A. Pa.).

§ 2885. If Facts Undisputed, Petition to Revise Proper Remedy.

Page 1695, note 42. Impliedly, *In re Hecox*, 21 A. B. R. 314, 164 Fed. 823 (C. C. A. Colo.).

§ 2886. If Facts Disputed, May Be Reviewed Only if Appeal Available.

Page 1695. *Francis v. McNeal*, 22 A. B. R. 337, 170 Fed. 445 (C. C. A. Pa.): "The proceeding before us cannot be treated as a petition of review. It is not confined to matters of law, but turns on questions of fact. If it can be entertained at all, it must be as an appeal."

Page 1695, note 43. See, in addition, *In re Blanchard Shingle Co.*, 21 A. B. R. 142, 164 Fed. 311 (C. C. A. Wash.), quoted at § 2917.

§ 2887. Holdings That Appeal under 25 (a) Exclusive of Error.

Page 1695. *Brady v. Bernard & Kittinger*, 22 A. B. R. 342, 170 Fed. 576 (C. C. A. Ky.): "It is also the settled rule of this court, in accordance with the great weight of authority in the federal courts, and in harmony with the case of *First National Bank v. Title & Trust Co.*, 198 U. S. 280, 14 Am. B. R. 102, * * * and earlier decisions of the Supreme Court, that the provisions for appeal under § 25 (a) of the Bankruptcy Act and those for review under § 24 (b) are 'mutually exclusive,' and that where an appeal has been erroneously taken it cannot be treated and sustained as a petition for review. *In re Mueller*, 14 Am. B. R. 256, 135 Fed. 712, * * * *Dickas v. Barnes*, 15 Am. B. R. 566, 140 Fed. 849, * * * *Davidson v. Friedman*, 15 Am. B. R. 489, 140 Fed. 853, *In re McMahon*, 17 Am. B. R. 530, 147 Fed. 684; *O'Dell v. Boyden*, 17 Am. B. R. 751, 150 Fed. 731."

Page 1696, note 46. See, in addition, *Coal Fields Co. v. Caldwell*, 17 A. B. R. 138, 147 Fed. 475 (C. C. A. W. Va.); obiter, *Postlethwaite v. Hicks*, 21 A. B. R. 426, 165 Fed. 807 (C. C. A. W. Va.).

§ 2888. Holdings That Optional Even in Three Cases Where Appeal Provided under 25 (a).

Page 1696. Obiter (apparently) *Coder v. Arts*, 22 A. B. R. 1, 213 U. S. 223: "By paragraph b of § 24, the circuit courts of appeals have jurisdiction to superintend and revise in matters of law, proceedings of the several inferior courts of bankruptcy within their jurisdiction. The proceeding under this section is designed to enable the circuit court of appeals to review questions of law arising in bankruptcy proceedings, and is not intended as a substitute for the right of appeal upon controverted questions of fact under the right of appeal given in controversies arising in bankruptcy proceedings (§ 24), or the special appeal given in certain cases under § 25."

Page 1696. Impliedly, *First National Bank of Louisville v. Holt*, 18 A. B. R. 766, 155 Fed. 100 (C. C. A. Ky.): "This case comes here by two methods for review; one by petition for review of an order made in the bankruptcy proceedings in *In re Martin Company*, and the other by an appeal from the same order in the respect that it is a decree in an independent controversy arising in the course of a bankruptcy proceeding. The order complained of is one made by the referee and approved by the district judge setting aside an allowance of a secured claim of the First National Bank of Louisville, and requiring it to pay to the trustee one thousand dollars which, it was held, the bank had received from the bankrupt through an unlawful preference. The order was therefore one made in the bankruptcy proceedings proper and not in an independent controversy arising in such proceedings, and is reviewable here upon the petition for review under § 24b, of the act. Accordingly the appeal is dismissed."

Page 1696, note 47. See, in addition, impliedly, *Hall & Kaul Co. v. Friday*, 19 A. B. R. 841, 158 Fed. 593 (C. C. A. Pa.); impliedly, *In re Pfaffinger*, 19 A. B. R. 309, 154 Fed. 328 (C. C. A. Ky.); *In re New Eng. Breeders' Club*, 22 A. B. R. 124, 169 Fed. 586 (C. C. A. N. H.).

Page 1697. Indeed, it has been held that, in general, the provisions for appeal and for review on petition are mutually exclusive, and that the revisory jurisdiction does not include any orders or decrees which are appealable or which are reviewable on writ of error.

Morehouse v. Hardware Co., 24 A. B. R. 178, 177 Fed. 337 (C. C. A. Nev.): "In *Lathrop v. Drake*, 91 U. S. 516, * * * it was held that the appellate jurisdiction conferred on the circuit courts by the Act of 1867 was of two classes of cases, one to be exercised under a petition for review, the other by the ordinary appeal or writ of error. The same distinction has been recognized in construing the Bankruptcy Act of 1898, and it has been held that the provisions for appeal and for review on petition are mutually exclusive, and that the revisory jurisdiction does not include any orders or decrees which are appealable or reviewable on writ of error. *In re Rusch* (C. C. A.), 8 Am. B. R. 518, 116 Fed. 270; *Walter Scott & Co. v. Wilson* (C. C. A.), 8 Am. B. R. 349, 115 Fed. 284; *In re Friend* (C. C. A.), 13 Am. B. R. 595, 134 Fed. 778; *In re Mueller* (C. C. A.), 14 Am. B. R. 256, 135 Fed. 712; *Odell v. Boyden* (C. C. A.), 17 Am. B. R. 751, 150 Fed. 731; *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 11 Am. B. R. 709; *First National Bank of Chicago v. Chicago Title & Trust Co.*, 198 U. S. 280, 14 Am. B. R. 102."

§ 2888½. **Erroneous Holding as to Appealability, Decree Not a Mere Nullity.**

Where the Circuit Court of Appeals has erroneously proceeded on an appeal when the matter was not appealable, its decree, nevertheless, is not a mere nullity, but is valid until reversed.

Obiter (matter being appealable) *Loeser v. Bank & Trust Co.*, 20 A. B. R. 845, 163 Fed. 212 (C. C. A. Ohio): "Assuming that the decree of the District Court was reviewable and not appealable, the fact that we erroneously exercised jurisdiction under the appeal does not make the judgment a nullity. It was, at most, an error to be corrected by a timely application to this court upon a petition to rehear or by resort to some appellate procedure for the correction of error. We had jurisdiction to determine whether the case was appealable under § 24a or 25a of the Bankruptcy Act, or only reviewable upon a petition to review under § 24b. An erroneous determination of that somewhat cloudy question will not render the judgment void but only erroneous. But counsel say that the question of jurisdiction under the appeal is not shown by the record to have been raised or decided, and that this takes the judgment outside of the principle referred to. The distinction is not sound. The subject was one within the general jurisdiction of this court. The procedure by which our appellate jurisdiction might be invoked was either by a petition for review under § 24b, or by an appeal in one of the several subjects mentioned in 25a, or by appeal under the general appellate jurisdiction conferred by § 24a 'of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.' When the power of this court to expunge one of its judgments is invoked upon the ground of its utter nullity, every presumption in favor of the judgment, which does not contradict the record, must be indulged. Limited as is the jurisdiction of the inferior nisi prius courts of the United States and subject to a presumption against jurisdiction throughout the progress of a cause, yet the judgments of these tribunals are not nullities, although jurisdiction is not shown upon the record. Such judgments are, although jurisdiction is not apparent, binding upon the parties and such apparent want of jurisdiction is available only in some form of review by a superior court. * * * It follows therefore from the exercise of jurisdiction that there is an incontestable presumption that the court determined that it had jurisdiction under the appeal."

§ 2892. **Such Appeals Permissible Only as to Adjudication, Discharge and Allowance of Claims.**

Page 1698, note 52. Instance, no appeal from order sustaining or overruling exceptions to trustee's accounts. *Bank of Clinton v. Kondert*, 20 A. B. R. 178, 159 Fed. 703 (C. C. A. La.); *Thompson v. Mauzy*, 23 A. B. R. 489, 174 Fed. 611 (C. C. A. W. Va.).

§ 2893. **First: Appeals from Adjudications or Refusals to Adjudge Bankrupt.**

Page 1699, note 53. Order holding a certain individual, himself not adjudged bankrupt, to be a member of a partnership which had already been adjudged bankrupt in its firm name, and to be therefore liable to the firm creditors, is not appealable. *Francis v. McNeal*, 22 A. B. R. 337, 170 Fed. 445 (C. C. A. Pa.).

§ 2894. But No Appeal if Jury Trial Had.

Page 1699, note 54. See, in addition, *Lennox v. Allen Lane Co.*, 21 A. B. R. 648, 167 Fed. 114 (C. C. A. Mass.).

Page 1700. Where lack of jurisdiction does not affirmatively appear on the face of the record, but is dependent upon questions of fact which have been decided in favor of jurisdiction by the court below, the appellate court will not remand with instructions to dismiss the entire proceedings.

§ 2897½. Whether Includes Revocation of Discharge.

Whether a refusal to revoke a discharge is appealable has not been authoritatively determined.

Thompson v. Mauzy, 23 A. B. R. 489, 174 Fed. 611 (C. C. A. W. Va.).

But it would seem that the refusal to revoke a discharge is the equivalent of a reaffirmance of the right to a discharge, and so might be appealable under § 25a.

§ 2898. Third: Appeals from Allowance or Rejection of Claims.

Page 1701, note 61. Thus, as to claims for rent, *Postlethwaite v. Hicks*, 21 A. B. R. 70, 165 Fed. 897 (C. C. A. W. Va.); instance, *In re Davis*, 23 A. B. R. 446, 174 Fed. 556 (C. C. A. Pa.).

§ 2901. Where Lien or Priority Incident to Disputed Debt, Its Validity, Priority, etc., Appealable.

Page 1702, note 66. See, in addition, *In re Doran* (*Moorman v. Beard*), 18 A. B. R. 760, 154 Fed. 467 (C. C. A. Ky.).

§ 2902. But Where Debt Undisputed Mere Fact That Disputed Lien or Priority Incident to Debt Insufficient.

Page 1703, note 67. See, in addition, *In re Blanchard Shingle Co.*, 21 A. B. R. 142, 164 Fed. 311 (C. C. A. Wash.): Mortgagee's attorney's fee on foreclosure allowed as a claim but denied as a lien.

Page 1703, note 68. See, in addition, *In re Blanchard Shingle Co.*, 21 A. B. R. 142, 164 Fed. 311 (C. C. A. Wash.).

§ 2906½. Nor to Accounts or Reports of Trustees.

Nor to orders sustaining or overruling exceptions to trustee's accounts.

Bank of Clinton v. Kondert, 20 A. B. R. 178, 159 Fed. 703 (C. C. A. La.); compare also, ante, § 2868; post, § 2930, as to trustees' reports of exempted property.

§ 2907. Nor, Probably, to "Claims" for Costs and Expenses of Administration.

Page 1705. Thus, a claim of creditors for reimbursement of attorneys' fees and other expenses, incurred in contesting unjust claims and in proceedings to recover assets, is not appealable under § 25 (a) (3), nor appealable at all, but reviewable only upon petition for review.

Ohio Valley Bank Co. v. Switzer, 18 A. B. R. 689, 153 Fed. 362 (C. C. A. Ohio).

§ 2910. Rejection or Allowance of Set-Off Appealable.

Page 1705, note 80. See, in addition, *Morehouse v. (Pacific) Hardware & Steel Co.*, 24 A. B. R. 178, 177 Fed. 337 (C. C. A. Nev.).

§ 2911. No Appeal in Bankruptcy Proceedings Proper Except in Three Cases of § 25 (a) Mentioned.

And appeals may not be taken in bankruptcy proceedings proper in any other cases than those limited in § 25 (a).

Bank of Clinton v. Kondert, 20 A. B. R. 178, 159 Fed. 703 (C. C. A. La.).

Page 1705, note 81. See, in addition, *Thompson v. Mauzy*, 23 A. B. R. 489, 174 Fed. 611 (C. C. A. W. Va.).

§ 2914. Under § 24 (a) Both Law and Fact Reviewed.

Page 1708, note 85. Impliedly, *In re Leech*, 22 A. B. R. 599, 171 Fed. 622 (C. C. A. Ky.).

Page 1708, note 86. Impliedly, *In re Leech*, 22 A. B. R. 599, 171 Fed. 622 (C. C. A. Ky.).

§ 2916. May Treat "Appeals" as Petitions for Reversion.

Page 1709. *In re William's Estate (Anheuser Busch v. Harrison)*, 19 A. B. R. 389, 156 Fed. 934 (C. C. A. Wash.): "If it be conceded that the petition for revision was filed in the wrong court, the appeal, involving as it does only a question of law, may be treated as a petition for revision."

Page 1709, note 88. See, in addition, *In re Blair*, 5 A. B. R. 793, 106 Fed. 662 (C. C. A. I. Ter.), *In re Jacobs*, 3 A. B. R. 671, 99 Fed. 539 (C. C. A. Mo.).

§ 2917. But Not Where Facts Disputed.

Page 1709. Indeed, it is permissible solely where questions of law alone are involved.

In re Blanchard Shingle Co., 21 A. B. R. 142, 164 Fed. 311 (C. C. A. Wash.): "As in the case a consideration of the facts is essential to any review of the decision of the court complained of, it is clear that the appeal cannot be treated as a petition for revision, as is suggested by the appellant

may be done. "That is only permissible where questions of law only are involved."

Francis v. McNeal, 22 A. B. R. 337, 170 Fed. 445 (C. C. A. Pa.): "The proceedings before us cannot be treated as a petition of review. It is not confined to matters of law but turns on questions of fact."

§ 2918. Simultaneous Appeal and Petition for Review.

Page 1709, note 90. See, in addition, instance, *Hendricks v. Webster*, 20 A. B. R. 112, 159 Fed. 927 (C. C. A. Ia.); instance, *Knapp v. Milw. Tr. Co.*, 20 A. B. R. 671, 162 Fed. 675 (C. C. A. Wis.); instance, *In re Dunlop*, 19 A. B. R. 361, 156 Fed. 545 (C. C. A. Minn.); *In re Hecox*, 21 A. B. R. 314, 164 Fed. 823 (C. C. A. Colo.).

Page 1710. Doubtless the appeal has the precedence, and if appeal will lie, the proper practice would be to dismiss the petition for revision. This is so for the obvious reason that the appeal, if well taken, has already vacated the order, so there is nothing to review.

Page 1710. Impliedly, *Knapp v. Milw. Tr. Co.*, 20 A. B. R. 671, 162 Fed. 675 (C. C. A. Wis.): "Knapp has appealed and has also filed a petition to review and revise. The petition is dismissed, as the matter is properly reviewable on appeal."

But compare, *First Nat. Bank of Louisville v. Holt*, 18 A. B. R. 766, 155 Fed. 100 (C. C. A. Ky.), wherein the court dismissed the appeal (in a "proceeding in bankruptcy") and retained the revision proceedings.

If review of the weight of the evidence is desired, the hearing will be upon the appeal.

In re Dunlop, 19 A. B. R. 361, 156 Fed. 545 (C. C. A. Minn.).

Hendricks v. Webster, 20 A. B. R. 112, 159 Fed. 927 (C. C. A. Iowa): "James Hendricks appealed from said decree to this court, and also filed an original petition asking for a review of the same. As we are asked to consider evidence in the record, we dismiss the petition for review, and will hear the case upon the appeal."

Coder v. McPherson, 18 A. B. R. 523, 152 Fed. 951 (C. C. A. Iowa): "As the question at issue involves a consideration of the facts disclosed by the evidence, the case will be considered upon the appeal and the petition to revise is dismissed."

§ 2922. Must Be "Final" Order.

An "order to show cause" is in the nature of process, being merely the means prescribed by law for bringing the defendant into court to answer the plaintiff's demands; and, in jurisdictions where even interlocutory orders are made appealable if they affect substantial rights, it has been held that an order to show cause is not appealable.

Morehouse v. (Pacific) Hardware & Steel Co., 24 A. B. R. 178, 177 Fed. 337 (C. C. A. Nev.).

§ 2923. Validity, Priority, etc., of Liens Appealable as "Controversies."

Page 1713, note 98. Instance, mortgagee's attorney denied lien though claim allowed as unsecured debt, *In re Blanchard Shingle Co.*, 21 A. B. R. 142, 164 Fed. 311 (C. C. A. Wash.); also, see *Mound Mines Co. v. Hawthorne*, 23 A. B. R. 242, 173 Fed. 882 (C. C. A. Colo.); *Loeser v. Bank & Trust Co.*, 20 A. B. R. 845, 163 Fed. 212 (C. C. A. Ohio).

Page 1713. Likewise are controversies over dower rights.

Thomas v. Woods, 23 A. B. R. 132, 173 Fed. 585 (C. C. A. Kans.).

Page 1713. And other interests in property.

And they are appealable, although the lien be incident to a debt, the debt itself not being disputed and hence not appealable under Bankr. Act, § 25 (a).

Page 1713, note 99. See, in addition, instance, *Loeser v. Bank & Trust Co.*, 20 A. B. R. 845, 163 Fed. 212 (C. C. A. Ohio).

§ 2925. Likewise, Summary Order on Trustee or Receiver to Surrender Assets to Third Party.

Page 1713, note 102. See, in addition, *Franklin v. Stoughton Wagon Co.*, 22 A. B. R. 63, 168 Fed. 857 (C. C. A. Okla.).

§ 2929. Limited to Matters of Law under § 24 (b).

Page 1715, note 106. See, in addition, *In re Leech*, 22 A. B. R. 599, 171 Fed. 622 (C. C. A. Ky.); *Landry v. San Antonio Brew. Ass'n*, 20 A. B. R. 226, 159 Fed. 708 (C. C. A. Tex.): allowance of a secured claim.

§ 2930. Thus, Exemptions Reviewable Only by Petition to Review.

Page 1715, note 107. Compare, to same effect, §§ 2866, 2906; instance, *In re Youngstrom*, 18 A. B. R. 572, 153 Fed. 99 (C. C. A. Colo.); instance, *Hall & Kaul Co. v. Friday*, 19 A. B. R. 841, 158 Fed. 593 (C. C. A. Pa.); inferentially, *In re Goodman*, 23 A. B. R. 504, 174 Fed. 644 (C. C. A. Ala.).

They are reviewable under § 24 (b) and only thus.

Davidson v. Ferguson-McKinney Co., 18 A. B. R. 156, 150 Fed. 269 (C. C. A. Tex.).

§ 2932. Administrative Orders Reviewable under § 24 (b).

Thus, objections to a trustee's report, seeking to charge him with assets coming into his possession but not accounted for, raise questions which the bankruptcy court may summarily determine, and its determination is reviewable by petition to review under § 24 (b) and only thus.

In re Moore & Bridgeman, 21 A. B. R. 651, 166 Fed. 689 (C. C. A. Tex.).

§ 2933. Attorneys' Fees and Other Expenses of Administration.

Page 1715, note 110. See, in addition, *Ohio Valley Banking Co. v. Switzer*, 18 A. B. R. 689, 153 Fed. 362 (C. C. A. Ohio); instance, *In re Irwin*, 23 A. B. R. 487, 174 Fed. 642 (C. C. A. Pa.).

Thus, as to claims of creditors for reimbursement of attorneys' fees and other expenses in recovering assets for the benefit of the estate.

Ohio Valley Bk. Co. v. Switzer, 18 A. B. R. 689, 153 Fed. 362 (C. C. A. Ohio).

§ 2935. Orders on Nonbankrupt Partners to File Schedules or Surrender Firm Assets.

Page 1716, note 112. Compare, analogously, on germane proposition, *Francis v. McNeal*, 22 A. B. R. 337, 170 Fed. 445 (C. C. A. Pa.).

§ 2938. And Summary Orders on Bankrupts and Others to Surrender Assets or Execute Instruments.

A summary order on the bankrupt to surrender assets to the trustee is reviewable only under § 24 (b).

Page 1716, note 117. See, in addition, *In re Walsh Bros.*, 21 A. B. R. 14, 163 Fed. 352 (D. C. Iowa); instance, *Loveless v. Southern Grocer Co.*, 20 A. B. R. 180, 159 Fed. 415 (C. C. A. La.); instance, *Lesaius v. Goodman*, 21 A. B. R. 446, 165 Fed. 889 (C. C. A. Pa.).

Page 1717. Similarly, a summary order upon a third person to return property which he had taken from the custody of the receiver or trustee in bankruptcy is not reviewable by appeal under § 25 (a), but only by petition to revise.

In re Rose Shoe Mfg. Co., 21 A. B. R. 725, 168 Fed. 39 (C. C. A. N. Y.).

§ 2939½. Surrender of Preferences.

Orders disallowing preferred claims for failing to surrender preferences may be reviewed by petition to revise.

First Nat. Bk. of Louisville v. Holt, 18 A. B. R. 766, 155 Fed. 100 (C. C. A. Ky.), quoted at § 2888. Where, however, the order sought to be reviewed was an exercise of discretion in refusing to ratify an agreement to suppress criminal prosecution as consideration for the return of the preference, it is not reviewable on petition to revise. *Mulford v. Fourth St. Nat. Bank*, 19 A. B. R. 742, 157 Fed. 897 (C. C. A. Pa.).

Although, as noted at § 2909, they are also appealable.

Summary orders on assignees to surrender property where assignments for the benefit of creditors are void, are reviewable only by petitions to revise under § 24b.

In re Farrell, 23 A. B. R. 826, 176 Fed. 505 (C. C. A. Ohio): "Thus the remedy for coming into this court upon complaint made against allowance or refusal of a summary order is, we think, reducible to petition to review in matter of law, according to subdivision b, § 24, of the Bankruptcy Act."

§ 2942. Section 24 (b) Authorizes Review Only of Law, Not Facts.

Page 1719. *In re Grassler & Reichwald*, 18 A. B. R. 694, 154 Fed. 478 (C. C. A. Calif.): "It was intended thereby to provide a summary method for revising the orders and decisions of courts of bankruptcy upon questions of law, and the section does not contemplate any review of the facts."

Page 1719. *Landry v. San Antonio Brew. Ass'n*, 20 A. B. R. 226, 159 Fed. 700 (C. C. A. Tex.): "We find in the transcript neither an agreed statement of facts, a finding of facts by the judge, nor even a summary of the evidence. Petitions to this court for superintendence and revision are restricted to questions of law. Therefore this petition is denied."

Page 1719, note 123. See, in addition, *Lesaius v. Goodman*, 21 A. B. R. 446, 165 Fed. 889 (C. C. A. Pa.); *Ross v. Stroh*, 21 A. B. R. 644, 165 Fed. 628 (C. C. A. Pa.); *In re Leech*, 22 A. B. R. 599, 171 Fed. 622 (C. C. A. Ky.); impliedly, *In re Irwin*, 23 A. B. R. 487, 174 Fed. 642 (C. C. A. Pa.).

Page 1720. And matters of discretion, where there is no abuse of discretion alleged will not be reviewed.

Mulford v. Fourth St. Nat'l Bk., 19 A. B. R. 742, 157 Fed. 897 (C. C. A. Pa.).

And where the record does not contain the evidence taken before the referee, it will be presumed that the facts were sufficient to sustain his finding and order, and only matters of law, apparent upon the face of the record may be considered.

In re Baum, 22 A. B. R. 295, 169 Fed. 410 (C. C. A. Ark.).

Likewise, where it contains "substantially" all the evidence but not "all" the evidence.

Alkon v. United States, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.). See post, § 2953.

§ 2943. Intervening Petitions Claiming Property or Funds in Custody of Bankruptcy Court or Claiming Liens or Other Interests Therein Reviewable by Petition to Revise.

Page 1720, note 125. See, in addition, instance, *Ross v. Stroh*, 21 A. B. R. 644, 165 Fed. 628 (C. C. A. Pa.). But compare, *In re Doran*, 18 A. B. R. 760, 154 Fed. 467 (C. C. A. Ky.).

§ 2943½. Summary Orders on Court Officers or Other Third Parties to Surrender Assets, Likewise Reviewable.

Summary orders upon court officers or other third parties to surrender assets are reviewable by petition to revise, where merely review of the law is involved.

In re Hecox, 21 A. B. R. 314, 164 Fed. 823 (C. C. A. Colo.): "As the case at bar is that of a petition for a summary order on the receiver to deliver

property to the trustee in bankruptcy, which order was refused by the District Court solely on a question of law, the case is one presenting a controversy 'arising in bankruptcy' under § 24b of the Bankrupt Act, and is reviewable in matter of law."

§ 2945½. If by Writ of Error.

If it be by writ of error, a bill of exceptions is requisite. But if the error is patent on the face of the record a bill of exceptions is not necessary, as where there has been a jury trial of an involuntary bankruptcy petition where the only issue on review is whether on the face of the pleadings one of the petitioning creditors' claim is a provable debt.

Grant Shoe Co. v. Laird Co., 21 A. B. R. 484, 212 U. S. 445.

The citation upon a writ of error is defective where it does not give the names of all applicants for the writ.

Kerrch v. United States, 22 A. B. R. 544, 171 Fed. 366 (C. C. A. Mass.).

Error will not lie to a refusal of a motion to quash an indictment on account of anything which may be raised by demurrer.

Kerrch v. United States, 22 A. B. R. 544, 171 Fed. 366 (C. C. A. Mass.).

§ 2947½. Even by Prevailing Party, if Cross Errors Claimed.

The prevailing party may not be heard to urge cross errors, even though suggested by the assignment of errors or by argument, but he may be heard only in support of the decree or order below, unless he also files a petition for review.

Page 1722. *Board of Com'rs, Kan. v. Hurley*, 22 A. B. R. 209, 169 Fed. 92 (C. C. A. Kans.): "An appellee who does not take an appeal, and a defendant in error who does not sue out a writ of error, cannot confer jurisdiction upon an appellate court to consider or review decisions adverse to him upon questions suggested by an assignment, or by an argument of cross-errors, nor can he be heard upon such question. He may be heard only in support of the order, decree, or judgment below."

See post, § 2961½.

§ 2951. And to Present, Clearly, Issues of Law.

Page 1723, note 133. See, in addition, impliedly, *Ross v. Stroh*, 21 A. B. R. 644, 165 Fed. 628 (C. C. A. Pa.).

§ 2952. Also, to Show Insufficiency of Grounds for Order.

And where the record does not contain the evidence taken before the court below or referee, it will be presumed that the facts were sufficient to sustain his finding and order, and only matters of law, apparent upon the face of the record, may be considered.

In re Baum, 22 A. B. R. 295, 169 Fed. 410 (C. C. A. Ark.); *State Bank v. Haswell*, 23 A. B. R. 330, 174 Fed. 209 (C. C. A. Iowa).

And it may be presumed that defective descriptions were cured by the proof actually produced.

State Bank v. Haswell, 23 A. B. R. 330, 174 Fed. 209 (C. C. A. Iowa).

§ 2953. Whether Testimony and Other Evidence to Appear.

Page 1724, note 135. Compare, ante, §§ 552, 1554, 2855.

However, where all the evidence is not shown, reversal on the weight of the evidence cannot be had.

Alkon v. United States, 22 A. B. R. 489, 163 Fed. 810 (C. C. A. Mass.): "The record does not purport to give all the evidence, because the bill of exceptions concludes with a statement that what is recited in it was 'substantially all.' The case in the way shown to us is exceedingly thin, and, if we were judges of the fact as well as of the law, it may be that we should find against the United States in reference thereto. As, however, the proofs in cases of conspiracy are frequently purely inferential, we cannot say that there were not circumstances which appeared at the trial, but which are not shown, and which justified the District Court in sending the case to the jury. In the form in which the case comes to us, it is not so bare of possibilities that, sitting as a court of law, we can declare that there was error in overruling this motion."

§ 2955. Findings of Fact or Equivalent, Requisite.

Page 1724. *Landry v. San Antonio Brew. Ass'n*, 20 A. B. R. 226, 159 Fed. 700 (C. C. A. Tex.): "We find in the transcript neither an agreed statement of facts, a finding of facts by the judge, nor even a summary of the evidence. Petitions to this court for superintendence and revision are restricted to questions of law. Therefore this petition is denied." On rehearing: "The record shows that the judge on the hearing considered the certificate of the referee as to the questions presented, and the summary of the evidence, and thereupon reversed the referee and entered judgment accordingly, so that we cannot from the record say whether the judge decided the case upon the facts reported by the referee or upon facts found by himself on the evidence. To determine whether the judge a quo correctly ruled the law, we must necessarily have before us the facts upon which he acted."

Ross v. Stroh, 21 A. B. R. 644, 165 Fed. 628 (C. C. A. Pa.): "While neither the Bankruptcy Act nor the general orders in bankruptcy prescribe the practice to be adopted in proceedings on revisory petitions, the matters of law of which revision is sought should in some manner be clearly presented. * * * There are no findings of fact by the District Court, and no specifications of legal error in the revisory petition, which enable us to do so. It does not appear ever that they were argued before the District Court."

Page 1724, note 140. See, in addition, *Schuler v. Hassinger*, 24 A. B. R. 184, 177 Fed. 119 (C. C. A. Ala.).

§ 2957. But May Be "Looked to."

Although it may be thus "looked to" only when the proceedings are by way of petition for revision, not by way of error.

§ 2958¼. Confined to Facts Shown in Record.

And the reviewing court is confined to the facts shown in the record.

See citations in preceding paragraphs of this subdivision impliedly or expressly supporting this proposition; also, *In re Roadarmour*, 24 A. B. R. 49, 177 Fed. 379 (C. C. A. Ohio), quoted post at § 2958½.

§ 2958½. Deficiency of Facts Not Cured by Allegations of Petition for Review.

Deficiency of facts in the record is not to be cured by allegations made in the petition for review.

In re Roadarmour, 24 A. B. R. 49, 177 Fed. 379 (C. C. A. Ohio): "The petitioner seeks to review the action of the District Court in disallowing his claim for legal services in successfully resisting the allowance of certain claims presented against the bankrupt's estate. The record discloses that petitioner was not employed by the trustee to make such opposition, but that he was employed in that behalf by certain of the creditors of the bankrupt. It is alleged in the petition for review that petitioner's employment by creditors was had after the trustee in bankruptcy had refused to resist the allowance of the claims in question. There is nothing in the record presented to us sustaining this allegation. No finding of facts was made either by the referee, whose order of disallowance was reviewed by the district judge, or by the judge. The record attached to the petition for review is limited to the order of the referee, the order of the District Court and the opinion of the district judge, which contains the statement that the claims defeated aggregated a considerable amount and that petitioner's services 'were valuable and resulted in the disallowance of such claims.' The district judge based his disallowance of petitioner's claim upon the entire absence of authority to allow it 'under circumstances such as are here presented.' Petitioner discusses the question in his brief as if the refusal of the trustee in bankruptcy to oppose the allowance of the claims in question, and petitioner's employment in consequence of such refusal were established by the record. But such is not the case. The allegation in the petition for review filed in this court is no evidence of such fact; nor is the allegation referred to put in issue. We are confined to the record attached to the petition or sent up in connection with the proceedings to review."

§ 2961. Assignment of Errors to Be Filed.

It must set out the errors separately and particularly.

Acme Food Co. v. Meier, 18 A. B. R. 550, 153 Fed. 74 (C. C. A. Mich.): "The 11th Rule of this court requires that each error intended to be assigned shall be separately and particularly set out, and when it is to the charge, the assignment shall set out the part referred to totidem verbis. We have already ruled that this assignment, so far as it covers the question last alluded to, is not well taken. We cannot sustain a single assignment as partly good and partly bad without violating our rules. But aside from this the court was substantially right in saying that the testimony of Meier upon this point was uncontradicted. When the court undertook to state the evidence it was

the duty of counsel to call attention to evidence overlooked, if important, and give the court an opportunity of correcting the statement. This was not done. We see no sufficient reason for noticing this as 'a plain error not assigned,' which under strong circumstances the court at its option may do under Rule XI.'

§ 2961½. Even by Appellee, if Appellee Also Claims Cross-Errors.

An appellee who does not himself also take an appeal cannot confer jurisdiction upon the appellate court to consider or review decisions adverse to him, upon questions suggested by an assignment, or by an argument of cross-errors, nor can he be heard upon such questions. He may be heard only in support of the order, decree or judgment below.

Board of Com'rs Kan. *v.* Hurley, 22 A. B. R. 209, 169 Fed. 92 (C. C. A. Kans.). See ante, § 2947½.

§ 2962. Complete Record to Be Made.

Page 1726. Compare, Nat'l Bk. *v.* Abbott, 21 A. B. R. 436, 165 Fed. 852 (C. C. A. Mo.): "A proceeding in bankruptcy is a proceeding in equity, and on an appeal to this court, or to the Supreme Court, the decisive issue is not whether there was an error in the admission or exclusion of evidence, but whether or not all the competent and relevant evidence presented to the Appellate Court sustains the decree. The established practice in the Federal courts in equity is that examiners, masters, and the Circuit Courts must, under rule No. 67 in equity, take, record, and, in case of an appeal, return to the Appellate Court, all the evidence offered by either party, that which was held to be incompetent or immaterial as well as that which they deemed competent and relevant, to the end that, if the Appellate Court is of the opinion that evidence rejected should have been received, it may consider it, render a final decree, and thus conclude the litigation without remanding the suit to procure the excluded evidence. If evidence is objected to and ruled out, it must nevertheless be written down and preserved in the record, subject to the objections, or the ruling cannot be considered in the Appellate Court. From the general rule that all evidence offered must be taken and preserved, the evidence of a privileged witness, evidence plainly privileged and evidence which clearly and affirmatively appears to be so incompetent, irrelevant, or immaterial that it would be an abuse of the process or power of the court to compel its production or to permit its introduction, are excepted. *Blease v. Garlington*, 92 U. S. 1, 7, 8, 23 L. Ed. 521; *Dowagiac Mfg. Co. v. Lochren*, 143 Fed. 211, 213, 214, 74 C. C. A. 341, 343, 344, and cases there cited. Referees, other officers taking testimony, and the District Court are governed by the same rule of practice in the taking of evidence and the hearing of controversies in bankruptcy, where the reason for the rule is much stronger than in ordinary suits in equity, because many of the orders and decrees in bankruptcy are reviewable first in the District Court and again in the Court of Appeals, and the delays would be intolerable if it were necessary for each court to remand for further testimony whenever it found that excluded evidence should have been received."

And where the evidence does not appear, defective allegations will be presumed to have been cured by the proof.

State Bank v. Haswell, 23 A. B. R. 330, 174 Fed. 209 (C. C. A. Iowa): "It is unnecessary to decide whether this description was sufficient to identify the land. The rule is that every presumption must be indulged in favor of the correctness of a judgment rendered by a court of competent jurisdiction until the contrary appears. 'Omnia praesumuntur rite et solemniter esse acta' is the maxim to be applied. Let it be conceded, then, that the petition failed to sufficiently describe the land charged to have been unlawfully conveyed, by not specifying the county or State in which it was located. Nevertheless the proof may have supplied the defect. The fact that the bank failed to bring the proof here for our consideration justifies us in the belief that it did so, and we ought, in the interest of justice, to so presume. The common-law rule of pleading was that: 'Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict.' Andrews' *Stephen's Pleading*, § 109."

§ 2979½. No Stay of Pending Proceedings without Supersedeas Bond.

Without a supersedeas bond the appeal will not suspend the execution of an order, nor stop pending proceedings. Thus, an appeal from an adjudication of bankruptcy will not suspend an order upon the bankrupt to file schedule, unless a supersedeas bond be given.

In re *Philip Brady*, 21 A. B. R. 364, 169 Fed. 152 (D. C. Ky.). Compare ante, § 2860.

§ 2981. Time for Appeal in Bankruptcy Proceedings Proper.

Page 1733. *Brady v. Bernard & Kittinger*, 22 A. B. R. 342, 170 Fed. 573 (C. C. A. Ky.): "As no appeal was prayed or granted from the judgment of adjudication within ten days after its rendition, the time for appealing therefrom expired at the end of the said ten days, and could not be extended or revived by any subsequent proceeding in the case."

Page 1733, note 173. See, in addition, *Postlethwaite v. Hicks*, 21 A. B. R. 70, 165 Fed. 897 (C. C. A. W. Va.); *Morgan v. Benedum*, 19 A. B. R. 601, 157 Fed. 232 (C. C. A. W. Va.); In re *Philip Brady*, 21 A. B. R. 364, 169 Fed. 152 (D. C. Ky.); *Thompson v. Mauzy*, 23 A. B. R. 489, 174 Fed. 611 (C. C. A. W. Va.).

§ 2986. But Delay in Bond and Citation Not Fatal, if Appeal "Allowed" in Time.

Page 1734. But compare, *Nazima Trading Co. v. Martin*, 21 A. B. R. 159, 164 Fed. 838 (C. C. A. Alaska): "There is in the record further ground of dismissal that, although the appeal was allowed on August 9, 1907, citation

was not issued and the assignment of errors was not filed until February 25, 1908, and that in the meantime the October term of this court was held and adjourned. In *Jacobs v. George*, 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127, and in *Pender v. Brown et al.*, 120 Fed. 496, 56 C. C. A. 646, it was held that by the intervention of a term of the appellate court between the allowance of an appeal and the issuance of the citation, if citation is not waived, the appeal becomes inoperative."

§ 2987. Application for Extension Too Late after Expiration of Time.

Page 1734, note 180. Compare, *Nazima Trading Co. v. Martin*, 21 A. B. R. 159, 164 Fed. 838 (C. C. A. Alaska): "No order was obtained extending the time to file the transcript in this court. It was not filed until nearly five months after the return day. Intervening the return day and the filing of the transcript was the May term of this court, at which the appeal should have been heard. No showing whatever has been made of accident, or mistake, and no excuse of any kind is offered for the delay. It is within the sound discretion of the court, it is true, to relieve parties who have not complied with the rules; but that discretion should not be exercised in a case where there has been long delay and there is utter absence of excuse or extenuation."

§ 2988. Time for Appeal Begins from Date of Entry of Order Overruling Motion for Rehearing.

Where a motion for a rehearing has been filed in time, the time for appeal begins to run from the date of entry of the order overruling the motion.

Mills v. Fisher & Co., 20 A. B. R. 237, 159 Fed. 897 (C. C. A. Tenn.); inferentially, but obiter, *Brady v. Bernard & Kittinger*, 22 A. B. R. 342, 170 Fed. 576 (C. C. A. Ky.). But compare, contra, where the motion is not filed in time, *Morgan v. Benedum*, 19 A. B. R. 601, 157 Fed. 232 (C. C. A. W. Va.), and *Brady v. Bernard & Kittinger*, 22 A. B. R. 342, 170 Fed. 576 (C. C. A. Ky.).

Likewise, from an order sustaining a demurrer and dismissing a petition for adjudication.

Mills v. Fisher & Co., 20 A. B. R. 237, 159 Fed. 897 (C. C. A. Tenn.).

§ 2989. Motion for Rehearing Not Filed in Time, Insufficient.

Morgan v. Benedum, 19 A. B. R. 601, 157 Fed. 232 (C. C. A. W. Va.): "The Bankruptcy Act * * * § 25, * * * in plain terms provides that from orders allowing or rejecting a debt or claim of \$500 or over, such appeal shall be taken within 10 days after the judgment appealed from has been rendered: * * * This appeal should have been taken within 10 days from the order of 26th of July, 1906, and the time cannot be extended by means of a petition for review or rehearing filed more than a month thereafter. To do so would be to evade the statute of limitations entirely. The fact that the appeal was taken within 10 days from the order finally denying the application for a rehearing entered on the 31st day of October, 1906, cannot be used to bridge over the period from July to October."

Page 1735, note 182. See, in addition, *In re Philip Brady*, 21 A. B. R. 364, 169 Fed. 152 (D. C. Ky.); compare, analogously, *In re A. O. Brown*, 23 A. B. R. 93, 175 Fed. 769 (C. C. A. N. Y.), where nunc pro tunc order was held ineffective, under local rule.

No Appeal from Order Denying Rehearing on Belated Motion.—No appeal lies from an order refusing an application for a rehearing filed after time for appeal has expired, either under the Bankruptcy Act or under the rules of equity.

Page 1735. *Morgan v. Benedum*, 19 A. B. R. 601, 157 Fed. 232 (C. C. A. W. Va.): "No appeal lies from an order rejecting a petition for rehearing under the bankrupt law. Sections 24 and 25 of the Bankruptcy Act prescribe in what cases appeals may be had, and these sections manifestly do not cover such a case as this. * * * Assuming that the appellant relies on the rules and practice in equity causes as controlling in the matter of taking this appeal, he is clearly without remedy, as it is well settled that, inasmuch as petitions for rehearing are addressed to the sound discretion of the court, no appeal lies from an order refusing the same."

And an extension of time for hearing such a belated motion is not an extension of time for appeal.

Brady v. Bernard & Kittinger, 22 A. B. R. 342, 170 Fed. 576 (C. C. A. Ky.): "As neither the motion nor the petitions to set aside said judgment were made or presented to the court until after the expiration of said ten days, the case cannot, for that reason, if for no other, be brought, even by analogy, within the rule laid down by this court in the case of *Mills v. Fisher & Co.*, 20 Am. B. R. 237, 159 Fed. 897, 87 C. C. A. 77, 16 L. R. A. (N. S.) 656, that where a petition to rehear is filed within ten days after the judgment the time for taking an appeal is thereby extended."

In re Philip Brady, 21 A. B. R. 364, 169 Fed. 152 (D. C. Ky.).

§ 2990. Reviving Lost Right of Appeal by Motion Pretended to Be for Reconsideration of Merits.

Obiter, *West v. McLaughlin Co.*, 20 A. B. R. 654, 162 Fed. 124 (C. C. A. Mich.): "One purpose which runs through the Act is to require the prompt and expeditious winding up of estates, and the provision just copied was intended to promote that end. Notwithstanding some judicial expressions which possibly favor it, we cannot accept as accurate or sustainable the contention that it would not be an abuse of the discretion of the court to set aside an order disallowing a claim for the sole purpose of extending the time for taking an appeal. We conceive that such a course would practically nullify the wise provision of the statute, and go beyond the bounds of a proper discretion; but we do not doubt that an order disallowing a claim, as well as other orders, is within the control of the court making it, and that the court may, in the exercise of a sound judicial discretion, set it aside, even after the expiration of 10 days."

§ 2991½. Likewise Motion to Vacate Adjudication.

Likewise, a motion to vacate the adjudication made after the expiration of the time limited for appeal is ineffectual to extend the time limit.

Page 1736. In re Goldberg, 21 A. B. R. 828, 167 Fed. 808 (C. C. A. N. Y.): "He did not appeal, and the time limited by the statute for taking an appeal expired March 1907. A year later, March 23, 1908, he moved the District Court to vacate the order of adjudication; his application was denied. This is merely an attempt indirectly to extend the time within which to review the adjudication of bankruptcy. This cannot be done."

Brady v. Bernard & Kittinger, 22 A. B. R. 342, 170 Fed. 576 (C. C. A. Ky.), quoted in this same paragraph.

Nor may appeal be taken from an order overruling the motion to vacate the adjudication, even though taken within ten days from such order, because such an order is not appealable either as a proceeding in bankruptcy (not being mentioned in § 25 (a)) nor as a "controversy," but such order is reviewable by petition for review.

Brady v. Bernard & Kittinger, 22 A. B. R. 342, 170 Fed. 576 (C. C. A. Ky.): "While, however, in so far as the appeal was taken from the order or judgment of June 9, 1908, the motion to dismiss cannot be sustained upon the ground upon which it was based, namely, that the appeal was not taken in time, the court is constrained of its own motion to dismiss such an appeal, for the reason that the order or judgment overruling the motion to set aside the judgment of adjudication is not one from which an appeal will lie to this court. As already stated, it is not one of the specified judgments which are reviewable by appeal under § 25a of the Bankruptcy Act. Neither will an appeal lie under § 24a of the Act, investing the Circuit Courts of Appeals with 'appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy of which they have appellate jurisdiction in other cases.' The 'controversies arising in bankruptcy proceedings' referred to in this section, as has been heretofore held by this court, are 'those independent or plenary suits which concern the bankrupt's estate, and arise by intervention or otherwise between the trustee representing the bankrupt's estate, and claimants asserting some right or interest adverse to the bankrupt or his general creditors,' and do not include 'administrative orders and decrees in the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate,' which, under § 24b of the Bankrupt Act, are subject to revision by this court in matter of law upon petition for review. While the line of demarcation between the classes of cases respectively appealable and reviewable is not always distinctly marked, it is clear that the proceedings under the motion to set aside the judgment adjudicating Brady a bankrupt related to an administrative matter which arose in the ordinary course of the administration of the bankrupt estate, under the power of the court to set aside a judgment improperly obtained as an incident to the principal cause and without recourse to an original proceeding for that purpose. (Doss v. Tyack, 14 How. 297, 14 L. Ed. 428.) And that the order or judgment overruling the motion to set aside the adjudication would have been reviewable by this court in matter of law upon a petition for review seasonably filed in this court."

§ 2993. No Express Time for Petitions for Review.

Page 1736, note 186. See, in addition, In re Strobel, 20 A. B. R. 22, 160 Fed. 916 (C. C. A. N. Y.).

Court Rule Limiting to Ten Days.—The Circuit Court of Appeals of the second circuit has adopted Rule No. 38, limiting the time to ten days, In re

A. O. Brown, 23 A. B. R. 93, 175 Fed. 769 (C. C. A. N. Y.). Such time may be extended on motion filed before the expiration thereof, *In re A. O. Brown*, 23 A. B. R. 93, 175 Fed. 769 (C. C. A. N. Y.).

§ 2995. But Not Dismissed unless Delay Unreasonable.

Page 1737, note 188. Compare, inferentially, *Brady v. Bernard & Kittinger*, 22 A. B. R. 342, 170 Fed. 576 (C. C. A. Ky.).

§ 2997. By Analogy Should Be Filed within Six Months' Time.

Page 1737, note 191. Inferentially, *Steele v. Buel*, 5 A. B. R. 165, 104 Fed. 968 (C. C. A. Iowa); *In re Youngstrom*, 18 A. B. R. 572, 153 Fed. 97 (C. C. A. Colo.); instance, *In re Tomlinson*, 18 A. B. R. 691, 154 Fed. 834 (C. C. A. Okla.); thus for review of an order overruling a motion to vacate adjudication (filed after ten days from the date of adjudication); *Brady v. Bernard & Kittinger*, 22 A. B. R. 342, 170 Fed. 576 (C. C. A. Ky.), quoted, on other point, at § 2991½. But limited to 10 days by rule in second circuit, see *In re A. O. Brown*, 23 A. B. R. 93, 175 Fed. 769 (C. C. A. N. Y.).

§ 2999. Time for Review in Bankruptcy Proceedings Proper, Whether Ten Days by Analogy.

And it has been held in some cases that in bankruptcy proceedings proper (as distinguished from "controversies arising," etc.) the time for review should, by analogy to § 25 (a), be limited to ten days.

Page 1737, note 193. So, by rule, *In re Stroebel*, 20 A. B. R. 22, 160 Fed. 916 (C. C. A. N. Y.). Costs on appeal and error, see, in addition, *In re McCrea*, 20 A. B. R. 412, 161 Fed. 246 (C. C. A. N. Y.).

But in other cases this has been denied and the rule announced that six months time is allowed.

In re Youngstrom, 18 A. B. R. 572, 153 Fed. 97 (C. C. A. Colo.); inferentially, compare, *In re Good*, 3 A. B. R. 605, 94 Fed. 389 (C. C. A. Mo.); compare, inferentially, *Brady v. Bernard & Kittinger*, 22 A. B. R. 342, 170 Fed. 576 (C. C. A. Ky.).

§ 2999½. Time for Review on Writ of Error.

The statutes [Rev. Stats., § 1008; Act of March 3, 1891, c. 517, §§ 4, 5, 26 Stats. 826, 827] fix the time within which writs of error may be brought.

Grant Shoe Co. v. Laird Co., 21 A. B. R. 484, 212 U. S. 445.

§ 3000. Rehearing Where Order Based on Authority Since Overruled.

It will also be granted "after term," if status quo is not altered, for there are no "terms" in the bankruptcy court.

Page 1738. *In re Keyes*, 20 A. B. R. 183, 160 Fed. 763 (D. C. Mass.): "Of the above construction of § 57n, now authoritatively settled as the true construction in such manner as to bind the courts of bankruptcy within this cir-

cuit, it seems to me that the petitioners ought to have the same benefit which they would have had if the decision in *Powell v. Leavitt* had been announced a few weeks earlier, or if my decision in this case had been delayed until a few weeks later. Notwithstanding the fact that the petitioners claimed no appeal, as they might have done, I see no reason why a rehearing may not be ordered for this purpose; it being conceded that no steps have been taken since November 8, 1906, which have changed the situation of the parties so far as the distribution of the assets is concerned. The same funds which were then in the hands of the trustee he holds now, and it is not too late to admit the petitioners, if their right is clear, to a share in their distribution. The term of the court within which its decision of that date was made came to an end before this petition for rehearing was filed; but I think I am justified in holding that, in bankruptcy proceedings, the court's power to reconsider and revise its orders and decrees does not expire with the term at which they are made."

"No terms in bankruptcy," see §§ 431, 858.

§ 3001. Objections Not Raised Below, Not Heard Above.

Page 1738, note 195. See, in addition, *Miller v. Acid & Fertilizer Co.*, 21 A. B. R. 416, 211 U. S. 496, quoted at § 1491. Also contra, on review of district court's affirmance of referees' order, *Davis v. Crompton*, 20 A. B. R. 53, 158 Fed. 735 (C. C. A. Pa.), quoted ante, at § 2861½.

Thus, where the only question contested in an involuntary bankruptcy proceeding was whether or not the alleged bankrupt was a person engaged chiefly in farming or the tillage of the soil, and, after hearing the evidence, the court made its finding and conclusion, upon which an order of adjudication was entered, and the opposing creditors made no objection to the want of proof of the acts of bankruptcy alleged, made no requests to find in respect thereto and did not object to the findings that were made for deficiencies in that regard, their objection, taken for the first time on appeal from the order of adjudication, that other findings should have been made in relation to the acts of bankruptcy or that the findings made were, for want of evidence, fatal to the judgment, comes too late.

Armstrong v. Fernandez, 19 A. B. R. 746, 208 U. S. 324: "From that order of adjudication this appeal was prayed, but it nowhere appears that Armstrong and others objected to the want of proof of the acts of bankruptcy or asked any findings in respect thereto, or objected to the findings that were made for deficiencies in that regard. In other words, Armstrong and others permitted the findings to be made as they were, and now say that other findings should have been made in relation to proof of acts of bankruptcy, without having objected that they were not made, or that the findings as made were on that account fatal to the judgment. The presumption is that if such a suggestion had been made to the court, the alleged deficiencies, if really existing, could have been supplied and would have been supplied. But the record and the certificate of the judge leave no doubt that the petition as to acts of bankruptcy was sustained by the facts."

And the grounds of objection to the admissibility of evidence should appear on the record as having been stated.

Compare ante, § 552½.

§ 3002. Record to Show Same Issues Presented to Court Below.

Page 1738. *Bank v. Walker*, 20 A. B. R. 840, 163 Fed. 510 (C. C. A. Md.): "The function of a petition to revise is certainly not to raise new issues of fact in this court, but on the contrary, to point out errors of law existing on the face of the record presented to us from the court below."

Page 1739. And where the evidence does not appear in the record, defective pleading will be presumed to have been cured by the proof.

State Bank v. Haswell, 23 A. B. R. 330, 174 Fed. 209 (C. C. A. Iowa), quoted at § 2962.

§ 3004. But Will Be, if Not Waivable, Though Not Considered Below, nor Assigned as Error.

Page 1740. But where lack of jurisdiction does not affirmatively appear on the face of the record, but is dependent upon questions of fact which have been decided in favor of jurisdiction by the court below, the appellate court will not, instead of dismissing an appeal wrongly taken, notice the alleged lack of jurisdiction nor remand the case with instructions to dismiss the entire proceedings.

Brady v. Bernard & Kittinger, 22 A. B. R. 342, 170 Fed. 576 (C. C. A. Ky.).

§ 3005. Plain Error Noticed, Though Not Raised by Parties Themselves.

And the reviewing court has its option to notice a plain error, although it is not assigned.

Instance held not within the option, *Acme Food Co. v. Meier*, 18 A. B. R. 550, 153 Fed. 74 (C. C. A. Mich.).

§ 3008. "Opinion" of Court Insufficient, Though May Be "Looked to."

Page 1741. And a right decree will not be reversed because a wrong reason is given therefor.

Naylon v. Christiansen, 19 A. B. R. 789, 158 Fed. 290 (C. C. A. Mich.).

§ 3009. Judgment on Facts Not Disturbed Except for Manifest Error.

Page 1741. *Coder v. Arts*, 18 A. B. R. 513, 152 Fed. 943 (C. C. A. Iowa): "When the court has considered conflicting evidence and made a finding or decree it is presumptively correct and unless some obvious error of law has

intervened or some serious mistake of fact has been made, the finding or decree must be permitted to stand."

Thompson v. Mauzy, 23 A. B. R. 489, 174 Fed. 611 (C. C. A. W. Va.): "We do not regard it as improper to point out that, inasmuch as the issues were tried without the intervention of a jury, the findings of the court as to the facts are entitled to great weight upon appeal."

Page 1741, note 208. Compare, ante, § 2861. See, in addition, *Seigel v. Cartel*, 21 A. B. R. 140, 164 Fed. 691 (C. C. A. Iowa); *Clay v. Waters*, 20 A. B. R. 561, 161 Fed. 815 (C. C. A. Mo.); (Special Master) *Fouche v. Shearer*, 22 A. B. R. 828, 172 Fed. 592 (D. C. Ga.).

Page 1741. And it is especially true that the reviewing courts will not disturb a findings of facts except for manifest error, where both the referee and district judge have coincided.

Page 1741, note 209. See, in addition, *Stephens v. Merchants' Bank*, 18 A. B. R. 560, 154 Fed. 341 (C. C. A. Ills.); *Nat'l Bank v. Abbott*, 21 A. B. R. 436, 165 Fed. 852 (C. C. A. Mo.). Compare similar proposition post, § 3025¼; also compare, analogously, *Manson v. Williams*, 22 A. B. R. 22, 213 U. S. 453; *Page v. Rogers*, 21 A. B. R. 496, 211 U. S. 575; *In re Sweeney*, 21 A. B. R. 866, 168 Fed. 612 (C. C. A. Tenn.); *Canner v. Tapper Co.*, 21 A. B. R. 872, 168 Fed. 519 (C. C. A. Mass.).

Page 1742. Analogously, *Page v. Rogers*, 21 A. B. R. 496, 211 U. S. 575: "But the rule is well established that where two courts have concurred in findings of facts in a suit in equity, this court will accept those findings unless error is clearly shown."

Page 1742. *Coder v. McPherson*, 18 A. B. R. 523, 152 Fed. 951 (C. C. A. Iowa): "The finding of the court upon this question of fact is presumptively correct, and it should be sustained unless some obvious error of law or serious mistake of fact intervened in the consideration of the case. The fact that the referee who saw and heard the witnesses and who enjoyed the best opportunity to judge of the credibility of their testimony came to a different conclusion detracts much, however, from the strength of this presumption."

And where the matter depends wholly on the credibility of the witnesses the special master's findings may be preferred to those of the District Judge.

In re Wheeler, 21 A. B. R. 262, 165 Fed. 188 (C. C. A. Ills.): "In cases of this kind, where there is nothing in the evidence pointing one way or the other, we think it our duty to accept the findings of the branch of the court before whom the witness personally appeared, and who on that account, had superior opportunity to determine her credibility. In this case that branch of the court is the referee, who under the Bankruptcy Act * * * is given power, in the first instance, to find the facts; and all things considered, we think it was error in the District Court not to accept that finding."

Page 1742, note 212. **Burden of Proof Where Facts Peculiarly in Party's Knowledge.**—The burden of proof lies on the party who wishes to support his case by a particular fact which lies more peculiarly within his knowledge or of which he is presumed to be cognizant *West v. McLaughlin Co.*, 20 A. B. R. 654, 162 Fed. 124 (C. C. A. Mich.).

Page 1742. And where the findings are clearly against the weight of the evidence the reviewing court will reverse the lower court.

West v. McLaughlin, 20 A. B. R. 654, 162 Fed. 124 (C. C. A. Mich.): "We do not question the general proposition, so often announced by appellate tribunals, where a case turns upon an issue of fact, particularly where the testimony is contradictory, and where there may be advantages in seeing or knowing the witnesses and hearing them testify, that the appellate court will presume that the findings of fact by the lower court were correct, though this is always with the qualification that such findings do not appear to be clearly against the weight of the testimony. *Ohio Valley Bank v. Mack*, 20 Am. B. R. 40, 163 Fed. 155."

Houck v. Christy, 18 A. B. R. 330, 152 Fed. 612 (C. C. A. Kans.): "The true rule, however, in such cases as this, is that the findings of the master, concurred in by the court, are to be taken as presumptively correct, and will be permitted to stand unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, but are not conclusive. *Furrer v. Ferris*, 145 U. S. 132, 134, * * * *Girard Ins. Co. v. Cooper*, 162 U. S. 529, 538, * * * *Moffatt v. Blake*, 75 C. C. A. 265, 145 Fed. 40. We have no disposition to depart from this rule."

§ 3010. Trivialities Not Considered—Substantial Interest and Prejudicial Error to Be Shown.

And, unless the error be prejudicial, it will be disregarded.

Jacobs v. United States, 20 A. B. R. 550, 161 Fed. 694 (C. C. A. Mass.): "An omission quite general, and not at all peculiar to this case, arises from the fact, to which we have referred, that parties seem to overlook that it is not sufficient to show that a certain ruling was technically erroneous, but that it must also be shown that it was prejudicial, or, at least, that there is a presumption that it was prejudicial within the liberal rules of the Supreme Court in this respect. With all the various matters brought to our attention, we do not recall that there was a single one as to which it was pointed out to us that the alleged error was prejudicial, or that there was any presumption that it was so."

Likewise, where only moot questions are involved, the petition for review will be dismissed.

In re Altieri, 19 A. B. R. 459 (C. C. A. N. Y.).

§ 3011½. Discretionary Matters.

Where there is no abuse of discretion, discretionary matters will not be reviewed.

Mulford v. Fourth St. Nat'l B'k, 19 A. B. R. 742, 157 Fed. 897 (C. C. A. Pa.).

Thus, as to the issuance or quashing of a writ of habeas corpus ad testificandum to bring a witness or bankrupt from imprisonment to testify.

In re Thaw, 21 A. B. R. 561, 166 Fed. 71 (C. C. A. Pa.).

It is no abuse of discretion to permit a defective verification to an involuntary petition in bankruptcy to be amended.

Armstrong v. Fernandez, 19 A. B. R. 746, 208 U. S. 324.

§ 3012. Obedience to Mandate Enforced by Mandamus.

Page 1743, note 215. *Ex parte Chicago Title & Trust Co.*, 16 A. B. R. 742, 146 Fed. 742 (C. C. A. Pa.), reversed by First Nat'l Bk. of Chicago *v. Chicago Title & Trust Co.*, 19 A. B. R. 542, 207 U. S. 61. Compare, *First Nat'l Bk. of Chicago v. Chicago Title & Trust Co.*, 19 A. B. R. 542, 207 U. S. 61, reversing *Ex parte Chicago Title & Trust Co.*, 16 A. B. R. 848, 146 Fed. 742.

§ 3014. But Only Permissible, Then, if Amount in Controversy Exceeds \$2,000, etc.

But such appeal is allowable only in two cases, first, where the amount in controversy exceeds the sum of \$2000, and the question involved is also one which might have been taken on appeal or writ of error from the highest court of the state to the Supreme Court of the United States.

Chapman v. Bowen, 18 A. B. R. 844, 207 U. S. 89: "We are not able to perceive that a writ of error from the highest court of a State to this court could be maintained. No validity of a treaty or statute of, or an authority exercised under, the United States was drawn in question; nor the validity of a statute of, or an authority exercised under, any State, on the ground of repugnancy to the Constitution, treaties or laws of the United States; nor was any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and decided against. The decision below proceeded on well-settled principles of general law, broad enough to sustain it without reference to provisions of the Bankruptcy Act."

Page 1745, note 3. *Blake, trustee, v. Openhym & Sons*, 23 A. B. R. 616, 216 U. S. 322.

Likewise, the claim of a secured creditor, where the trustee contends the security was fraudulently transferred in violation of § 67e.

Coder v. Arts, 22 A. B. R. 1, 213 U. S. 223: "Is the case one which might have been taken to this court upon appeal or writ of error from the highest court of the state? We are of opinion that it is. In determining the validity of the lien asserted to secure the claim, a construction of the Bankruptcy Act is directly involved. A construction of the Act is insisted upon by the appellant which would defeat the lien. On the other hand, the construction contended for by the appellee would give the lien validity. In such a case, had the case been in the state court, it might have been brought here for review under § 709 of the Revised Statutes."

§ 3020. To Be on Certificate.

Page 1747, note 12. See, in addition, *Chapman v. Bowen*, 18 A. B. R. 844, 207 U. S. 89.

§ 3022. Appeals to Supreme Court to Be Taken within Thirty Days.

Where an appeal is taken within the thirty days, and the Circuit Court of Appeals has made the findings of fact and conclusions of law part of the record by an order made within the thirty days directing the same to be filed nunc pro tunc, as of the date of the judgment, there is a sufficient compliance with General Order 36.

Coder v. Arts, 22 A. B. R. 1, 213 U. S. 223.

But the thirty days rule is not applicable to proceedings on writ of error, as, for example, where a jury trial has been had on an involuntary bankruptcy petition.

Grant Shoe Co. v. Laird Co., 21 A. B. R. 484, 212 U. S. 445.

§ 3023. Record for Transmission to Supreme Court.

Page 1748, note 17. See, in addition, *Crucible Steel Co. v. Holt*, 23 A. B. R. 302, 174 Fed. 127 (C. C. A. Ky.).

But such making and filing of its findings are not exacted of the court unless the parties indicate their intention to appeal.

Chapman v. Bowen, 18 A. B. R. 844, 207 U. S. 89; *Crucible Steel Co. v. Holt*, 23 A. B. R. 302, 174 Fed. 127 (C. C. A. Ky.).

Page 1748. *Knapp v. Milw. Tr. Co.*, 20 A. B. R. 671, 162 Fed. 679 (C. C. A. Wis.): "The decree of this court was rendered on April 14, 1908. Whether the subject matter of this controversy makes a case that is appealable to the Supreme Court under subdivision 'b' of § 25 of the Bankruptcy Act * * * and whether it is too late in any event to take the appeal under § 2 of the General Order above quoted, are questions that would have to be considered should an allowance of an appeal hereafter be asked. At this time it is enough to say that we do not understand that § 3 of General Order 36 intends that a Circuit Court of Appeals shall, of its own motion, ascertain and determine in advance of its decision upon an appeal in bankruptcy, whether a question is raised upon which a party is entitled to allowance of an appeal to the Supreme Court. If such right is claimed, it should be called to attention, as we believe, in advance of decision, with request for findings in the event of adverse ruling upon the question alleged to be appealable. Whether findings of fact and conclusions of law are to be made and filed in this case, nunc pro tunc as of the date of such decree, can be determined if and when application for appeal to the Supreme Court is made and allowed."

Where the record fails to contain the findings of fact and conclusions of law, the appeal will be dismissed, and the omission cannot be supplied by reference to the opinion of the court below.

Chapman v. Bowen, 18 A. B. R. 844, 207 U. S. 89.

§ 3025¼. No Reversal on Facts Where Two Lower Courts Have Concurred.

The Supreme Court will not reverse except for clear error where the two lower courts have concurred in their findings on the facts.

Page *v. Rogers*, 21 A. B. R. 496, 211 U. S. 575. Compare, similar proposition, ante, § 3009.

Page 1749. *Manson v. Williams*, 22 A. B. R. 22, 213 U. S. 453: "Both the district court and the circuit court of appeals have found as a fact that the brothers were partners, and that the goods belonged to the firm. In such cases this court, as a rule, will not disturb the findings, but it has done so in some instances. *Darlington v. Turner*, 202 U. S. 195, 220."

§ 3025½. Question of Construction of Bankruptcy Act.

Where a construction of the Bankruptcy Act is involved, the United States Supreme Court may have jurisdiction to review the decisions of the highest state tribunal.

Ante, § 3014.

Thus, where the appellant insists upon a construction of the Bankruptcy Act which would defeat a lien, whilst the construction contended for by the appellee would give it validity, the construction of the Bankruptcy Act is directly involved in the determination of the question as to the validity of the lien.

Coder v. Arts, 22 A. B. R. 1, 213 U. S. 223, quoted at § 3014.

§ 3026. State Supreme Court's Decision on Trustee's Action to Recover Assets Transferred Contrary to Bankruptcy Act, Presents Federal Question, Reviewable by Supreme Court.

Page 1749, note 19. See, in addition, *Coder v. Arts*, 22 A. B. R. 1, 213 U. S. 223.

§ 3027. State Supreme Court's Decision as to Scope of Prior State Judgment, Presents No Federal Question.

It is the conclusively settled doctrine that the scope and effect of a State judgment is peculiarly a question of State law, and, therefore, a decision relating only to such subject involves no Federal question.

Corbett v. Craven, 23 A. B. R. 516, 215 U. S. 125.

So that where the only question involved is whether a purchaser from a trustee in bankruptcy pendente lite is bound by a State court's decree against the trustee, no Federal question is presented.

Corbett v. Craven, 23 A. B. R. 516, 215 U. S. 125.

§ 3028. Decision Below Based on Well Settled General Law.

Where the decision of the court below has proceeded on well settled principles of general law, broad enough to sustain it without reference to the provisions of the Bankruptcy Act, appeal or writ of error to the

Supreme Court of the United States will not be allowed, the validity of a treaty or statute of the United States, or of an authority exercised under the United States not being drawn in question, nor a State statute nor an authority exercised under a State being claimed to be repugnant to the constitution, treaties or laws of the United States.

Chapman v. Bowen, 207 U. S. 89, 18 A. B. R. 844, quoted at § 3014.

Blake, trustee, v. Openhym & Sons, 216 U. S. 322, 23 A. B. R. 616, 216 U. S. 322: "An appeal [In *Chapman v. Bowen*, 207 U. S. 89, 18 A. B. R. 844], was allowed to this court by a judge of the Circuit Court of Appeals, which, on motion, was dismissed, on the ground that a writ of error from the highest court of the State to this court could not be maintained, because no validity of a treaty or statute of, or an authority exercised under, the United States, was drawn in question; nor the validity of a statute of, or any authority exercised under, any State, on the ground of repugnancy to the Constitution, treaties, or laws of the United States; nor was any treaty, right, privilege, or immunity claimed under the Constitution or any treaty or statute or commission held or authority exercised under the United States, and decided against it. It was further said that 'the decision below proceeded on well-settled principles of general law, broad enough to sustain it without reference to provisions of the Bankruptcy Act.'"

Thus, even where, after the filing of an involuntary bankruptcy petition, replevin had been instituted by leave of the State court against a State court receiver still in possession of the assets, who had thereupon given redelivery bond and retained the goods in specie, (the receiver in bankruptcy, on receiving the goods in turn, agreeing to assume all liability on the redelivery bond) no Federal question, as to the paramount jurisdiction of the Bankruptcy Court over the res, is presented, it being indubitably competent for the Bankruptcy Court to permit the prosecution of the replevin action under the state court, continuation of which prosecution was lawful up to the time it was forbidden by the injunction of the Bankruptcy Court.

Blake, trustee, v. Openhym & Sons, 23 A. B. R. 616, 216 U. S. 322.

THE BANKRUPTCY ACT OF 1898
with Amendments of 1910

AN ACT

TO CREATE A UNIFORM SYSTEM OF BANKRUPTCY IN THE UNITED STATES AND TERRITORIES

(Adopted July 1, 1898; Amendments Approved February 5, 1903; June 15, 1906, and June 25, 1910). Portions Amended by Act of June 25, 1910, Shown in *Italics*.

CHAPTER I.

DEFINITIONS.

Section 1. Meaning of Words and Phrases.—*a* The words and phrases used in this act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: (1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition; (2) "adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed; (3) "appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme Court of the United States; (4) "bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (5) "clerk" shall mean the clerk of a court of bankruptcy; (6) "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association; (7) "court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; (8) "courts of bankruptcy" shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska; (9) "creditor" shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) "date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed; (11) "debt" shall include any debt, demand, or claim provable in bankruptcy; (12) "discharge" shall mean the release of a bankrupt from all his debts which are provable in bankruptcy,

except such as are excepted by this act; (13) "document" shall include any book, deed, or instrument in writing; (14) "holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; (15) a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts; (16) "judge" shall mean a judge of a court of bankruptcy, not including the referee; (17) "oath" shall include affirmation; (18) "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer; (19) "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; (20) "petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named; (21) "referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or anyone acting in his stead; (22) "conceal" shall include secret, falsify, and mutilate; (23) "secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets; (24) "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia; (25) "transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; (26) "trustee" shall include all of the trustees of an estate; (27) "wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year; (28) words importing the masculine gender may be applied to and include corporations, partnerships, and women; (29) words importing the plural number may be applied to and mean only a single person or thing; (30) words importing the singular number may be applied to and mean several persons or things.

CHAPTER II.

CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.

Sec. 2. Courts and Jurisdiction.—That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereinafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdiction; (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; (3) appoint receivers or the marshals, upon application of parties in interest, in case the court shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; (4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; (5) *authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, as provided in section forty-eight of this act*; (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered; (9) confirm or reject compositions between debtors and their

creditors, and set aside compositions and reinstate the cases; (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; (11) determine all claims of bankrupts to their exemptions; (12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases; (13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment; (14) extradite bankrupts from their respective districts to other districts; (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act; (16) punish persons for contempts committed before referees; (17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearing and after notices to them; (18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; (19) transfer cases to other courts of bankruptcy; and (20) *exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy.*

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

CHAPTER III.

BANKRUPTS.

Sec. 3. Acts of Bankruptcy.—*a* Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property, with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State; of a Territory, or of the United States; or

(5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

b A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving the preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

c It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing of the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.

d Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.

e Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, of all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of

such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond.

Sec. 4. Who May Become Bankrupts.—*a Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this act as a voluntary bankrupt.*

b Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States.

Sec. 5. Partners.—*a A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.*

b The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

c The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

d The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

e The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

f The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

g The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

h In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

Sec. 6. Exemption of Bankrupts.—*a* This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

Sec. 7. Duties of Bankrupts.—*a* The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (2) comply with all lawful orders of the court; (3) examine the correctness of all proofs of claims filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute to his trustee transfers of all his property in foreign countries; (6) immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this act, coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, and one for the referee, and one for the trustee; and (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

PROVIDED, HOWEVER, That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid

his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence.

Sec. 8. Death or Insanity of Bankrupts.—*a* The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: PROVIDED, That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence.

Sec. 9. Protection and Detention of Bankrupts.—*a* A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State; upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this act.

b The judge may at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true, and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

Sec. 10. Extradition of Bankrupts.—*a* Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.

Sec. 11. Suits by and against Bankrupts.—*a* A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be

further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

b The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

c A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

d Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

Sec. 12. Compositions, When Confirmed.—*a* A bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and the list of his creditors required to be filed by bankrupts. In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed.

b An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

c A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.

d The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

e Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a

composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.

Sec. 13. Compositions, When Set Aside.—*a* The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.

Sec. 14. Discharges, When Granted.—*a* Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

b The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of, or to answer any material question approved by the court: *Provided, That a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose.*

c The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

Sec. 15. Discharges, When Revoked.—*a* The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted,

revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

Sec. 16. Co-Debtors of Bankrupts.—*a* The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.

Sec. 17. Debts Not Affected by Discharge.—*a* A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or wilful and malicious injuries to the person or property of another; or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

CHAPTER IV.

COURTS AND PROCEDURE THEREIN.

Sec. 18. Process, Pleadings, and Adjudications.—*a* Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien, in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for the cause fix a longer time.

b The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow.

c All pleadings setting up matters of fact shall be verified under oath.

d If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this act, and makes the adjudication or dismiss the petition.

e If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

f If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

g Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee.

Sec. 19. Jury Trials.—*a* A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

b If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

c The right to submit matters in controversy, or an alleged offense under this act, to a jury shall be determined and enjoyed, except as provided by this act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.

Sec. 20. Oaths, Affirmations.—*a* Oaths required by this act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

b Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.

Sec. 21. Evidence.—*a* A court of bankruptcy may, upon application of any officer, bankrupt or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act: PROVIDED, That the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.

b The right to take depositions in proceedings under this act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.

c Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.

d Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.

e A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

f A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

g A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.

Sec. 22. Reference of Cases after Adjudication.—*a* After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee

within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.

b The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.

Sec. 23. Jurisdiction of United States and State Courts.—*a* The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b *Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b; section sixty-seven, subdivision e; and section seventy, subdivision e.*

c The United States circuit court shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act.

Sec. 24. Jurisdiction of Appellate Courts.—*a* The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

b The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

Sec. 25. Appeals and Writs of Error.—*a* That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme courts of the Territories, in the following cases, to-wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt;

(2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

b From any final decision of a court of appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States.

c Trustees shall not be required to give bond when they take appeals or sue out writs of error.

d Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

Sec. 26. Arbitration of Controversies.—*a* The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

b Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.

c The written finding of the arbitrators, or a majority of them, as to the issue presented, may be filed in court and shall have like force and effect as the verdict of a jury.

Sec. 27. Compromises.—*a* The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

Sec. 28. Designation of Newspapers.—*a* Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be pub-

lished by this act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published.

Sec. 29. Offenses.—*a* A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

b A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

c A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.

d A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

Sec. 30. Rules, Forms, and Orders.—*a* All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

Sec. 31. Computation of Time.—*a* Whenever time is enumerated by days in this act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless

the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.

Sec. 32. Transfer of Cases.—*a* In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.

CHAPTER V.

OFFICERS, THEIR DUTIES AND COMPENSATION.

Sec. 33. Creation of Two Offices.—*a* The offices of referee and trustee are hereby created.

Sec. 34. Appointment, Removal and Districts of Referees.—*a* Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and (2) designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

Sec. 35. Qualifications of Referees.—*a* Individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and (4) residents of, or have their offices in, the territorial districts for which they are to be appointed.

Sec. 36. Oaths of Office of Referees.—*a* Referees shall take the same oath of office as that prescribed for judges of United States courts.

Sec. 37. Number of Referees.—*a* Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.

Sec. 38. Jurisdiction of Referees.—*a* Referees respectively are hereby invested, subject always to a review by the judge within the

limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act; (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

Sec. 39. Duties of Referees.—*a* Referees shall (1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable; (2) examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended; (3) furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest; (4) give notices to creditors as herein provided; (5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; (6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so; (7) safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and (10) whenever their respective offices are in the same cities or towns where the courts of bankruptcy

convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

b Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counselors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy.

Sec. 40. Compensation of Referees.—*a* Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.

b Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

c In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commission shall be paid to the referee.

Sec. 41. Contempts before Referees.—*a* A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpoenaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law: PROVIDED, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

b The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.

Sec. 42. Records of Referees.—*a* The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States.

b A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

c The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

Sec. 43. Referee's Absence or Disability.—*a* Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.

Sec. 44. Appointment of Trustees.—*a* The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.

Sec. 45. Qualification of Trustees.—*a* Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.

Sec. 46. Death or Removal of Trustees.—*a* The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

Sec. 47. Duties of Trustees.—*a* Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estates; (2) *collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is com-*

patible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied; (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in which it has been deposited; (5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (6) keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts; (7) lay before the final meeting of the creditors detailed statements of the administration of the estate; (8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; (9) pay dividends within ten days after they are declared by the referees; (10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

b Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

c The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings.

Sec. 48. Compensation of Trustees, Receivers and Marshals.

—a Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and such commissions on all moneys disbursed or turned over to any person, including lien holders, by them, as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and

less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition.

b In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

c The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

d Receivers or marshals appointed pursuant to section two, subdivision three, of this act shall receive for their services, payable after they are rendered, compensation by way of commission upon the moneys disbursed or turned over to any person, including lien holders, by them, and also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees, as the court may allow, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: Provided, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such compositions: Provided further, That when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two of this act, he shall not receive nor be allowed in any form or guise more than two per centum on the first thousand dollars or less, and one-half of one per centum on all above one thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee: Provided further, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this act.

e Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two of this act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and, in cases of receivers or marshals, also upon

the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees; such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: Provided, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition: Provided further, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this act.

Sec. 49. Accounts and Papers of Trustees.—*a* The accounts and papers of trustees shall be opened to the inspection of officers and all parties in interest.

Sec. 50. Bonds of Referees and Trustees.—*a* Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.

b Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

c The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so.

d The court shall require evidence as to the actual value of the property of sureties.

e There shall be at least two sureties upon each bond.

f The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond.

g Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

h Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

i Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this act, of whose estates they are respectively trustees.

j Joint trustees may give joint or several bonds.

k If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.

l Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

m Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

Sec. 51. Duties of Clerks.—*a* Clerks shall respectively (1) account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers; (2) collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money with which to pay such fees; (3) deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used; (4) and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

Sec. 52. Compensation of Clerks and Marshals.—*a* Clerks shall respectively receive as full compensation for their service to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.

b Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their services in the proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to

receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals.

Sec. 53. Duties of Attorney-General.—*a* The Attorney-General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.

Sec. 54. Statistics of Bankruptcy Proceedings.—*a* Officers shall furnish in writing and transmit by mail such information as is within their knowledge and as may be shown by the records and papers in their possession, to the Attorney-General, for statistical purposes, within ten days after being requested by him to do so.

CHAPTER VI.

CREDITORS.

Sec. 55. Meetings of Creditors.—*a* The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

b At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.

c The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this act.

d A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place.

e The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written

request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.

f Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.

Sec. 56. Voters at Meetings of Creditors.—*a* Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.

b Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings; nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the value of such securities or priorities, and then only for such excess.

Sec. 57. Proof and Allowance of Claims.—*a* Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whatever any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.

b Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

c Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred.

d Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

e Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceeding at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

f Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

g The claims of creditors who have received preferences, voidable under section sixty, subdivision *b*, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision *e*, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances.

h The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

i Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.

j Debts owing to the United States, a State, a county, a district or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

k Claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.

l Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part.

m The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

n Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the ren-

dition of such judgment: PROVIDED, That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer.

Sec. 58. Notices to Creditors.—*a* Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) *all hearings upon applications for the confirmation of compositions*; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustees, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy; (8) the proposed dismissal of the proceedings, and (9) *there shall be thirty days' notice of all applications for the discharge of bankrupts.*

b Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.

c All notices shall be given by the referee, unless otherwise ordered by the judge.

Sec. 59. Who May File and Dismiss Petitions.—*a* Any qualified person may file a petition to be adjudged a voluntary bankrupt.

b Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

c Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

d If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join

therein, the case may be proceeded with, but otherwise it shall be dismissed.

e In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

f Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

g *A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors, and to that end the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard.*

Sec. 60. Preferred Creditors.—*a* A person shall be deemed to have given a preference, if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

b *If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and*

any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

c If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

d If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

CHAPTER VII.

ESTATES.

Sec. 61. Depositories for Money.—a Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

Sec. 62. Expenses of Administering Estates.—a The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.

Sec. 63. Debts Which May Be Proved.—a Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing

of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

b Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

Sec. 64. Debts Which Have Priority.—*a* The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

b The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; and, where property of the bankrupt transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

c In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be

applied to the payment of the debts which were owing at the time of the adjudication.

Sec. 65. Declarations and Payment of Dividends.—*a* Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.

b The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: PROVIDED, That the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed; And provided further, That the final dividend shall not be declared within three months after the first dividend shall be declared.

c The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.

d Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such court shall be paid any amounts.

e A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this act.

Sec. 66. Unclaimed Dividends.—*a* Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.

b Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: PROVIDED, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends.

Sec. 67. Liens.—*a* Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

b Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

c A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with the like force and effect as such holder might have done had not bankruptcy proceedings intervened.

d Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this act.

e That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the

benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee [trustee] and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

f That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: PROVIDED, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.

Sec. 68. Set-Offs and Counterclaims.—*a* In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

b A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

Sec. 69. Possession of Property.—*a* A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize

and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.

Sec. 70. Title to Property.—*a* The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: PROVIDED, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

b All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

c The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

d Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the

date of the final decree setting aside the composition or revoking the discharge.

e The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

f Upon the confirmation of a compensation offered by a bankrupt, the title to his property shall thereupon revert in him.

Sec. 71. That the clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts: PROVIDED, That said bankruptcy indexes and dockets shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor.

Sec. 72. *That neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act.*

The Time When This Act Shall Go into Effect.—*a* This act shall go into full force and effect upon its passage: PROVIDED, HOWEVER, That no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.

b Proceedings commenced under State insolvency laws before the passage of this act shall not be affected by it.

[Section 14 of the amendatory act of 1910 provides as follows:

"That the provisions of this amendatory act shall not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of said act approved July first, eighteen hundred and ninety-eight, as amended by said act approved February fifth, nineteen hundred and three, and as further amended by said act approved June fifteenth, nineteen hundred and six."]

UNOFFICIAL FORMS IN BANKRUPTCY

[UNOFFICIAL FORM No. 54.]

Voluntary Petition of Corporation.

In the District Court of the United States, for the District of
In Bankruptcy.

To the Honorable ,

Judge of the District Court of the United States,

For the District of

The petition of , of in the County of
..... and District and State of , a corporation, engaged
in and not a municipal, railroad, insurance nor banking
corporation,* respectfully represents:

That it has had its principal place of business (or has resided or had
its domicile) for the greater portion of the six months next immediately
preceding the filing of this petition at , within said judicial
district; that it owes debts which it is unable to pay in full; that it is willing
to surrender all its property for the benefit of creditors, and desires to
obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked "A" and verified by the oath
of your petitioner's proper officer, contains a full and true statement of
all its debts, and (so far as it is possible to ascertain) the names and
places of residence of its creditors and such further statements concerning
said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked "B" and verified by the oath
of your petitioner's proper officer, contains an accurate inventory of all
its property, both real and personal and such further statements concerning
said property as are required by the provisions of said acts.

That an authentic copy of the vote or resolution authorizing the filing
of this petition is as follows, [or is attached hereto as Exhibit "C"].

Wherefore your petitioner prays that it may be adjudged by the Court
to be a bankrupt within the purview of said acts.

.....

United States of America, District of ss:

I, , am the [here insert the official capacity
of the affiant] of the corporation which is the petitioning debtor mentioned

*Negating of exceptions not mere matter of defense, III Remington on
Bankruptcy § 244.

and described in the foregoing petition, and I do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

....., *Petitioner.*

Subscribed and sworn to before me this day of 19...

.....
Official Character.

[UNOFFICIAL FORM No. 55.]

**Resolution of Stockholders, Directors, etc., Authorizing Voluntary
 Bankruptcy of Corporation.**

"At a meeting of the stockholders [or, of the Board of Directors or Trustees, as the case may be] of the Company [or Association or Society, etc.] a corporation created under the laws of the State of held at in the County of and State of, on this day of A. D., the condition of the affairs of said corporation having been inquired into and it having been ascertained to the satisfaction of said meeting that the said corporation was insolvent, and that its affairs ought to be wound up, it was voted [or resolved] by a majority of the corporators [or stockholders, or directors or trustees] present at such meeting (which was duly called and notified for the purpose of taking action upon the subject aforesaid) that be and thereby was authorized, empowered and required to file a petition in the District Court of the United States for the District of, within which said corporation has had its residence, domicile or principal place of business during the greater portion of the preceding six months, for the purpose of having the same adjudged Bankrupt, and that such proceedings be had thereon as are provided by the act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved July 1st, 1898, and acts amendatory thereof.

In Witness Whereof, I have hereunto subscribed my name as of said Corporation and affixed the seal of the same this day of, 19....

.....
of said Corporation.

[Seal]

[UNOFFICIAL FORM No. 56.]

Involuntary Petition against Corporation.

In the District Court of the United States, for the District of
 Division.
 In Bankruptcy.

....., Petitioning Creditors }
v.
 , Bankrupt }

To the Hon., Judge of the District Court of the United States:

That , of , has for the greater portion of six months next preceding the date of filing this petition, had its principal place of business [or had its residence or its domicile] at , in the County of and State and District aforesaid, and owes debts to the amount of \$1,000, and is a moneyed corporation [or "business" or "commercial" corporation as the case may be] and is not a municipal, railroad, insurance nor banking corporation*.

That your petitioners are creditors of said , having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of \$500. That the nature and amount of your petitioners' claims are as follows:

And your petitioners further represent that said is insolvent† and that within four months next preceding the date of this petition the said committed an act of bankruptcy, in that it did heretofore, to-wit, on the day of

Wherefore your petitioners pray that service of this petition, with a subpoena, may be made upon , as provided in the acts of Congress relating to bankruptcy, and that it may be adjudged by the court to be a bankrupt within the purview of said acts.

.....,
 ,
 ,
 ,

Petitioners.

..... *Attorney.*

*Compare Remington on Bankruptcy—Exceptions not mere matter of Defense § 244.

†Insolvency is not a necessary allegation as to assignments for the benefit of creditors nor "written admissions," as acts of bankruptcy. See Remington on Bankruptcy, § 174.

United States of America, District of ss:

....., , , being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them are true.

.....

Before me, , this day of , 19....

.....

[*Official Character.*]

[UNOFFICIAL FORM No. 57.]

Composition before Adjudication—Bankrupt's Application for Calling of Meeting, etc., to Consider Offer of Composition before Adjudication. See III Remington on Bankruptcy—Supplement, § 2358½.

In the District Court of the United States, for the District of
 In Bankruptcy.

In the Matter of

.....

Bankrupt.

To the Hon. , Judge of the District Court of the United States:

Your petitioner represents that he has filed [or is filing herewith] his voluntary petition for adjudication of bankruptcy, [or petitioner represents that an involuntary petition in bankruptcy has been filed against him], and that the same is still pending, and that he desires to present an offer of composition to his creditors without adjudication of bankruptcy.

Petitioner has filed [or is filing herewith] a list of his creditors and a schedule of his assets in accordance with law; and is willing to present himself for examination at a meeting of his creditors, and in all things else to perform the duties required of him in the premises.

Wherefore, petitioner prays for an order referring the proceedings herein to a referee in bankruptcy and appointing a meeting of creditors for the consideration of the same.

.....

[Verification]

[Where the bankrupt is a partnership or a corporation, the above form should be adapted to the facts in the case.]

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Assignments of unearned wages, § 2678, p. 768.

Subsequently earned wages coming under prior levy, § 2678½, p. 770.

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Advice of counsel tends to negative fraudulent intent, § 2536, p. 743; § 2521, p. 742.

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Corporate stock, omitting to schedule interest in, § 2541, p. 744.

Interest in decedent's estate, where bankrupt's rights doubtful or involved, omitted from schedules, § 2541, p. 744.

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That property could have been claimed as exempt, evidence toward negating intent, § 2539½, p. 743.

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False statement in writing

Agent making statement with bankrupt's authority, § 2563, p. 752.

Partner's statement, § 2563, p. 752.

Recklessness and carelessness in regard to agent's statement, raising presumption of connivance, § 2563, p. 752.

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Bookkeepers, acts of, whether imputable to bankrupt, § 2485, p. 737.

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Must be made to person from whom property obtained, § 2564, p. 753.

Obtaining property on credit on, § 2556, p. 749.

Property must be obtained on credit, § 2566, p. 755.

"Money" borrowed on credit included, § 2566, p. 755.

Recklessness, without honest belief in truth of statement, § 2560, p. 751.

Releasing bankrupt from claims founded on false statement,

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- Whether other than particular creditor defrauded may oppose on this ground, § 2559, p. 749.
- "Within four months," not necessary that statement have been made within, § 2570, p. 756.
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- Fraudulent acts of agents and partners not imputable unless actual knowledge exists, where commission of "offense" is ground urged, § 2484, p. 737.
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- Fraudulent acts of agents and partners, whether imputable where ground charged is not commission of "offense," § 2485, p. 737.
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- Previous discharge within six years**
 - Jurisdiction to administer estate unimpaired though discharge barred because of previous discharge within six years, § 2579, p. 757.
 - Adjudication not vacated nor voluntary petition dismissed to aid bankrupt who discovers discharge barred, § 2579, p. 757.
 - "Within six years," whether measures time between first and second discharge, or between first discharge and filing of second petition in bankruptcy, § 2577, p. 756.
 - Referee's failure to properly publish notice of first meeting of creditors, no ground, § 2480, p. 736.
- "Refusal to obey court's order or to answer"**
 - Refusal to answer incriminating questions, § 2581, p. 757.
- Unless bankrupt commits one of acts prohibited his discharge "shall" be granted,** § 2469, p. 735.
 - Commission of crime of larceny against objecting creditors, before bankruptcy, § 2469, p. 735.
 - "Recklessness," "improvidence" or "incompetence" in business affairs, § 2469, p. 765.
- Withholding discharge for bankrupt's contempt, § 2480, p. 736.
- Withholding discharge for non-compliance with rules of court, § 2478, p. 736.

Hearing of specifications**Before special master**

- Findings to be based on evidence introduced in opposition, not on facts known otherwise, § 2628, p. 761.
- Whether special master to exclude improper evidence, § 2629, p. 761.
- Creditor's abandonment of further opposition, § 2628, p. 761.
- Evasive testimony: credibility, § 2648, p. 764.
- Evidence need not be beyond reasonable doubt, § 2638, p. 762.
- Failure to produce material witnesses who are accessible, § 2646, p. 763.

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Bookkeeper, where blamed for omission of entries of payments to relatives, § 2646, p. 764.

Final hearing on discharge to be before judge

Certificate of conformity, unauthorized, § 518½, p. 132; § 2428½, p. 726; § 2457, p. 733; § 2625, p. 760.

"General examination" of bankrupt admissible, § 2641, p. 763.

But must be introduced or stipulated in, § 2641, p. 763.

Impeachment of witness by inherent improbability of own testimony, § 2650, p. 764.

Presumptions of fact may shift against bankrupt and compel rebuttal, § 2636, p. 762.

Negligence of bookkeeper in omitting transactions with relatives, bankrupt required further to state circumstances of information given to bookkeeper, § 2636, p. 762.

Where "offense" charged, evidence to be "clear," "satisfying" or "convincing," § 2639, p. 763.

Proof aided by presumptions, § 2637½, p. 762.

"Natural" and "probable" consequences of act presumed intended, § 2637½, p. 762.

Fraudulent transfer decree, whether binding, § 2647½, p. 764.

Specifications in opposition to discharge

"Certificate of conformity," none under present act, § 518½, p. 132; § 2428½, p. 726; § 2457, p. 733; § 2625, p. 760.

Essential allegations and form of

All grounds need not be sustained—Discharge refused if any one sustained, § 2601, p. 759.

Amendment refused where amendment tendered fails to state good cause, § 2621, p. 760.

Capacity of objecting creditor, sufficient to allege interested as a creditor, § 2594, p. 758.

Evidence not to be pleaded, but specifications not invalidated thereby, § 2606, p. 759.

Prosecuting objections in forma pauperis, § 2448, p. 732.

Time extended, even after expiration of original time, § 2454, p. 732.

Time extended, but only for "good cause," § 2454, p. 732.

Verification and signature

Amendment of, in sound discretion of court, § 2586, p. 758.

Amendment of, one objecting creditor wholly failing to sign or verify at all, § 2586, p. 758.

Form of verification—Precise wording need not be followed, § 2591, p. 758.

Who may oppose discharge**"Any party in interest"**

Trustee competent by Amendment of 1910, § 2458½, p. 733; § 2459, p. 733.

Court itself, not

Contempt proceedings pending against bankrupt, discharge not granted until termination, § 2457, p. 733.

Certificate of conformity, none required under present act, § 518½, p. 132; § 2428½, p. 726; § 2457, p. 733; § 2625, p. 760.

DISCHARGE—Continued.**Must have pecuniary interest**

Assignee of a creditor's claim, purchasing for the purpose of opposition, § 2460, p. 734.

Nondischargeable claim, whether sufficient, § 2460, p. 733.

Releasing bankrupt from claims founded on false statement, whether estops creditor from opposing discharge, § 2460, p. 734.

Need not have proved, nor have "provable," claim, § 2461, p. 734.

One creditor prosecuting objections of another, § 2463 $\frac{1}{4}$, p. 734.

Trustee competent by Amendment of 1910, § 571, p. 145; § 593 $\frac{1}{2}$, p. 147; § 898 $\frac{1}{2}$, p. 223; § 940 $\frac{1}{4}$, p. 230; § 940 $\frac{1}{2}$, p. 230; § 2458 $\frac{1}{2}$, p. 733; § 2459, p. 733.

Object and effect of amendment, § 940 $\frac{1}{4}$, p. 230.

Trustee, but only when authorized by creditors, § 571, p. 145; § 593 $\frac{1}{2}$, p. 147; § 898 $\frac{1}{2}$, p. 223; § 941 $\frac{1}{4}$, p. 230; § 940 $\frac{1}{2}$, p. 230.

Trustee, procedure where trustee is to object, § 2463 $\frac{1}{2}$, p. 734.

Authorization by creditors, how creditors vote, § 2463 $\frac{1}{2}$, p. 735.

Expense chargeable out of estate, § 2463 $\frac{1}{2}$, p. 735.

Meeting of creditors, § 571, p. 145; § 593 $\frac{1}{2}$, p. 147; § 2463 $\frac{1}{2}$, p. 735.

Notice to creditors, § 2463 $\frac{1}{2}$, p. 735.

Partnership discharge

Act of one bars firm discharge, if done within scope of partnership business

False statement in writing to obtain credit made by one partner, § 2793, p. 789.

Partnership debt, discharge of in individual bankruptcy of member

Cancellation of judgment against partnership, none where individual partner alone in bankruptcy, § 2794, p. 789.

Petition for discharge**Dismissal of**

In effect a judgment denying discharge, § 2436, p. 727.

Even though for mere failure to file, § 2436, p. 727.

Neglect of counsel no excuse, § 2436, p. 728.

Order of dismissal to be entered, else not res judicata, § 2436, p. 728.

Hearing of discharge petition

Judge to fix date, not referee, § 2430 $\frac{1}{2}$, p. 727.

Thirty days notice required by Amendment of 1910, § 565 $\frac{1}{4}$, p. 142; § 2431 $\frac{1}{2}$, p. 727.

Second petition not maintainable after refusal of first, where debts identical, § 2437, p. 728.

Creditors appearing in second bankruptcy, proving claims and examining bankrupt, no estoppel, § 2437, p. 729.

Debt provable in first bankruptcy put into judgment after expiration of time for applying for discharge, § 2437, p. 729.

Refusal, "without prejudice to renewal of application" if pending litigation favorable to bankrupt, § 2437, p. 728.

Second petition, where debts in subsequent bankruptcy partly same,

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partly new, discharge in first bankruptcy being refused, § 2438, p. 730.

Discharge decree providing for exception of old claim, § 2438, p. 730.

Intervening judgment on old debt, § 2438, p. 731.

Time for filing discharge petition, § 2424, p. 725.

After one month and before end of year meaning "year and a day," § 2423, p. 725.

Extension of only because "unavoidably prevented," § 2426, p. 725.

No notice to creditors of application for extension of, requisite, § 2424, p. 725.

No vacating of adjudication of bankruptcy to give jurisdiction, § 2427½, p. 726.

Res judicata of discharge decree

Erroneous judgment on debt, notwithstanding discharge duly pleaded and proved is res judicata until reversed, § 2687, p. 772.

Cancellation of judgments discharged by bankruptcy, § 2687, p. 772.

Former refusal of discharge is, as to all claims then provable, § 2680, p. 771.

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